(19,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

NORTHERN SECURITIES COMPANY, Defendant and Appellant,
vs.
EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York.
No. —.

On Appeal from the Circuit Court of the United States for the District of New Jersey.

Filed September 22, 1904.

1 Circuit Court of the United States, District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,
vs.
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY Company, Defendants.

Second Amended Bill.

(Filed June 4, 1904.)

To the honorable the judges of the circuit court of the United States for the district of New Jersey:

Edward H. Harriman and Winslow S. Pierce, residents and citizens of the State of New York; Oregon Short Line Railroad Company, a corporation organized and existing under the laws of the State of Utah and a resident and citizen of said State, and The Equitable Trust Company of New York, a corporation organized and existing under the laws of the State of New York and a resident and citizen of said State, bring this their second amended bill of complaint against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey, and a resident and citizen of said State and an inhabitant of the district of New Jersey, and the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin and a resident and citizen of said State.

And thereupon your orators complain and say:

I. Your orators Edward H. Harriman and Winslow S. Pierce are severally residents and citizens of the State of New York; your orator Oregon Short Line Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah as a railroad corporation, and a resident and citizen of said State; and your orator The Equitable Trust Company of New York is a corporation organized and existing under and by
2 virtue of the laws of the State of New York and a resident and citizen of said State.

II. The defendant Northern Securities Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a resident and citizen of said State and an inhabitant of the district of New Jersey. The defendant Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and a resident and citizen of said State, but is not an inhabitant or found within the district of New Jersey and is without the jurisdiction of this court.

III. Your orators are informed and verily believe and, therefore, aver that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to the par value of $155,000,000, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that said preferred stock was converted into common stock so as to make the entire issue of stock of said railway company consist of one class or common stock, and that such is the authorized amount of its capital stock at the present time, which has been issued and is now outstanding. The Great Northern Railway Company is a corporation created and existing by virtue of the laws of the State of Minnesota, and its authorized capital stock in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding.

IV. Your orators further aver that said Great Northern Railway Company at all the times in this bill mentioned owned and operated and still owns and operates a system of railways extending from Superior, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, to Everett and Seattle, in the State of Washington, and to Portland, in the State of Oregon, with a branch line to Helena, in the State of Montana; that the defendant Northern Pacific Railway Company at all the times in this bill mentioned owned and operated and still owns and operates a system of railways extending from Ashland, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Helena, in the State of Montana, to Seattle and Tacoma, in the State of Washington, and Portland, in the State of Oregon; and that said systems of railway are substantially parallel and in a position to

compete with each other in the transportation of persons and
3 property among the several States and between said States and foreign countries and in the transaction of interstate and foreign commerce carried on by them.

V. The defendant Northern Securities Company was organized on or about the 13th day of November, 1901, by filing in the office of the secretary of state of New Jersey, as required by the statutes of said State in such case made and provided, a certificate of incorporation wherein and whereby it was, among other things, recited that said corporation was organized for the object of acquiring and holding shares of the capital stock of other corporations, that its authorized capital stock should be four hundred million dollars ($400,000,000) divided into four million shares of the par value of one hundred dollars ($100) each, and that its duration should be perpetual, as will more fully and at length appear by said certificate of incorporation so filed in the office of the secretary of state of New Jersey, of which a copy is hereto annexed as Exhibit A and made a part hereof.

Although incorporated and organized in form according to and nominally for objects authorized by the laws of the State of New Jersey, in reality said Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States and for objects prohibited by the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and as an instrument and agency to affectuate and accomplish the objects of said combination, that is to say: prior to November 13, 1901, James J. Hill, J. Pierpont Morgan, William T. Clough, D. Willis James, John S. Kennedy, Robert Bacon, George F. Baker and Daniel S. Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of the State of New Jersey, and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns.

4 Thereupon, in pursuance of said agreement said Northern Securities Company was organized under the laws of the State of New Jersey in manner aforesaid, and forthwith agreed to

acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis.

VI. Your orators are informed and verily believe and, therefore, aver that in pursuance of said agreement and prior to the 9th day of April, 1903, about $176,822,900 par value of the stock of said Northern Securities Company was issued by it in exchange for about $153,759,400 par value of the stock of said Northern Pacific Railway Company, and about $211,057,600 par value of the stock of said Northern Securities Company was issued by it in exchange for about $118,124,200 par value of the stock of said Great Northern Railway Company, and about $7,522,000 was issued for cash used for the purchase of other property and for corporate purposes, that said Securities Company caused the certificates for said railway shares to be transferred into and registered in its own name or the names of its agents and ever since has held and now holds the same so registered, and that such issue of Northern Securities stock for said stock of the Northern Pacific and Great Northern Railway Companies was to the then existing holders of stock in said railway companies and in exchange for certificates for said railway stocks, and for the purpose and with the intention of effectuating the scheme or combination above alleged, and to enable the Northern Securities Company, as such holding corporation, to hold a majority of the shares of the said railway companies and control the operation and management of the same.

Your orators are informed and verily believe, and, therefore, aver that all and singular the persons to whom the stock of said Northern Securities Company was issued, whether for shares of either of said railway companies or for cash, had full knowledge and information of the purposes for which said Northern Securities Company was organized and of the fact that a majority of the capital stock of each of said railway companies was to be or had been deposited with said Securities Company as custodian or depositary in pursuance of said agreement.

VII. Your orators further show that prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned
5 $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of

$78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest in $82,491,871 par value and said cash, and said Harriman and Pierce are now and ever since said 18th day of November, 1901, have been the registered owners and holders of said $82,491,871 par value of the shares of said defendant Northern Securities Company and such holding of stock by them is and at all times has been as trustees for the use and benefit of your orator Oregon Short Line Railroad Company, which is the beneficial owner thereof. Said $82,491,871 par value of the stock of said defendant Northern Securities Company, standing in the names of your orators Harriman and Pierce, trustees as aforesaid, was part of the original issue of the stock of the said Northern Securities Company.

Your said orators further show that the exchange aforesaid was made by your said orators in good faith in the belief that the organization of said Securities Company was not and the acquisition and holding by it of said railway stocks, as aforesaid, would not be in violation of any statute of the United States, and that it was under such belief that these complainants refrained, pending the final determination of the suit brought by the United States, as hereinafter alleged, from taking any steps or instituting any proceedings for the protection of their rights in the premises.

6 VIII. Your orators further show that heretofore and by indenture dated July 17, 1902, said Oregon Short Line Railroad Company duly pledged $82,491,000 par value of said stock of said defendant Northern Securities Company with your orator The Equitable Trust Company of New York, as trustee for an issue of bonds of said Oregon Short Line Railroad Company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding, as will more fully and at length appear by said indenture, a copy of which is hereto annexed as Exhibit B and made a part hereof. The said stock of the Securities Company so issued to said Harriman and Pierce on November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now actually in the custody of your orator, The Equitable Trust Company of New York, as pledgee as aforesaid, and are available for tender, return or restoration as hereinafter alleged.

IX. Your orators further aver that at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harri-

man and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid.

X. Your orators further aver that after the organization of said Northern Securities Company, and on or about the 10th day of March, 1902, the Attorney-General of the United States, under and by virtue of the provisions of the said act of Congress of July 2, 1890, commonly known as the anti-trust act, and
7 entitled "An act to protect trade and commerce against unlawful restraints and monopolies," filed in the circuit court of the United States for the district of Minnesota, third division, a petition or bill of complaint in the name and on behalf of The United States of America against the defendant above named, Northern Securities Company, and against The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel Lamont, as defendants in said suit, in and by which bill of complaint it was, among other things, alleged that the defendants in said suit had entered into an unlawful combination or conspiracy in violation of the provisions of said anti-trust act, in organizing the Northern Securities Company in pursuance of the combination and for the purposes aforesaid, and praying that such combination be adjudged and decreed unlawful, and that it be adjudged and decreed that the defendant Northern Securities Company had acquired all and singular the shares of stock of the Northern Pacific and the Great Northern Railway Companies held or acquired by it in pursuance of an unlawful combination or conspiracy; that the Northern Securities Company, its stockholders, officers, directors, agents and servants, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company; that a mandatory

injunction issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, rendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued; that the Northern Pacific Railway Company be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock; that the defendant Great Northern Railway Company be likewise perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock; that the individual defendants above named be perpetually enjoined from in any manner holding, voting or acting as the owner of any of the stock of the Northern Securities Company issued
8 in exchange for stock of either of the said railway companies, unless authorized by said circuit court of the United States, and that a mandatory injunction issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by them and accept therefor the stock of the defendant railway company in exchange for which the same was issued. That thereafter, such proceedings were had in said suit that the various defendants therein duly answered, and issue was joined by the filing of replications on behalf of the United States to the separate and several answers of said defendants. All of which will more fully and at large appear by the record in said suit remaining on file in the office of the clerk of said circuit court of the United States for the district of Minnesota, third division, a transcript or copy of which is hereto annexed as Exhibit C and made a part hereof.

XI. Your orators further show that such proceedings were had in said suit in the circuit court of the United States for the district of Minnesota that thereafter, on or about the 9th day of April, 1903, a final decree was entered in favor of the complainant United States of America and against the defendants in said suit, in and by which decree it was, among other things, adjudged and decreed that said defendants in said suit had entered into a combination or conspiracy in restraint of trade such as the said anti-trust act denounced as illegal, that all of the stock of the Northern Pacific Railway Company and all of the stock of the Great Northern Railway Company then claimed to be held and owned by the defendant Northern Securities Company was acquired and was then held by it in virtue of such unlawful combination or conspiracy, that the Northern Securities Company, its officers, servants, agents and employees, should be and they were enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies, that the Northern Securities Company should be and it was enjoined from voting the aforesaid stock or from voting at any

meeting of the stockholders of either of the aforesaid railroad companies or from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railroad companies, or either of them, by virtue of its holding of such stocks therein, that the said railway companies, their officers, directors, servants and agents be and they were enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf at any corporate election, or from paying any dividends to the Northern Securities Company on account of stock of either of the aforesaid railway companies
9 which it then claimed to own and hold, and that the railway companies be and they were enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. Said decree further contained a provision that nothing therein contained should be construed as prohibiting the Northern Securities Company from returning or transferring to the stockholders of the Northern Pacific and the Great Northern Railway Companies, respectively, all or any of the shares of stock in either of said railway companies which said Northern Securities Company had theretofore received from said stockholders in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Northern Securities Company from making transfers and assignments of the stock aforesaid to such person or persons as might then be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies; all of which will more fully and at length appear by reference to the decree of said circuit court of the United States for the district of Minnesota, third division, dated on said April 9, 1903, a copy of which is hereto annexed as Exhibit D and made a part hereof. Your orators further show that they were represented in said suit by the Northern Securities Company and Northern Pacific Company as well as by the individual defendants Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the Northern Pacific Company's stock acquired and held by said Northern Securities Company.

XII. Your orators further show that the defendants in said cause thereupon appealed to the Supreme Court of the United States from said decree and that such proceedings were had upon said appeal that thereafter and on or about the 14th day of March, 1904, a decision was entered in said Supreme Court, affirming said decree of said circuit court of the United States for the district of Minnesota, and that thereafter and on or about the 15th day of April, 1904, the mandate of the Supreme Court of the United States was duly issued and on or about the 19th day of April, 1904, was duly filed in the office of the clerk of said circuit court of the United

States for the district of Minnesota, which said mandate affirmed said decree of the 9th day of April, 1903.

XIII. Your orators are advised by counsel and, therefore,
10 aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns.

XIV. Your orators further show that immediately upon the rendition of such decision by the Supreme Court of the United States, the defendant Northern Securities Company, by action of its board of directors, determined to fully and unreservedly abandon and terminate said combination and its holding of said railway stock and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof or to $3,954,000 par value, and to distribute and divide the stock of each of said Great Northern and Northern Pacific Railway Companies held by it *pro rata* among the stockholders of said Northern Securities Company, but not to return and retransfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, or their assigns, any of the shares of stock in either of said railway companies which said Northern Securities Company originally received from such stockholders in exchange for its own stock.

Thereupon and in order to consummate said purposes, as your orators are informed and verily believe and, therefore, aver, the board of directors of the Northern Securities Company on or about March 22, 1904, adopted certain preambles and resolutions in the words and figures following:

Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been
11 enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

Whereas, this company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem nec-
12 essary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

Resolved, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock a. m., on April 21, A. D. 1904.

Your orators further show that thereupon a circular or notice was directed to be issued and immediately was issued by and on behalf of the defendant, Northern Securities Company, addressed to its stockholders, notifying them of a special meeting of stock-

holders for the purpose of voting upon the propositions submitted by the directors as in said preambles and resolutions stated, and that such meeting was held on the 21st day of April, 1904. A copy of the notice or circular so issued by the defendant Northern Securities Company is hereto annexed as Exhibit E and made a part hereof.

Your orators further show that at such meeting of stockholders the stock of said Northern Securities Company was reduced ninety-nine per cent. by the vote of more than seventy per cent. in interest of its stockholders, and that by a like vote said plan of *pro rata* distribution was assented to, but that your orators then and there duly protested that said plan of distribution was illegal and in violation of the rights of your orators.

And your orators aver and show that the said plan of distribution is unauthorized by law, illegal and *ultra vires* the Northern Securities Company and in violation of the rights and equities of your orators, and in violation of the laws of the United States and of the State of New Jersey, and that the same has never been assented to by your orators and is not binding upon them.

XV. As your orators are informed and verily believe and, therefore, aver, the books of account and stock ledgers kept by
13 the defendant Northern Securities Company and the records of its transfer agent and registrar of transfer show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of said Northern Pacific or said Great Northern Railway Company, and will show that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of said railway companies, is now held in the name or on behalf of the original holders who exchanged the same for stock of said railway companies, and that, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the said Northern Securities Company so transferred to third parties can be traced and shown in and by said records and books so that the assigns of the original holders of stock of the defendant Northern Securities Company can be identified and the stock of either railway company originally exchanged by their assignors can be delivered to said assigns in exchange for their present holdings of stock of the defendant Northern Securities Company.

XVI. Your orators further show that the defendant Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators, and they will thereby suffer injury, which cannot be compensated in damages, in that the

shares of the Northern Pacific Railway Company to which your orators are so entitled are registered on the books of said Northern Pacific Railway Company in the name of said Securities Company, and that said railway shares or any like amount of shares could not be purchased in any market or from any persons whomsoever.

XVII. Your orators further show that the proposed distribution *pro rata* in place of the return and restitution of the stock of said railway companies would represent a very large loss of annual income to your orators, amounting to over one million dollars, that is to say, the dividends at the rate now being paid upon the stock of the Northern Pacific Railway Company to which your orators are entitled would exceed by the sum of over one million dollars per annum the dividends upon the stock of the Great Northern and Northern Pacific Railway Companies which they would receive upon such *pro rata* division, and that the value of the Northern Pacific Railway stock to which your orators are entitled now exceeds and at all times mentioned in this bill exceeded by the sum or value of over ten million dollars the aggregate value of the *pro rata* share of the holdings of each of the said railway companies which your orators would receive on any such proposed *pro rata* distribution, which latter would be as follows: viz., $32,070,612 par value of Northern Pacific stock and $24,638,919 par value of Great Northern stock instead of $78,108,000 par value of Northern Pacific stock.

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XVIII. Your orators further show and aver that they are ready, able and willing, and they hereby offer to return and deliver, or cause to be returned and delivered, and they hereby tender to the said Northern Securities Company all and singular the certificates for the shares of its capital stock so received by them as aforesaid, and such part of said sum of $8,915,629 in cash so paid to them by or on behalf of the said Northern Securities Company as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, so delivered and exchanged by them as aforesaid, and the common stock of said railway company into which the preferred stock so exchanged was converted as aforesaid, and they hereby offer to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court shall direct and in all respects to do and perform equity and right in the premises.

XIX. Your orators further show that after the restoration and return to the original depositors or their assigns of all and singular the shares of stock of said railway companies so acquired and held by the defendant, Northern Securities Company, under and by virtue of said illegal combination, there will remain in the treasury of said defendant more than sufficient assets and funds with which to pay and redeem any and all of the $7,522,000 par value of stock of the defendant issued as aforesaid for cash, or to fully compensate any such holders if compensation be adjudged.

In consideration whereof and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where matters of this kind are cognizable, your orators pray the aid of this honor-
15 able court to the end that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employees be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same.

Your orators further pray that it may please your honors to grant unto your orators a writ of subpœna of the United States of America issued out of and under the seal of this honorable court, to be directed to said defendant, Northern Securities Company, therein and
16 thereby commanding it on a day certain to be named, and under a certain penalty, to be and appear before this honorable court, and then and there to answer all and singular the premises, under its corporate seal, but not under oath which is expressly waived, and to stand to, perfo rm and abide by such further order

direction and decree therein as may be made against it in the premises.

And your orators further pray a like writ of subpœna to be directed to the defendant Northern Pacific Railway Company therein and thereby commanding it on a day certain to be named, to appear and answer at its option.

And your orators as in duty bound will ever pray, &c.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Complainants.

JOHN F. DILLON,
R. V. LINDABURY,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
BAINBRIDGE COLBY,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, } ss:

William D. Cornish, of full age, being duly sworn, on his oath says: I am vice-president of The Oregon Short Line Railroad Company, one of the complainants in the foregoing second amended bill of complaint named. I have read the said second amended bill and am familiar with the contents thereof, and the matters and things therein set forth so far as they relate to the acts and deeds of said Oregon Short Line Railroad Company are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

WM. D. CORNISH.

Subscribed and sworn to before me this 3d day of June, 1904.

[L. S.] J. B. MAXWELL,
Notary Public, No. 51, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, } ss:

Winslow S. Pierce, of full age, being duly sworn, on his oath says: I am one of the complainants in the foregoing second
17 amended bill of complaint named. I have read the said second amended bill and am familiar with the contents thereof, and the matters and things therein set forth so far as they relate to my own acts and deeds are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

WINSLOW S. PIERCE.

Subscribed and sworn to before me this 3d day of June, 1904.

[L. S.] J. B. MAXWELL,
Notary Public, No. 51, N. Y. Co.

18 EXHIBIT A TO BILL OF COMPLAINT.

Certificate of Incorporation of Northern Securities Company.

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey, entitled "An act concerning corporations (revision of 1896)," and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1.) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of owne-ship.

(3.) To pu-chase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebted-
19 ness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness of stock.

(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other

States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business) are as follows:

Name and post-office address.	Number of shares.
George F. Baker, Jr., 258 Madison avenue, New York, New York	100
Abram M. Hyatt, 214 Allen avenue, Allenhurst, New Jersey	100
Richard Trimble, 53 East 25th street, New York, New York	100

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the 17th section of the act concerning corporations (revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws, or by vote of the board of directors.

21 The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation; to determine whether any, and, if any, what part of any, accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the payment of dividends; and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine whether and to what extent, and at what time and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of the State of New Jersey, or authorized by the board of directors, or by a resolution of the stockholders.

The board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting,
22 provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals, the twelfth day of November, 1901.

GEO. F. BAKER, JR. [L. S.]
ABRAM M. HYATT. [L. S.]
RICHARD TRIMBLE. [L. S.]

Signed, sealed and delivered in the presence of
GEO. HOLMES.

STATE OF NEW YORK, }
County of New York, Manhattan, } *ss:*

Be it remembered that on this twelfth day of November, 1901, before the undersigned, personally appeared George F. Baker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

GEO. HOLMES,
Master in Chancery of New Jersey.

23 & 24 EXHIBIT B TO BILL OF COMPLAINT.

Oregon Short Line Four per Cent. and Participating Twenty-five Year Gold Bonds.

Oregon Short Line Railroad Company, with the Equitable Trust Company of New York, Trustee.

Trust Indenture.

Dated July 17, 1902.

Principal Due August 1, 1927.

Interest Payable February 1 and August 1.

25 Oregon Short Line Railroad Company.

Trust Indenture.

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31 This trust indenture, dated the seventeenth day of July, in the year one thousand nine hundred and two, by and between the Oregon Short Line Railroad Company, a corporation duly organized and existing under the laws of the State of Utah (hereinafter called the "railroad company"), party of the first part, and the Equitable Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, as trustee (hereinafter called the "trustee"), party of the second part.

Incorporation of railroad company.

Whereas the party of the first part was duly incorporated under the laws of the State of Utah and has acquired certain shares of the par value

Ownership of stock of Securities Company.

of one hundred dollars each of the common capital stock of the Northern Securities Company, (hereinafter called the "Securities Company"), and may acquire additional shares of such capital stock, and desires to borrow money for its corporate purposes, and to that end has, by its board

Resolution to issue bonds.

of directors, resolved to issue its bonds to be called "Oregon Short Line four per cent. and participating twenty-five year gold bonds," each to be for one thousand dollars, or for a multiple thereof in the case of registered bonds; such bonds to be payable in the city of New York, on the first day of August, in the year one thousand nine hundred and twenty-seven, and to bear interest from August 1, 1902, at the rate of four per cent. per annum, payable semi-annually on the first days of February and August in each year, and to be entitled for every calendar year beginning with the year 1903 to receive in addition to said

32 interest an amount equal to any dividends and interest in excess of four per cent. upon the amount of said bonds, which may be paid in cash during such year upon the collateral on deposit with the trustee hereunder as security for the payment of said bonds as hereinafter provided;

Resolution to execute trust indenture.

And whereas, the board of directors of the railroad company has duly determined and resolved that the railroad company shall secure the payment of the principal and interest of said bonds and of said dividend payments by executing this trust indenture and by pledging and depositing

with the Equitable Trust Company of New York, as trustee, subject to the trusts and conditions thereof ten (10) shares of the capital stock of the Securities Company for every one thousand dollars par value of said bonds issued hereunder; Resolution to secure loan by pledge of stock of Securities Company.

And whereas, this trust indenture was submitted to said board of directors, and it was duly resolved that the same be executed by the president or vice-president of the railroad company in its name and on its behalf, that the corporate seal of the railroad company be thereto affixed and attested by its secretary or an assistant secretary, and that this trust indenture be acknowledged and delivered on behalf of the railroad company to the trustee herein named; Resolution to acknowledge and deliver trust indenture.

And whereas, the board of directors of the railroad company has duly approved the forms of coupon bond, registered bond, coupons and trustee's certificate substantially of the tenor and purport following: Resolution to approve form of bonds, etc.

33 (Form of Coupon Bond.)

No. —. $1,000. Form of coupon bond.

UNITED STATES OF AMERICA.

Oregon Short Line Railroad Company.

Four Per Cent. and Participating Twenty-five Year Gold Bond.

Due August 1, 1927.

The Oregon Short Line Railroad Company (hereinafter called the "railroad company"), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness, on the first day of August in the year 1927, at the city of New York, and to pay interest thereon from August 1, 1902, at the rate of four per cent. per annum, payable in said city in like gold coin, semi-annually on the first days of February and August in each year, upon presentation and surrender, as they severally mature, of the interest coupons

hereto annexed, and also on February 1, 1904, and on the first day of February of each subsequent year, upon like presentation and surrender of the February coupons, a *pro rata* share of any amount by which the dividends and interest which shall have been paid in cash during the preceding calendar year upon the collateral on deposit with the trustee, as security for the payment of the issue of bonds of which this is one, shall exceed four per cent. upon the amount of such bonds outstanding.

Both the principal of this bond and said interest and dividend payments are payable without deduction for any tax or taxes which the railroad company may be required to pay thereon or retain therefrom under any present or future law of the United States of America, or of any State, county or municipality therein.

34 This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as the "Oregon Short Line four per cent. and participating twenty-five year gold bonds," issued and to be issued under a trust indenture dated July 17, 1902, executed by the railroad company to the Equitable Trust Company of New York, as trustee, and equally secured by the deposit and pledge with said trustee, subject to said trust indenture, of common stock of the Northern Securities Company, the aggregate amount of such bonds not to exceed the par value of such stock of the Northern Securities Company deposited and to be deposited with said trustee. Reference is hereby made to said trust indenture for a statement of the nature and extent of the security, the rights of the holders of bonds under the same, and the terms and conditions upon which the bonds are issued and secured. All or any of said bonds may be redeemed at a premium of two and one-half per cent. of their face value and accrued interest and dividend payments as provided in said trust indenture, on any first day of February or August upon three calendar months' previous notice.

This bond shall pass by delivery unless registered in the name of the owner on the books of the railroad company, such registry being noted on the bond by the railroad company. After such registry no transfer shall be valid unless made on said books by the registered holder in person or

by his attorney duly authorized, and similarly noted on the bond, but the same may be discharged from registry by being transferred to bearer, and thereupon transferability by delivery shall be restored: but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery. This bond may also at any time be surrendered, with all unmatured coupons thereto appertaining, in exchange for a registered bond without coupons, as provided in said trust indenture.

35 This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate of the trustee hereon endorsed.

In witness whereof, the Oregon Short Line Railroad Company has caused these presents to be signed by its president or its vice-president, and its corporate seal to be hereunto affixed and to be attested by its secretary or an assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereto, as of the first day of August, 1902.

OREGON SHORT LINE RAILROAD COMPANY,
By —— ——, President.

Attest:
—— ——, Secretary.

[Form of Coupon for August of Each Year and February, 1903.]

Form of coupon fo August of each year and February, 1903.

No. —. $20.

On the first day of ——, 19—, Oregon Short Line Railroad Company will pay to bearer, at the city of New York, twenty dollars ($20), United States gold coin, being six months' interest then due on its four per cent. and participating twenty-five year gold bond No. —.

—— ——, Treasurer.

Form of February coupon for 1904 and subsequent years.

[Form of February Coupon for 1904 and Subsequent Years.]

No. —.

On the first day of February, 19—, Oregon Short Line Railroad Company will pay to bearer at the city of New York, twenty dollars
36 ($20) United States gold coin, being six months' interest then due on its four per cent. and participating twenty-five year gold bond numbered as stated below, and also any dividend payment in addition to said interest which may be payable on said bond on said date. No. of bond —.

—— ——, Treasurer.

[Form of Registered Bond.]

Form of registered bond.

No. —. $—.

UNITED STATES OF AMERICA.

Oregon Short Line Railroad Company.

Registered Four Per Cent. and Participating Twenty-five Year Gold Bond.

Due August 1, 1927.

The Oregon Short Line Railroad Company (hereinafter called the "railroad company"), for value received, hereby promises to pay to —— —— or assigns, —— thousand dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness, on the first day of August in the year 1927, at the city of New York, and to pay interest thereon from the first day of February or August, as the case may be, next preceding the date of this bond, at the rate of four per cent. per annum, payable in said city in like gold coin, semi-annually on the first days of February and August in each year, and also on February 1, 1904, and on the first day of February of each subsequent year, a *pro rata*
37 share of any amount by which the dividends and interest which shall have been paid in

cash during the preceding calendar year upon the collateral on deposit with the trustee, as security for the payment of the issue of bonds of which this is one, shall exceed four per cent. upon the amount of such bonds outstanding.

Both the principal of this bond and said interest and dividend payments are payable without deduction for any tax or taxes which the railroad company may be required to pay thereon or retain therefrom under any present or future law of the United States of America, or of any State, county or municipality therein.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as the "Oregon Short Line four per cent. and participating twenty-five year gold bonds," issued and to be issued under a trust indenture dated July 17, 1902, executed by the railroad company to the Equitable Trust Company of New York, as trustee, and equally secured by the deposit and pledge with said trustee, subject to said trust indenture, of common stock of the Northern Securities Company, the aggregate amount of such bonds not to exceed the par value of such stock of the Northern Securities Company deposited and to be deposited with said trustee. Reference is hereby made to said trust indenture for a statement of the nature and extent of the security, the rights of the holders of bonds under the same, and the terms and conditions upon which the bonds are issued and secured. All or any of said bonds may be redeemed at a premium of two and one-half per cent. of their face value and accrued interest and dividend payments as provided in said trust indenture on any first day of February or August upon three calendar months' previous notice.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the books of the railroad company, at the city of New York, upon surrender and cancellation of this bond, and a new registered
38 bond will be issued to the transferee in exchange therefor, as provided in said trust indenture, and on payment, if the railroad company shall so require, of the transfer fee therein provided for. This registered bond may be exchanged, as provided in said trust indenture, for coupon bonds (with all unmatured and unpaid coupons attached) having the same aggregate par value, subject to

such regulations governing such exchange as shall be, from time to time, established by the railroad company.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate of the trustee hereon endorsed.

In witness whereof, the Oregon Short Line Railroad Company has caused these presents to be signed by its president or its vice-president, and its corporate seal to be hereunto affixed and to be attested by its secretary or an assistant secretary, the — day of ——, 19—.

OREGON SHORT LINE RAILROAD COMPANY,
By —— ——, President.

Attest:
—— ——, Secretary.

[Form of Trustee's Certificate.]

Form of trustee's certificate.

This is to certify that this bond is one of the bonds described in the within mentioned trust indenture dated July 17, 1902, and executed by the Oregon Short Line Railroad Company to the undersigned, as trustee.

THE EQUITABLE TRUST COMPANY OF NEW YORK, Trustee,
By —— ——, Secretary.

39 Now, therefore, this trust indenture, witnesseth

That in order to secure the payment of the principal and interest of all said bonds at any time issued and outstanding under this trust indenture, and such dividend payments as may become due thereon, according to the tenor, purport and effect of said bonds, and to secure the performance and observance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which said bonds are issued, received and held, and for and in consideration of the premises and of the acceptance or purchase of said bonds by the holders thereof, and of the sum of one hundred dollars, lawful money of the United States of America, to it duly

paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Oregon Short Line Railroad Company, party of the first part, has pledged, and by these presents does pledge, with the Equitable Trust Company of New York, as trustee, upon the trusts and subject to the terms and conditions herein expressed, all and singular the shares of the par value of one hundred dollars ($100) each of the common capital stock of the Northern Securities Company, for which certificates indorsed for transfer in blank, or accompanied by instruments of transfer in blank, shall from time to time be deposited with said trustee by the railroad company subject to the provisions of this trust indenture.

Pledging clause.

Stock pledged.

But, in trust, nevertheless, for the equal and proportionate benefit and security of all holders of the bonds and coupons issued or to be issued under and secured by this trust indenture, and for the enforcement of the payment of said bonds and the interest and dividend payments thereon, when payable, according to the tenor, purport and effect of such bonds and this trust indenture, and to secure the performance and observance of, and compliance with, the covenants and conditions of this trust indenture, without preference, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in the issue, sale or negotiation thereof, or by reason of the purpose of its issue, so that each and every bond issued or to be issued hereunder shall have the same right, lien and privilege under and by virtue of this trust indenture, and so that every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been duly issued, sold and negotiated simultaneously with the execution and delivery hereof.

Pledged in trust.

This trust indenture further witnesseth that the railroad company has agreed and covenanted, and hereby does agree and covenant, with the trustee, and with the respective holders from time to time of the said bonds and coupons, or any thereof, as follows, that is to say:

Article first. The coupon and registered bonds issued under and secured by this trust indenture, together with the coupons pertaining to the coupon bonds, shall be substantially of the tenor

Issue of bonds.

and purport above recited, and shall be known as the "Oregon Short Line four per cent. and participating twenty-five year gold bonds." The coupon bonds shall be of the denomination of one thousand dollars ($1,000) each, and the registered bonds shall be of the denomination of one thousand dollars ($1,000) each or of such multiples of one thousand dollars as the board of directors of the railroad company shall from time to time authorize. The registered bonds shall bear interest only from the first day of February or of August, as the case may be, next preceding their respective dates of issue. Said bonds shall be consecutively numbered, and shall from time to time be executed on behalf of the railroad company by its president or its vice-president, and its corporate seal shall be thereunto affixed and attested by its secretary or an assistant secretary. The bonds shall then be delivered to the trustee for certification by it and the trustee shall thereupon certify and deliver said bonds to the railroad company, or upon its order, as hereinafter in article second hereof provided, and not otherwise. In case the officers who shall have signed or sealed any of said bonds shall cease to be such officers of the railroad company before the bonds so signed or sealed shall have been actually certified by the trustee or delivered, such bonds may, nevertheless, be adopted by the railroad company, and upon the written request of the railroad company shall be certified and delivered subject to the provisions of article second hereof as though the persons who signed or sealed such bonds had not ceased to be officers of the railroad company. The coupons to be attached to coupon bonds shall be authenticated by the engraved signature of the present treasurer or of any future treasurer of the railroad company, and the railroad company may adopt and use for that purpose the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall be actually certified and delivered or issued. The first coupon shall be payable February 1, 1903, and shall represent interest to that date from August 1, 1902. Only such bonds shall bear thereon endorsed a certificate substantially in the form hereinbefore recited, exe-

Execution of bonds.

Delivery of bonds.

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Coupons.

cuted by the trustee, shall be secured by this trust indenture or entitled to any lien, right or benefit hereunder; and such certificate of the trustee upon any such bond executed on behalf of the railroad company shall be conclusive evidence that the bond so cer-ified has been duly issued hereunder and that the holder is entitled to the benefit of the trusts hereby created. Before certifying or delivering any coupon bond, all coupons appertaining thereto then matured shall be cut off, canceled and delivered by the trustee to the railroad company. The aggregate amount of all the bonds which may be certified, issued and outstanding under this trust indenture or entitled to the security hereof shall not at any time exceed the par value of the common stock of the Securities Company deposited with the trustee and pledged hereunder. The railroad company and the trustee may deem and treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinafter authorized, and the bearer of any coupon appertaining to any such bond, whether registered or not, as the absolute owner of such bond or coupon for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

Aggregate amount of bonds.

42

Payment of unregistered bonds and coupons to bearer.

The railroad company further agrees and covenants that it will keep at an agency to be maintained by it in the city of New York, or cause to be kept at some bank or trust company in said city, a sufficient register or registers of bonds issued hereunder, which shall at all reasonable times be open for inspection by the trustee and any holder of bonds issued hereunder; and that, upon presentation for such purpose, the railroad company will register or cause to be registered therein, under such reasonable regulations as it may prescribe, any bonds issued under the provisions hereof. The holder of any coupon bond issued hereunder may have the ownership thereof registered on said books, and such registry noted on the bond, after which no transfer shall be valid unless made on the said books by the registered holder thereof in person or by his attorney duly authorized, and similarly noted on the bond; but the same may be discharged from registry by being in like manner transferred to

Register.

Registration of bonds.

bearer, and thereupon transferability by delivery shall be restored; but such bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, but every such coupon shall continue to pass by delivery, and shall remain payable to bearer. The holder of any coupon bond or bonds may, at his option, at any time surrender the same for cancellation with all unmatured coupons belonging thereto and receive in exchange therefor a like amount in registered bonds without coupons, as hereinafter provided.

Exchange of coupon for registered bonds.

43

Whenever any coupon bond or bonds issued under and secured by this trust indenture, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds, the railroad company shall issue, and the trustee shall certify and deliver, in exchange for such coupon bond or bonds, a like amount in registered bonds without coupons. Whenever any registered bond shall be surrendered for transfer, the railroad company shall issue, and the trustee shall certify and deliver to the transferee a like amount in new registered bonds. Any registered bond may in like manner be surrendered and exchanged for an equal amount in face value of coupon bonds with all unmatured and unpaid coupons attached and any coupon bonds so delivered shall have the same numbers as those in exchange for which the registered bond was issued. In every case of such exchange or transfer, the trustee shall forthwith cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company; but the number shall be preserved so as to identify and show for what bonds the coupon or registered bonds have been exchanged or transferred as the case may be. For any exchange of coupon bonds for registered bonds, or of registered bonds for coupon bonds, or for any transfer of registered bonds, the railroad company may make a charge not exceeding one dollar for each new registered bond or coupon bond issued upon such exchange or transfer.

Transfer of registered bonds.

Exchange of registered for coupon bonds.

Charge for exchange or transfer.

Temporary bonds.

Until the said coupon and registered bonds intended to be secured hereby can be engraved and prepared, the railroad company may execute and deliver printed or lithographed bonds, either reg-

istered or negotiable by delivery, and substantially of the tenor of the bonds hereinbefore recited, except that no coupons shall be attached to said bonds; and the same may be for the
44 payment of one thousand dollars ($1,000), or any multiple thereof, as the railroad company shall determine. All such printed or lithographed bonds shall bear upon their face the words "Temporary Oregon Short Line four per cent. and participating twenty-five year gold bond exchangeable for engraved bonds," and shall be certified by the trustee in the same manner as the bonds hereinbefore described, and such certificate shall be conclusive evidence that the bond so certified has been duly issued hereunder, and that the holder is entitled to the benefit of the trust hereby created. Such printed or lithographed bonds duly issued and certified hereunder shall be exchangeable for engraved bonds to be issued hereunder and upon any such exchange, said printed or lithographed bonds shall be forthwith canceled by the trustee and delivered to the railroad company. Until so exchanged, the said printed or lithographed bonds shall in all respects be entitled to the lien and security of these presents, as bonds issued and certified hereunder; and interest and dividend payments when and as payable shall be paid and endorsed thereon.

Replacing bonds mutilated or destroyed.

In case any coupon bond issued under this trust indenture or the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may issue, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date, bearing the same serial number as the one mutilated or destroyed, in exchange and substitution for and upon cancellation of the mutilated bond or coupons, or in lieu of and substitution for the same if destroyed. In case of destruction, the applicant for a substituted bond or coupons shall furnish to the railroad company evidence of the destruction of such bond or coupons so destroyed, which evidence must be satisfactory to the railroad company in its discretion.

Article second. The bonds issued and to be issued under and secured by this trust indenture

Certification and delivery of bonds.

shall, upon the execution and delivery
45 hereof, or as soon thereafter as may from time to time be required by the railroad company, be certified by the trustee and delivered to the railroad company, or upon its written order under its corporate seal, executed by its president or a vice-president and by its secretary or treasurer as follows:

Whenever the railroad company shall tender, or cause to be tendered, to the trustee certificates for any of the shares of the common capital stock of the Securities Company in amounts of one thousand dollars ($1,000) par value, or multiples thereof, accompanied by instruments of transfer in blank or indorsed for transfer in blank, the trustee shall receive the same, and in exchange therefor shall certify and deliver to the railroad company, or upon its order, an amount to the said bonds equal in face value to the par value of the shares of capital stock so tendered and received. Such shares of capital stock received by the trustee under this section shall be held by the trustee as pledged hereunder as security for the *pro rata* payment of the bonds from time to time issued hereunder, and the interest and dividend payments thereon. The aggregate amount of the bonds which may be issued hereunder shall be limited only by the amount in par value of the said shares of stock of the Securities Company from time to time deposited hereunder.

Covenant to pay principal, interest and dividend payments.

Article third. The railroad company agrees and covenants that it will duly and punctually pay, or cause to be paid, to every holder of any bond issued hereunder and secured hereby the principal, interest and dividend payments accruing thereon, all in gold coin of the United States of America of or equal to the present standard of weight and fineness, at the dates and place and in the manner mentioned in said bond or in the coupons thereto appertaining, according to the true intent and meaning thereof, without deduction from either principal or interest or dividend
46 payments for any tax or taxes which the railroad company may be required to pay thereon or retain therefrom under any present or future law of the United States of America, or of any State, county or municipality therein. The interest and dividend payments on coupon bonds shall be payable only upon presentation and surrender of

the respective coupons annexed to said coupon bonds as such coupons respectively mature; and when and as paid all coupons shall forthwith be canceled by the railroad company.

Dividend payments defined.

Article fourth. In addition to paying interest at the rate of four per cent. per annum upon said bonds, as hereinbefore provided, the railroad company hereby agrees and covenants to pay to the respective holders of said bonds on the first day of February, 1904, and on the first day of February of each year thereafter, a *pro rata* share of any amount by which the dividends and interest which shall have been paid in cash during the previous calendar year upon the collateral on deposit with the trustee (including not only stock of the Securities Company but any other stock, bonds or other securities that may become subject to this trust indenture as herein provided) shall exceed four per cent. upon the face amount of the outstanding bonds secured hereby. The amounts so payable are herein and in said bonds referred to as "dividend payments." So long as it shall not be in default in the payment of the principal of said bonds or the interest and dividend payments payable thereon, the railroad company shall, except as herein otherwise provided, be entitled to collect and use for its own purposes all the dividends and interest in respect of the deposited collateral. The dividend payments, measured by such dividends and interest paid in cash as aforesaid, shall be payable by the railroad company by way of interest in addition to four per cent. per annum upon the bonds secured hereby. Interest allowed by the trustee upon money on deposit hereunder shall not be deemed interest upon deposited collateral for the purpose of determining the amount of any dividend payment, but any such interest shall be payable to the railroad company so long as it shall not be in default as aforesaid. No dividend, increase or income in respect of the deposited collateral which shall be payable in stock or bonds, or otherwise than in money, and no right or privilege granted to the owner or holder of such collateral or any part thereof, to subscribe for or purchase stocks, bonds or other securities issued by the Securities Company, or by any other corporation, shall be deemed dividend or interest for the purpose of determining the amount of any

Until default railroad company shall collect dividends and interest on deposited collateral.

Interest allowed by trustee not deemed interest upon deposited collateral.

47

dividend payments under this trust indenture. Said dividend payments shall be payable, in the case of coupon bonds, upon the presentation and surrender of the respective February coupons, beginning with the coupon maturing February 1, 1904, and in the case of registered bonds, to the registered holders thereof.

When dividend payments shall be made.

Information concerning dividends and other income.

For the purpose of supplying information to bondholders, the railroad company shall, on or before the 10th day of January in each year, beginning with the year 1904, upon the written request of the trustee, file with the trustee a statement in writing, under its corporate seal, signed by its president, vice-president or treasurer, certifying the amount of dividends and other income received in cash during the preceding calendar year in respect of the collateral on deposit with the trustee.

Covenant not to extend interest.

Article fifth. In order to prevent any accumulation after maturity of coupons, or of claims for interest upon registered bonds, the railroad company agrees and covenants that it will not, directly or indirectly, extend or assent to the extension of the time for payment of any coupon or claim for interest upon any bonds secured hereby; and that it will not, directly or indirectly, be a party to or approve any such arrangement by purchasing or funding said coupons or claims for interest upon registered bonds, or in any other manner. In case the time for payment of any such coupon or claim for interest upon any bond secured hereby shall be so extended, whether or not such extension be by or with the consent of the railroad company such coupon or claim for interest shall not be entitled, in case of default hereunder, to the benefit or security of this trust indenture, except subject to the prior payment in full of the principal of all bonds issued hereunder then outstanding and of all matured coupons and claims for interest on such bonds, the payment of which has not been so extended.

Interest extended not secured by this trust indenture.

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Covenant to discharge taxes, etc.

The railroad company agrees and covenants that it will from time to time duly pay and discharge all taxes, assessments and governmental charges lawfully imposed upon the shares of stock hereby pledged, or upon any other property which may become subject to the lien hereof, or upon any part thereof, or upon the income or profits thereof, the lien of which might or could be held

prior or superior to the lien of this trust indenture, so that the priority of this trust indenture shall be fully preserved in respect of all such shares of stock and other property; and that it will also pay and discharge all taxes, assessments and governmental charges lawfully imposed upon the estate of the trustee, or upon the interest of the holder of any bond or bonds or coupons hereby secured in said shares of stock or other property; provided, however, that the railroad company shall not be required to pay any such taxes, assessments or governmental charges so long as it shall, in good faith and by appropriate legal proceedings, contest the validity thereof.

Railroad company may, in good faith, contest payment of taxes, etc.

The railroad company agrees and covenants that this trust indenture is and will always be kept a first lien upon all the shares of stock described in the granting clauses hereof, and upon all other property which may become subject to the lien hereof, and that it will not create or suffer to be created or to accrue or to exist any lien or charge having priority to, or preference over, the lien of this trust indenture upon said pledged shares of stock or other property, or any part
49 thereof, or upon the income thereof; provided, however, that it shall not be required to pay any such liens or charges so long as it shall in good faith and by appropriate legal proceedings contest the validity thereof.

Covenant to keep this trust indenture a first lien.

The railroad company agrees and covenants that it will, at all times until the payment of the principal of the bonds secured by this trust indenture, either keep an agency in the city of New York where bonds and coupons may be presented for payment and where notices and demands in respect of said bonds and coupons may be served, or designate by written notice to the trustee and by advertisement a bank or trust company in said city for such purposes. In default of any such agency or any such designation, presentation and demand may be made and notices served at the office of the trustee.

Covenant to keep agency in New York.

Article sixth. The power to vote upon, or consent in respect of, any shares of stock or other securities having voting powers that may be deposited and pledged hereunder shall be exercised by the railroad company as follows: So long as there shall be no default in the payment of the principal or interest of the bonds hereby secured or any

Voting power on pledged shares.

dividend payment payable thereon, the certificates for the said shares of stock in the name of the railroad company, or of such persons as the railroad company shall from time to time designate, shall remain in the trustee's possession, indorsed for transfer in blank, or accompanied by instruments of transfer in blank, as aforesaid, and the railroad company shall have power to vote or consent in respect of said shares of stock, personally or by proxy, for any purpose not inconsistent with the provisions of this trust indenture. But if default shall be made in the payment of any interest or dividend payment on any bonds secured hereby or in the payment of the principal of any such bonds, then, and in each and every such case, the trustee may in its discretion, and so far as it may be able, cause all shares of stock deposited and pledged hereunder to be transferred into its name or the name of its nominee. In the event of such default, and during the continuance of the same, the voting power on the said shares may be exercised by means of proper proxies, which shall, so far as the trustee is able, be given or procured by the trustee and delivered to such person or persons as may be designated or appointed by the holders of a majority in interest of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing duly signed by such holders or their authorized agents, as hereinafter provided; but until the holders of a majority in interest of the bonds hereby secured and then outstanding shall make such designation or appointment, the trustee may exercise the said voting power in its discretion.

Upon default stock may be transferred to trustee's name.

Trustee or appointee of majority of bondholders to vote stock during default.

Upon the termination of any such default, any shares of stock which may stand in the name of the trustee, or of its nominee, shall be transferred to the name of the railroad company, or its nominee or nominees, upon the railroad company providing the moneys necessary to pay any taxes and other expenses incident to such transfer; and the railroad company or its nominee or nominees as the case may be, shall forthwith indorse for transfer in blank the new certificate or certificates for such stock, and such certificate or certificates shall remain on deposit with the trustee, subject to this trust indenture.

Re-transfer of stock on termination of default.

Pledge of shares not to prevent consolidation, merger or sale.

Article seventh. The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities. The trustee shall also receive any moneys which shall be payable upon or under any of the deposited stock or other securities in payment or liquidation thereof or otherwise on account of the principal thereof. The trustee shall, upon the written request of the railroad company, subject the deposited shares of stock or other deposited securities to any plan for the reorganization or readjustment of the Securities Company, or of the corporation by which such other securities were issued, provided a majority of the entire capital stock of the Securities Company at the time issued and outstanding, including the stock deposited hereunder, or a majority of the entire issue outstanding of the other securities, including those on deposit hereunder, shall participate in such plan, and in such case the trustee shall receive such certificates of deposit, stocks, bonds or other securities and cash, if any, as shall be apportionable under such plan to such deposited stock or other securities.

Trustee to hold other securities.

Trustee shall subject deposited shares to plan for reorganization.

Trustee shall sell deposited shares upon request of the railroad company.

The trustee shall upon the written request of the railroad company, sell the deposited shares of the Securities Company, or any other deposited securities, at such price and upon such terms, whether payable in cash or in stocks, bonds or other securities, or partly in cash and partly in securities, as shall be directed by the railroad company, provided the holders of a majority of the entire capital stock of *of* the Securities Company at the time outstanding, or if the sale be of other securities, a majority of the entire issue thereof, including the pledged shares of stock or other securities, shall join in such sale at the same price and upon the same terms.

Covenant to deposit surplus for further security.

The railroad company agrees and covenants that in case the Securities Company, or any other corporation whose stock shall be on deposit hereunder, shall hereafter make any distribution of surplus, by dividend or otherwise, which shall
52 be payable in stock, bonds or other securities, it will either deposit with the trustee hereunder, for the further security of the bonds secured hereby, such an amount of such stock, bonds or other securities as shall be received by it upon such distribution in respect of the shares of stock at the time on deposit hereunder, or, at the option of the railroad company, pay to the trustee in cash an amount equal to the market value of the stocks, bonds or other securities at the time of delivery upon such distribution. If the Securities Company, or any other corporation whose stock or other securities shall be on deposit hereunder, shall at any time accord to the holders of such deposited stock or other securities any privilege or right to subscribe for or purchase stock or other securities to be sold or issued by such corporation, the railroad company shall, in case it shall exercise or sell such right or privilege, pay to the trustee, either in cash, or, at the option of the railroad company, in the new shares of stock or other securities (at their market value at the time of their delivery upon such issue or sale as aforesaid), an amount equal to the aggregate value of such right or privilege in respect of the deposited shares or other securities. The value of any such subscription right or privilege shall for the purposes hereof be the price at which it was sold by the railroad company, if it shall have been sold, and if exercised but not sold, either its market value at the time it was exercised, or, at the option of the railroad company, its appraised value at such time as determined by an appraiser appointed by the railroad company and approved by the trustee, or, in default of such appointment, by an appraiser appointed by the trustee.

Stock privileges.

Appraisal of stock privileges.

Shares to be endorsed in blank.

Any stock certificates or certificates of deposit and also any bonds or other securities (unless they be bearer bonds or securities) received by the trustee as in this article provided, shall be in the name of the railroad company, or of such person or persons as the railroad company shall designate, and shall be endorsed for transfer in blank or

accompanied by instruments of transfer in
53 blank, and all such deposited stock certificates, certificates of deposit, bonds and other securities shall remain on deposit with the trustee hereunder, and, unless disposed of as herein provided, shall be held subject to the provisions hereof as security for the payment of the bonds secured hereby and the interest and dividend payments thereon.

Redemption of pledged stock.

The trustee shall, whenever so directed in writing by the railroad company, surrender and deliver to the railroad company or upon its order any or all of the pledged shares of stock of the Securities Company upon the payment to the trustee of one hundred and five dollars ($105) per share and accrued interest and any dividend payment that may be due, all in gold coin of or equal to the present standard of weight and fineness, and in case of any such surrender and delivery, the railroad company shall pay to the trustee such additional sum, if any, as shall be necessary for the purchase or redemption as hereinafter provided of one thousand dollars face value of the bonds secured hereby for every ten shares of stock surrendered.

—redemption of bonds with proceeds.

Any cash received by the trustee under any of the provisions of this article shall be applied to the redemption, in the manner hereinafter provided, of bonds secured hereby, except to such extent as such cash shall be applied, as herein next provided, to the purchase of bonds. Prior to the beginning of the publication of the notice of an intention to redeem bonds with cash on deposit hereunder, the trustee shall, at the written request of the railroad company, apply such cash, or any part thereof, to the purchase upon the open market of bonds secured hereby, provided they can be purchased at a price not exceeding one hundred and two and one-half per cent. of their face value and accrued interest.

Trustee shall redeem bonds if railroad company does not.

In case the railroad company shall fail to take the necessary proceedings to accomplish the redemption of bonds with moneys received as in this article provided, on the first interest day on which such redemption can be made, then and in that
event, the trustee shall, upon its own motion,
54 redeem, on the first interest day on which such redemption can be made, so many of said bonds as may be redeemed with such moneys;

and in such case the trustee shall, in place of the railroad company, take the proceedings provided for in article fourteenth hereof, and the notices therein provided to be issued by the railroad company shall be issued by the trustee. The trustee may, however, in such case withhold from the moneys in its hands an amount sufficient to cover its compensation and expenses in and about such redemption.

Compensation of trustee.

During default trustee may and upon request of holders of majority of bonds shall act.

No action shall be taken by the trustee at the request of the railroad company pursuant to the authority conferred by this article, if the railroad company be in default in the payment of the principal or interest on the bonds secured hereby; but during any such default any action in respect of the deposited securities hereby required to be taken by the trustee upon the written request of the railroad company may be taken by the trustee, in its discretion, and shall be taken by it upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding and upon the trustee being indemnified to its satisfaction. Any request of the railroad company, as in this article provided, shall be expressed by a certified copy of a resolution of the board of directors or of the executive committee of the railroad company. The trustee may accept the certificate of the president, or vice-president, and secretary or treasurer of the railroad company, as conclusive evidence of any fact or facts upon which any action by the trustee as provided in this article may depend, or upon which it may desire or require information for the purposes of such action; and such certificate shall be full protection to the trustee for any action taken upon the faith thereof. The railroad company shall reimburse the trustee for all expenses by way of counsel fees or otherwise incurred by it in connection with any change in the securities pledged hereunder, as in this article provided, and the trustee may in its discretion require that the payment of such expenses be secured to its satisfaction in advance of taking any such action.

Form of request of railroad company.

Indemnity of trustee.

Until default railroad company to collect dividends, income, or increase on deposited shares.

Article eighth. So long as the railroad company shall not be in default in the payment of the principal of the bonds secured hereby, or of the interest or dividend payments payable thereon, it shall collect and receive any and all dividends,

income or increase in respect of said deposited shares of stock of the Securities Company or any other securities deposited hereunder, and the trustee shall pay or deliver to the railroad company, to be disposed of as herein provided, all moneys, bonds, scrip, shares of stock or other securities which it may receive by way of dividends, income or increase upon the deposited collateral.

Application of dividends, etc., upon default.

In case, however, the railroad company shall be in default in the payment of the principal of any of the bonds secured hereby, or the interest or dividend payments payable thereon, then, during such default, all dividends, income or increase upon the deposited shares of stock or other securities shall be collected and received by the trustee and shall be set apart, held and applied as follows:

—first, to pay expenses of trustee.

First. To pay any sum which at the time may be due to the trustee for compensation or expenses in the administration of the trusts hereby created, or to the reimbursement of advances made or incurred by the trustee pursuant to any provision of this trust indenture.

—second, to pay interest and dividend payments.

Second. To pay the semi-annual interest and any dividend payments which shall be due or payable on the bonds hereby secured, with interest on overdue installments of interest, to the holders of the coupons for such interest and dividend payments upon their surrender and cancellation, or to the registered holders of the registered bonds. In case the amount so received or collected by the trustee shall not be sufficient to pay in full the whole of such interest and dividend payments for the time being due and unpaid, the trustee shall apply the same to the payment of such interest and dividend payments in the order in which the same shall have become due, ratably and without discrimination among the holders of the bonds and coupons entitled thereto.

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—third, to pay balance to railroad company unless principal due.

Third. To pay to the railroad company, for its own use and benefit, any balance remaining after making the foregoing payments; provided, however, that if the railroad company be at the time in default in the payment of the principal of any of the bonds hereby secured any such balance shall, during such default, be held and disposed

of in the same manner as proceeds of the sale of the pledged shares of stock.

Right of trustee to declare principal due in case of default.

Article ninth. In case default shall be made in the payment of any interest or dividend payment on any bond hereby secured, and any such default shall continue for a period of three months, the trustee may, and upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, shall, by notice in writing delivered to the railroad company, declare the principal of all bonds secured hereby then outstanding to be due and payable immediately; and, upon any such declaration, the same shall become and be immediately due and payable, anything in this trust indenture or in said bonds contained to the contrary notwithstanding. This provision is, however, subject to the condition that if at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon such bonds (with interest on overdue installments of interest) and all unpaid dividend payments and the expenses and compensation of the trustee shall be paid by the railroad company or be collected out of the accrued dividends upon the shares of stock deposited hereunder before any sale thereof shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee may waive such default and its consequences, and obtain from the trustee a rescission of such declaration of the maturity of the principal; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

Waiver of default.

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Article tenth. In case (1) default shall be made in the payment of any interest or dividend payment on any bond hereby secured or in the payment of the principal of any such bond; or in case (2) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of three months after written notice thereof to the railroad company from the trustee or from the holders of five per cent. or more in amount of the outstanding bonds hereby secured, then, and in each and every such case, the trustee

may, and upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding shall, sell at public sale in the manner hereinafter provided, the shares of stock and other securities pledged hereunder, either in one lot or in several lots, as may be directed in writing by the holders of a majority in amount of said bonds, or in the absence of such direction, as may seem best to the trustee; or the trustee may forthwith proceed to protect and enforce its rights and the rights of bondholders under this trust indenture by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of the pledge herein provided for, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee shall deem most effectual in support of any of its rights or duties hereunder. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds hereby secured is intended to be exclusive of any other remedy, but every remedy herein provided shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute; and every power and remedy given by this trust indenture to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power, arising from any default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence therein. In case the trustee shall have proceeded to enforce any right under this trust indenture by sale, foreclosure or otherwise, and such proceedings shall have been discontinued or abandoned because of waiver or for any other reason, or shall have been determined adversely to the trustee, then, and in every such case, the railroad company and the trustee shall severally and respectively be restored to their former position and rights hereunder in respect of the shares of stock and other securities pledged hereunder, and all rights, remedies and powers of the trustee shall

Right of trustee to sell in case of default.

Right of trustee to institute legal proceedings.

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Remedies cumulative.

Delay or omission of trustee not to impair rights hereunder.

Upon termination of unsuccessful proceedings parties to be restored to former position.

continue as though no such proceedings had been taken.

Railroad company to join in deed.

In case the power of sale hereby authorized be exercised, the railroad company shall join in any deed of conveyance or other writing evidencing such sale.

Notice of sale.

Article eleventh. Notice of any sale under or by virtue of the power of sale herein contained, or pursuant to judicial proceedings, shall state the time when and the place where the same is to be made, and shall contain a brief general description of the shares of stock or other securities to be sold, and shall be published once in each week for four successive weeks prior to such sale in a newspaper published in the city of New York; and if the sale be pursuant to judicial proceedings such notice shall also comply with any requirement of statute or rule or order of court as to contents, or time of publication or otherwise. The trustee may adjourn any such sale, or cause the same to be adjourned from time to time, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, without further notice or publication, such sale may be made at the time and place to which the same shall be so adjourned. In case of such sale of said shares of stock, or other securities, or any part thereof, the whole of the principal sum of the bonds hereby secured, if not previously due, shall, at the option of the trustee, or of the holders of a majority in interest of the bonds hereby secured then outstanding, become immediately due and payable, anything in said bonds or in this trust indenture contained to the contrary not withstanding.

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Adjournment of sale.

Principal to become due on sale.

Conveyance to purchaser at sale.

The trustee and its successor or successors are hereby appointed the true and lawful attorney or attorneys irrevocable of the railroad company, in its name and stead to make all necessary instruments of conveyance, sale and transfer of the shares or other securities, and for that purpose the trustee may execute all necessary instruments of conveyance, assignment and transfer, and may substitute one or more persons or corporations with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof. Nevertheless, the railroad company agrees and covenants that, if so requested

by the trustee, purchaser or purchasers, it will ratify and confirm such sale by executing and delivering to the trustee or to such purchaser or purchasers all such necessary and proper instruments as may be designated in such request. Any such sale or sales, either under the power of sale hereby granted and conferred or under or by virtue of judicial proceedings, shall divest all right, title, interest, estate, claim and demand whatsoever, either at law or in equity, of the railroad company of, in and to the property sold, and shall be a perpetual bar, both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the property sold, or any part thereof, from, through or under the railroad company, its successors or assigns.

Application of proceeds of sale.

Article twelfth. In case of any sale upon default of the railroad company of the shares of stock or other securities pledged hereunder, whether under the power of sale hereby granted, or pursuant to judicial proceedings, the purchase money, proceeds or avails, together with any other sums which may then be held by the trustee or be payable to it under any of the provisions of this trust indenture as part of the trust estate, shall be applied as follows:

—first, to pay expenses, etc.

First. To the payment of the costs, expenses, fees and other charges of such sale, and a reasonable compensation to the trustee, its agents and attorneys, and to the payment of all expenses and liabilities incurred and advances or disbursements made by the trustee.

—second, to pay principal, interest and dividend payments.

Second. Any surplus then remaining, to the payment of the whole amount owing or unpaid upon the bonds hereby secured for principal, interest and dividend payments, with interest on the overdue installments of interest; and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal, interest and dividend payments, ratably according to the aggregate amount thereof, without preference or priority.

—third, surplus to rail road company.

Third. Any surplus then remaining, to the railroad company, its successors or assigns, or to whosoever may be lawfully entitled to receive the same.

In case of any sale of the said shares of stock

Purchaser may apply bonds, etc., on purchase price.

or other securities, or any part thereof, as in this article provided, the purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in or apply towards the payment of the purchase price
61 any bonds issued hereunder and any matured and unpaid interest and dividend payments and to be credited therefor on the purchase price to the extent of the value of such bonds, interest and dividend payments upon a distribution among the bondholders of the net proceeds of such sale after making the deductions allowable under the terms hereof for the costs and expenses of the sale and otherwise. But such bonds and claims for interest and dividend payments so applied in payment by the purchaser shall be deemed to be paid only to the extent so applied and credited. At any such sale, the trustee or any bondholders or their agents may bid for and purchase such shares of stock or other securities and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain and dispose of such shares of stock or other securities without further accountability. The receipt of the trustee or of the court officer conducting such sale shall be a sufficient discharge for the purchase money to any purchaser of the shares of stock or other securities or any part thereof, sold as aforesaid; and no such purchaser, or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of the purchase money upon or for any trust or purpose of this trust indenture, or be answerable in any manner whatsoever for any loss, misapplication or non-application of any such purchase money or any part thereof.

Trustee or bondholders may bid at sale.

Receipt for purchase price.

Purchaser need not see to application of purchase money.

Covenant to pay principal, interest and dividend payments to trustee in case of default.

Article thirteenth. The railroad company agrees and covenants that in case (1) default shall be made in the payment of any interest or dividend payment on any bonds hereby secured, and such default shall continue for a period of three months; or in case (2) default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds, or by declaration as authorized
62 by this trust indenture, or by a sale of the pledged shares of stock as hereinbefore provided, then, upon demand of the trustee, it will pay

to the trustee for the benefit of the holders of the bonds and coupons hereby secured and then outstanding, the whole amount due and payable on all such bonds and coupons for principal or interest or dividend payments, or all of them, as the case may be, with interest upon the overdue principal and installments of interest; and, in case the railroad company shall fail to pay the same forthwith upon such demand, the trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment against the railroad company for the whole amount so due and unpaid. The trustee shall be entitled to recover judgment as aforesaid either before or after or during the pendency of any proceedings for the enforcement of the lien of this trust indenture upon the pledged shares of stock, and its right to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this trust indenture or by the foreclosure of the lien hereof; and, in case of a sale of the shares of stock pledged hereunder, and of the application of the proceeds of sale to the payment of the debt hereby secured, either under any power hereby granted or judicial decree, the trustee in its own name and as trustee of an express trust, shall be entitled to receive and to enforce payment of any and all deficiency or amounts then remaining due and unpaid upon any or all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment against the railroad company for any portion of the debt remaining unpaid, with interest. No recovery of any judgment by the trustee and no levy of any execution under any such judgment upon property subject to the lien of this trust indenture, or upon any other property, shall, in any manner or to any extent, affect or impair the lien of the trustee upon the share of stock and other property pledged and to be pledged hereunder, or any part thereof, or any rights, powers or remedies of the trustee hereunder, or any rights, powers or remedies of the holders of the bonds hereby secured; but such lien, rights, powers and remedies shall continue unaffected and unimpaired as before, except as against the purchaser of the pledged shares at any sale made by the trustee hereunder or under

—suit therefor.

Lien not to be impaired by judgment or execution.

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Application of amount recovered.

judicial decree. Any money thus collected by the trustee, under this article shall be applied by the trustee, first, to the payment, at the option of the trustee, of the costs and expenses of the proceedings resulting in the collection of such moneys; and secondly, towards payment of the amounts then due and unpaid upon such bonds or coupons respectively, without any preference or priority of any kind, but ratably according to the amounts due and payable upon such bonds and coupons respectively at the date fixed by the trustee for the distribution of such moneys.

Redemption of all or part of bonds.

Article fourteenth. The railroad company may at any time redeem all or any of the outstanding bonds hereby secured at their face value and a premium of two and one-half per cent. and the accrued interest and dividend payments (if any) on any first day of February or August; provided that, if and so often as the railroad company shall be desirous of redeeming a part only of the then outstanding bonds, the particular bonds to be redeemed shall be ascertained by drawings by lot, to be made by the trustee, of so many of the said bonds as the said railroad company shall be desirous of redeeming, and provided also that not less than three calendar months' previous notice

Notice.

of the numbers of the bonds so drawn for redemption as last aforesaid, or (as the case may be) of the redemption of all the said bonds then outstanding, shall be given by mail to the holders of registered bonds at the addresses furnished by them to the railroad company and by publication at least once a week for twelve successive weeks in at least one daily newspaper in the city of New York,

64 and such notice shall state the numbers of the bonds so drawn or (as the case may be) the intention to redeem all of the bonds, and that the same will be redeemed at their face value and a premium of two and one-half per cent. and accrued interest and dividend payments (if any) on the first day of February or the first day of August specified in such notice (being not less than three or more than four calendar months from the date of the first publication of such notice) after which day interest and dividend payments upon the bonds so drawn shall cease to accrue.

—principal due thereupon.

Upon completion of the publication of such last-mentioned notice of redemption there shall become due and payable by the railroad company on the

day of redemption specified in such last-mentioned notice at the office or agency of the railroad company in the city of New York the principal of the bonds specified in such notice, together with the interest and dividend payments (if any) then due thereon and a premium of two and one-half per cent. of the face value of said bonds, and thereupon the railroad company shall pay such principal, interest, dividend payments (if any) and premium, if the said bonds are presented for payment. If the redemption of any bonds be upon the first day of August of any year, the railroad company shall deliver to the persons whose bonds are redeemed warrants entitling the bearer to receive upon surrender thereof on the following first day of February on'-half of the amount of any dividend payment which would have been payable on said date upon the bonds in respect of which such warrants were issued, if such bonds had not been redeemed.

August bonds upon redemption to receive warrants for dividend payments.

Any cash received under the provisions of article seventh shall, after deducting an amount sufficient to pay any unpaid compensation and expenses of the trustee, be available for the payment of said bonds to be redeemed as aforesaid as and when presented for payment, and the railroad company shall be required to pay to the trustee for the purposes of such redemption only such additional sum (if any) as may be necessary to redeem the bonds called for redemption.

Trustee to use cash received from merger, etc., to redeem bonds.

Unless default shall be made in the payment after presentation of the bonds specified in such notice as aforesaid, all interest shall cease to accrue upon such bonds after the day of redemption specified in said last-mentioned notice, and the coupons for interest subsequent to that date shall be and become void.

Interest to cease.

All bonds redeemed and paid as hereinbefore provided shall forthwith be canceled in the presence of a representative of the trustee and a representative of the railroad company, and the trustee shall thereupon note upon the trust indenture the fact of such cancellation, together with a memorandum of the numbers of the bonds so canceled, and shall thereupon deliver the bonds so canceled to the railroad company.

Redeemed bonds to be cancelled.

For every bond redeemed as herein provided otherwise than with money received by the trustee pursuant to article seventh hereof, the trustee

Pledged stock to be released.

shall, if and when requested in writing by the railroad company, release from the lien hereof and deliver to the railroad company a proportionate amount of the shares of the stock and of each class of other securities deposited and pledged hereunder.

Indemnity to and immunity of trustee.

Article fifteenth. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trusts hereby created which, in its opinion, will be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable security and indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder unless notified in writing of such default by one or more holders of the bonds hereby secured then outstanding; nor shall it be required to take any action in respect of any such default involving expense or liability, unless requested by an instrument in writing signed by the holders of not less than ten 66 per cent. in amount of the bonds hereby secured then outstanding and unless tendered reasonable security and indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision therefor, shall affect any discretion herein given to the trustee to take action in respect of such default, or to take action with or without any such request.

Counsel for trustee.

The trustee may, in its discretion, advise with legal counsel to be selected and employed by it at the expense of the railroad company, and anything done or suffered in good faith by the trustee in accordance with the opinion of counsel shall be conclusive in favor of the trustee on the railroad company and on all holders of bonds and coupons secured hereby.

Trustee to act on request of holders of 25 per cent. of bonds.

But in case of any default as aforesaid, it shall be the duty of the trustee, upon the written request of the holders of twenty-five per cent. in amount of the bonds hereby secured then outstanding and upon being indemnified as hereinafter provided, to take all needful steps for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, or to exercise the power of sale herein conferred, or to commence appropriate judicial proceedings

by action, suit or otherwise, as the trustee shall deem most expedient in the interest of the holders of the bonds hereby secured.

Right of holders of majority of bonds to direct action of trustee.

Anything in this trust indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured then outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument or concurrent instruments in writing executed and delivered to the trustee, to direct and control the method and place of conducting any and all proceedings for any sale of the shares of stock hereby pledged or any adjournment thereof, or for the foreclosure of this trust indenture, or any other action or proceeding hereunder.

No suit by bondholders permitted without prior request and indemnity to trustee.

67 Article sixteenth. No holder of any bond or coupon hereby secured shall have the right to institute any suit, action or proceeding at law or in equity upon or in respect of this trust indenture, or for the execution of any trust or power hereof, or for any other remedy under or upon this trust indenture, unless such holder shall previously have given to the trustee written notice of any existing default and of the continuance thereof as hereinbefore provided, nor unless also the holders of ten per cent. in amount of the bonds hereby secured then outstanding shall have made written request upon the trustee and shall have afforded to it reasonable opportunity either to proceed itself to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name, nor unless such holder or holders shall have offered to the trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding, and the trustee shall have refused or neglected to comply with such request within a reasonable time thereafter; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the trusts and powers of this trust indenture and to any action or cause of action for foreclosure or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds or coupons shall have any right in any manner whatever to affect, disturb

or prejudice the lien of this trust indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

Compensation of trustee.

Article seventeenth. The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, which compensation, as well as all reasonable expenses necessarily in-

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Immunity of trustee.

curred and disbursed hereunder, the railroad company agrees to pay. The trustee shall not be responsible in any manner whatsoever for the recitals herein contained as to the acts or powers of the railroad company or its stockholders, nor shall it be concerned with or accountable for the use of any bond hereunder delivered to the railroad company, or the application of the proceeds of any such bond. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, nor for anything whatever in connection with this trust, except its own willful misconduct or gross negligence. The trustee shall be reimbursed and indemnified against any liability or damage it may sustain or incur in the premises.

Resignation of trustee.

The trustee, or any trustee hereafter appointed, may resign and be discharged from the trusts created by this trust indenture, by giving notice of such resignation to the railroad company, and also to the bondholders by publication at least twice a week for four successive weeks in a newspaper published in the city of New York, and by due execution of the conveyance herein required.

Removal of trustee.

The trustee may be removed at any time by an instrument in writing executed by the holders of a majority in amount of the bonds hereby secured then outstanding; but no such removal shall be made before default hereunder without the written consent of the railroad company. In case the trustee, or any trustee hereafter appointed, shall at any time resign or be removed or otherwise become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then out-

Appointment of successor trustee.

standing, by an instrument or concurrent instruments or counterparts signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared, that, in case there shall at any time be a vacancy in the office of trustee hereunder, the railroad company may, by an instru-
69 ment executed by order of its board of directors, appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. Anything herein to the contrary notwithstanding, the railroad company may at any time substitute as trustee hereunder, a trust company or banking institution having a capital and surplus aggregating at least one million dollars, and incorporated under the laws of some other State than the trust company or bank at the time acting as trustee hereunder, or if the trustee be a natural person, under the laws of some State other than the State of such trustees' residence. In case the railroad company shall elect to make such substitution it shall file with the trustee a notice in writing to that effect duly approved by its board of directors, which notice shall specify the name of the trust company or banking institution which is to become the trustee hereunder. The railroad company shall publish notice of the appointment of or substitution of a trustee once a week for four successive weeks in a newspaper published in the city of New York.

Railroad company may fill vacancy.

Railroad company may substitute trustee.

—notice of such substitution.

Any new trustee appointed or substituted by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured, if such appointment be made by the bondholders within six months after the first publication of such last-mentioned notice, provided, however, that in no event shall a trustee be appointed by the bondholders who shall be a person residing in, or a corporation incorporated under the laws of a State other than the State of the residence or incorporation of the trustee to be superseded. If there be no such appointment by the bondholders, the trustee appointed or substituted by the company shall continue to act hereunder. If such new trustee appointed in place of the trustee, or of its successor in the trust, shall be a trust company or

Residence of new trustee.

Trustee may be a trust company or banking institution.

a banking institution, it shall be one in
70 good standing, and authorized to accept such trusts and having a capital and surplus aggregating at least one million dollars. One or more natural persons may, however, be appointed trustee or trustees hereof in case the holders of a majority in interest of the bonds secured hereby at the time outstanding shall so direct in writing.

—or an individual.

Acceptance of trust vesting pledged collateral in new trustee.

Any new trustee appointed or substituted hereunder shall execute, acknowledge and deliver to the railroad company an instrument accepting such appointment or substitution hereunder, and thereupon such new trustee shall, without any further act, deed or conveyance, become entitled to the possession of, and become vested with, all the shares of stock, properties, rights, powers and trusts of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; but the trustee retiring shall, nevertheless, on the written demand of the new trustee, execute and deliver an instrument conveying and transferring to such new trustee, upon the trusts herein expressed, all the shares of stock, properties, rights, powers and trusts of the trustee so retiring, and shall duly deliver and pay to the new trustee so appointed in its place all shares of stock, properties and moneys held by it under this trust indenture. Should any instrument in writing from the railroad company be required by any new trustee for more fully and certainly vesting in and confirming to it the said rights, powers, trusts, and duties, then any and all such instruments in writing shall, on request of such new trustee, be made, executed, acknowledged and delivered by the railroad company. No trustee who shall resign or be removed or displaced as hereinbefore provided shall be required to deliver to the new trustee the securities pledged hereunder unless and until its compensation and expenses shall have been paid in full; and upon such delivery of said securities the outgoing trustee shall be discharged from all further liability hereunder, or to the holder of any bonds hereby secured.

Retiring trustee to execute instrument of transfer.

Railroad company to execute instruments of transfer.

Retiring trustee to be discharged from liability.

Defeasance.

71 Article eighteenth. If, when the bonds hereby secured shall have become due and payable, the railroad company shall well and truly pay or cause to be paid the whole amount of the principal, interest and dividend payments due upon

all of the bonds hereby secured then outstanding, or shall provide for such payment by depositing with the trustee hereunder, within six months before or at any time after the maturity of said bonds, for the payment of such bonds and interest thereon, the entire amount due or to become due for principal and interest, and shall also pay or cause to be paid all other sums payable hereunder by the railroad company, and shall well and truly keep, perform and observe all the things herein required to be kept, performed and observed by it according to the true intent and meaning of this trust indenture, then and in that case the shares of stock hereby pledged, and all rights and interests therein and thereto, shall revert to the railroad company, or to whosoever may be entitled thereto, and the estate, right, title and interest of the trustee therein shall thereupon cease, determine and become void; and the trustee shall, in such case, on demand of the railroad company, and at the cost and expense of the latter, execute an instrument of satisfaction and discharge of this trust indenture; otherwise, the same shall be, continue and remain in full force and effect.

Satisfaction of trust indenture.

Article nineteenth. The railroad company further agrees and covenants that it will also do, execute, acknowledge and deliver, or cause or procure to be done, executed or acknowledged and delivered, all and every such further acts, deeds, transfers and assurances for the better assuring, conveying and confirming unto the trustee all and singular the shares of stock hereby pledged, or intended so to be, as the trustee or a majority in amount of the holders of bonds issued and outstanding hereunder shall reasonably require for better accomplishing the provisions and purposes of this trust indenture and for
72 better securing payment of the principal of the bonds intended to be secured hereby and the interest and dividend payments thereon. All the covenants, stipulations, promises and agreements in this trust indenture contained by or on behalf of the railroad company shall be for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured, and shall bind and apply to the successors and assigns of said railroad company, whether so expressed or not.

Covenant for further assurance.

Covenant to waive stay or extension laws.

The railroad company further agrees and covenants that it will not at any time insist upon or plead or in any manner whatever claim or take the benefit or advantage of any stay or extension law now or at any time hereafter in force; nor will it claim, take or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the pledged shares of stock, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provisions herein contained or to the decree of any court of competent jurisdiction; nor will it, after any such sale or sales, claim or exercise any right under any statute to redeem the shares of stock so sold or any part thereof, or obstruct or impede the accepted purchaser from taking possession of the same; and it hereby expressly waives all benefit or advantage of any such law or laws, and covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustee, but will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

Immunity of stockholders, officers, directors, etc., from personal liability.

No recourse under or upon any obligation, covenant or agreement contained in this trust indenture, or in any bond or coupon hereby secured, or under any judgment obtained against the railroad company or otherwise, shall be had against any incorporator, stockholder, officer or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise. This trust indenture and the obligations hereby secured are solely corporate obligations, and no personal liability whatever shall attach to or be incurred by the stockholders, directors or officers of the railroad company, or of any successor corporation, or any of them, under or by reason of any of the obligations, covenants or agreements contained in this trust indenture, or in any of the bonds or coupons hereby secured, nor shall any such personal liability be implied therefrom; and any and all personal liability of every name and nature, whether at common law or in equity, or by statute or constitution, of every such stockholder, officer or director is hereby expressly waived.

COPY BOUND CLOSE IN CENTER

Form and proof of requests, etc., by bondholders.

Article twentieth. Any request or other instrument required by this trust indenture to be signed and executed by bondholders may be in any number of concurrent instruments of similar tenor and may be executed by such bondholders in person, or by agent or attorney appointed by an instrument in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent or attorney, or of the holding by any person of coupon bonds, transferable by delivery, shall be sufficient for any purpose of this trust indenture, and shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument, if made in the following manner, viz: (1) The fact and date of the execution by any bondholder of any such request or of any other instrument or writing may be proved by the certificate of any notary public or other officer authorized to take, either within or without the State of New York, acknowledgments of deeds to be recorded in said State, certifying that the person signing such request or other instrument acknowledged to him the execution thereof, or by the affidavit of a witness to such execution. (2) The amount of coupon bonds transferable by delivery held by any person executing any such request or other instrument as a bondholder, and the amounts and issue numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank or other depository (wheresoever situated) whose certificate shall be deemed satisfactory by the trustee, showing that at the date therein mentioned such person had on deposit with such depository, or exhibited to it the bonds described in such certificate. (3.) The ownership of registered bonds shall be proved by the books for the registry of such bonds provided for in article first hereof.

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Acceptance of trust.

Article twenty-first. The Equitable Trust Company of New York, party hereto of the second part, hereby accepts the trusts in this trust indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

Definitions.

Except when otherwise indicated, the words "the trustee," or "said trustee," or any other equivalent term, as used in this trust indenture, shall be held and construed

to mean the trustee or trustees for the time being, and the words "bond," "bondholder," "holder" and "person" shall include the plural as well as the singular number. The words "railroad company" herein used shall be deemed to include any successor to the Oregon Short Line Railroad Company by consolidation, merger, sale or otherwise and any action herein authorized to be taken by the railroad company may be taken by any such successor. The trustee shall not be responsible for the recording or filing of this trust indenture.

In witness whereof, the parties hereto of the first and second parts have duly caused these presents to be executed in their respective corporate names by their respective presidents or vice-presidents, and their respective corporate seals to be hereto affixed and attested by their re-
75 spective secretaries or assistant secretaries, as of the day and year first above written.

OREGON SHORT LINE RAILROAD COMPANY,
By E. H. HARRIMAN,
[SEAL.] President.

Attest:
ALEX. MILLAR, Secretary.

Signed, sealed and delivered on behalf of the Oregon Short Line Railroad Company in the presence of
CHARLES J. HOEHNLE.

THE EQUITABLE TRUST COMPANY OF NEW YORK,
By WILLIAM T. CORNELL,
[SEAL.] President.

Attest:
LAWRENCE L. GILLESPIE,
Secretary.

Signed, sealed and delivered on behalf of the Equitable Trust Company of New York in the presence of
T. H. SHIPMAN.

76 STATE OF NEW YORK, County of Orange, } ss.:

Acknowledgment by railroad company.

On the 18th day of July, in the year 1902, before me personally came E. H. Harriman, to me known, who, being by me duly sworn, did depose and say that he resided at Arden, county of Orange, State of New York; that he is the president of the Oregon Short Line Railroad Company, one of the corporations described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

EDWARD H. SEAMAN,
[SEAL.] Notary Public, Orange County.

Nty. commission expires M'ch 30, 1904.

STATE OF NEW YORK, County of New York, } ss.:

Acknowledgment by trustee.

On the 18th day of July, in the year 1902, before me personally came William T. Cornell, to be known, who, being by me duly sworn, did depose and say that he resided in the city of New York, State of New York; that he is the president of the Equitable Trust Company of New York, one of the corporations described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] WM. T. JACKSON,
Notary Public, Westchester County.

Certificate filed in New York county.

77 EXHIBIT C TO BILL OF COMPLAINT.

Transcript of Record in the Case of The United States of America, Complainant, *vs.* The Northern Securities Company and Others, Defendants.

Circuit Court of the United States for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE NORTHERN SECURITIES COMPANY, THE Great Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } No. 789. C. Equity.

Transcript of Record.

Pleadings, etc.

78 UNITED STATES OF AMERICA
vs.
NORTHERN SECURITIES COMPANY ET AL.

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79 Appearances.

Circuit Court of the United States, District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant, *v.* NORTHERN SECURITIES COMPANY, THE GREAT Northern Railway Company, The Northern Pacific Railway Company, *et al.*, Defendants.	Appearance.

The clerk will enter our appearance for the complainants in the above-entitled cause.

MILTON D. PURDY,
Attorney of the United States
for the District of Minnesota.
PHILANDER C. KNOX,
Attorney-General of the United States.
JOHN K. RICHARDS,
Solicitor-General of the United States.

Dated March 10, 1902.

(Indorsed:) United States circuit court, district of Minnesota, third division. The United States of America, complainant, *v.* Northern Securities Company and others. Appearance of M. D. Purdy, P. C. Knox, and J. K. Richards, for complainant. Ent'd C. R. B. page 84. Filed March 10, 1902. Henry D. Lang, clerk.

United States Circuit Court, District of Minnesota, Chancery Rule Register.

1902. March 10.

THE UNITED STATES OF AMERICA, Complainant, *v.* NORTHERN SECURITIES COMPANY and Others, Defendants.	C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of Milton D. Purdy, Philander C. Knox,
80 and John K. Richards as solicitors of said complainant be, and the same hereby is, entered.

HENRY D. LANG, Clerk.

(C. R. "B." page 84.)

Entered 789, C. E.

In the Circuit Court of the United States for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
v.
NORTHERN SECURITIES COMPANY, THE GREAT Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants.
No. 789, C. E. Petition.

(Indorsed:) Filed March 10, 1902. Henry D. Lang, clerk.

In the Circuit Court of the United States for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
v.
NORTHERN SECURITIES COMPANY, THE GREAT Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants.
No. 789. C. E.

Petition.

To the judges of the circuit court of the United States for the district of Minnesota:

Now comes the United States of America, by Milton D. Purdy, the United States attorney for the district of Minnesota, acting under direction of the Attorney-General of the United States, and brings this its proceeding by way of petition against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey; the Great
81 Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota; the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin; James J. Hill, a citizen of the State of Minnesota and a resident of St. Paul, and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont, citizens of the State of New York, and residents of New York city, and, on information and belief, complains and says:

I.

The defendants, The Northern Pacific Railway Company and The Great Northern Railway Company, were, at the times hereinafter mentioned, and now are, common carriers, employed in the transportation of freight and passengers among the several States of the

United States and between such States and foreign nations, and, as such carriers so employed, were and are engaged in trade and commerce among the several States and with foreign nations.

II.

On and prior to the 13th day of November, 1901, the defendants, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as James J. Hill and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, The Great Northern Railway Company, and the defendants, J. Pierpont Morgan and Robert Bacon (members and representing the banking firm of J. P. Morgan & Co., of New York city), George F. Baker and Daniel S. Lamont, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, The Northern Pacific Railway Company.

III.

The Northern Pacific Railway Company and the Great Northern Railway Company, at and prior to the doing of the acts hereinafter complained of, owned or controlled and operated two separate, independent, parallel, and competing lines of railway running east and west into or across the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, the Northern Pacific system, extending from Ashland, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Helena, in the State of Montana and Spokane, in the State of Washington, to Seattle and Tacoma, in the State of Washington, and Portland, in the State of Oregon, and the Great Northern system, extending from Superior, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Spokane, in the State of Washington, to Everett and Seattle, in the State of Washington, and to Portland, in the State of Oregon, with a branch line to Helena, in the State of Montana, thus furnishing to the public two parallel and competing transcontinental lines connecting the Great Lakes and the Mississippi river with Puget sound and the Pacific ocean. At the times mentioned, these two railway systems, which will hereafter be referred to respectively as the Northern Pacific system and the Great Northern system, each of which, with its leased and controlled lines, main and branch, aggregates over 5,500 miles in length, were the only transcontinental lines of railway extending across the northern tier of States west of the Great Lakes, from the Great Lakes and the Mississippi river

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to the Pacific ocean, and were then engaged in active competition with one another for freight and passenger traffic among the several States of the United States and between such States and foreign countries, each system connecting at its eastern terminals, not only with lines of railway, but with lake and river steamers to other States and to foreign countries, and at its western terminals with sea-going vessels to other States, Territories, and possessions of the United States and to foreign countries.

IV.

Prior to the year 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized and existing under certain acts and resolutions of Congress. During that year the company became insolvent, and the line was placed it the hands of receivers by the
83 proper courts of the United States. While in this condition, awaiting foreclosure and sale, an arrangement was entered into between a majority of the bondholders of the Northern Pacific Railroad Company and the defendant, The Great Northern Railway Company, for a virtual consolidation of the Northern Pacific and Great Northern systems and the placing of the practical control of the Northern Pacific system in the hands of the defendant, The Great Northern Railway Company. This arrangement contemplated the sale, under foreclosure, of the property and franchises of the Northern Pacific Railroad Company to a committee of the bondholders, who should organize a new corporation, to be known as the Northern Pacific Railway Company, which was to become the successor of the Northern Pacific Railroad Company; one-half of the capital stock of the new company was to be turned over to the shareholders of the defendant, The Great Northern Railway Company, which in turn was to guarantee the payment of the bonds of the Northern Pacific Railway Company. An agreement was to be entered into for the exchange of traffic at intersecting and connecting points and for the division of earnings therefrom. The carrying out of this arrangement was defeated by the decision of the Supreme Court of the United States in the case of Pearsall *v.* The Great Northern Railway Company (which was decided March 30, 1896, and is reported in the one hundred and sixty-first volume of the reports of said court, beginning on page 646, to which reference is made), in which it was held that the practical effect would be the consolidation of two parallel and competing lines of railway, and the giving to the defendant, The Great Northern Railway Company, a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, to the detriment of the public and in violation of the laws of the State of Minnesota.

V.

Early in the year 1901 the defendants, The Great Northern and Northern Pacific Railway Companies, acting for the purpose of promoting their joint interests, and in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems
84 under a common source of control, united in the purchase of the total capital stock of the Chicago, Burlington and Quincy Railway Company, of Illinois, giving the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent. per annum, for such stock, at the rate of $200 in bonds in exchange for each $100 in stock, and in this manner purchased and acquired about $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, or about 98 per cent. thereof. In this manner, at the time stated, the defendants, The Great Northern and Northern Pacific Railway Companies, secured control of the vast system of railway lines known as the Burlington system, about 8,000 miles in length, extending from St. Paul, in the State of Minnesota, where it connects with the Great Northern and Northern Pacific Railway systems, through the States of Minnesota, Wisconsin, and Illinois, to Chicago, in the State of Illinois, and from these two cities through said States and through the States of Iowa, Missouri, Nebraska, Colorado, South Dakota, Wyoming, and Montana, to Quincy, in the State of Illinois; to Burlington and Des Moines, in the State of Iowa; to St. Louis, Kansas City, and St. Joseph, in the State of Missouri; to Omaha and Lincoln, in the State of Nebraska; to Denver, in the State of Colorado; to Cheyenne, in the State of Wyoming, and to Billings, in the State of Montana, where it again connects with the Northern Pacific Railway system, these States lying west of Chicago and south of the States crossed by the Great Northern and Northern Pacific systems, and constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system.

VI.

The attempt to turn over a controlling interest in the stock of the Northern Pacific Railway Company to the Great Northern Railway Company and thus effect a virtual consolidation of the two railway systems, having thus, in the year 1896, been defeated by a decision of the Supreme Court of the United States, the de-
85 fendants James J. Hill and his associate stockholders of the defendant, The Great Northern Railway Company, owning or controlling a majority of the stock of that corporation, and the defendants J. Pierpont Morgan and his associate stockholders of the defendant, The Northern Pacific Railway Company, owning or

controlling a majority of the stock of that corporation, acting for themselves as such stockholders and on behalf of the said railway companies in which they owned or held a controlling interest, on and prior to the 13th day *day* of November, 1901, contriving and intending unlawfully to restrain the trade or commerce among the several States and between said States and foreign countries carried on by the Northern Pacific and Great Northern systems, and contriving and intending unlawfully to monopolize or attempt to monopolize such trade or commerce, and contriving and intending unlawfully to restrain and prevent competition among said railway systems in respect to such interstate and foreign trade or commerce, and contriving and intending unlawfully to deprive the public of the facilities and advantages in the carrying on of such interstate and foreign trade or commerce theretofore enjoyed through the independent competition of said railway systems, entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to wit: A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over and transferred the capital stock, or a controlling interest in the capital stock, of each of the defendant railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock. In this manner, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common
86 stockholder, the Northern Securities Company, was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities Company. The individual stockholders of the Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems, collected and distributed by the holding corporation. In this manner, by making

the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.

VII.

In pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November, 1901, the defendant, The Northern Securities Company, was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the purpose and power,
not only to "purchase" and "hold" "shares of the capital
87 stock of any other corporation or corporations," under which
said company wrongfully claims and is exercising the power to acquire by exchange and hold the stock of the Northern Pacific and the Great Northern Railway Companies, but the purpose and power, while owner thereof, "to exercise all the rights, powers, and privileges of ownership;" that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power "to aid in any manner any corporation * * * of which any bonds * * * or stock are held * * * and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds * * * or stock," meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway Companies, or to preserve or enhance the value of their stocks or bonds.

VIII.

In further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on or about the 14th day of November, 1901, the defendant The Northern Securities Company was organized by the election of a board of directors and the selection of a president and other officers, the defendant James J. Hill, the president and controlling power in the management of the defendant The Great Northern Railway Company, being chosen a director and president

thereof; and thereupon, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendants James J. Hill and his associate stockholders of the defendant The Great Northern Railway Company assigned and transferred to the defendant The Northern Securities Company a large amount of the capital stock of the Great Northern Railway Company, the exact amount being unknown to complainant, but constituting a controlling interest therein, and complainant believes a majority thereof, upon the agreed basis of exchange of $180, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Great Northern Railway Company; and the defendants J. Pierpont Morgan and his associate stockholders of the Northern Pacific Railway Company assigned and transferred to the defendant
The Northern Securities Company a large majority of the
88 capital stock of the defendant The Northern Pacific Railway
Company, the exact amount being unknown to complainant, upon the agreed basis of exchange of $115, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; and thereafter, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendant The Northern Securities Company offered to the stockholders of the defendant railway companies to issue and exchange its capital stock for the capital stock of such railway companies, upon the basis of exchange aforesaid, no other consideration being required. In further pursuance of the unlawful combination or conspiracy aforesaid the defendant The Northern Securities Company has acquired an additional amount of the stock of the defendant railway companies, issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding, as owner and proprietor, substantially all of the capital stock of the Northern Pacific Railway Company, and, as complainant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein, and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof in the organization, management, and operation of said railway companies, and in the receipt and control of their earnings, and will continue to do so, unless restrained by the order of this court. By reason whereof a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce, to the great and irreparable damage of the people of the United States, in derogation of their common rights, and in violation of the act of Congress of July 2, 1890, entitled "An

act to protect trade and commerc- against unlawful r-straints and monopolies."

89 IX.

If the defendant The Northern Securities Company has not acquired a large majority of the capital stock of the defendant The Great Northern Railway Company, it is because the individual defendants named, and their associates in the combination or conspiracy charged in this petition, or some of them, since it became apparent that the legality of their corporate device for the merger of the stock of competing railway companies, through the instrumentality of a central or holding corporation, would be assailed in the courts, have purposely withheld, or caused to be withheld, a large amount of the capital stock of said railway company from transfer for the stock of the Northern Securities Company, and have purposely discouraged and prevented the transfer and exchange of such stock for the stock of the Northern Securities Company, all for the purpose of concealing the real scope and object of the unlawful combination or conspiracy aforesaid, and of deceiving and misleading the State and Federal authorities, and of furnishing a ground for the defense that the Northern Securities Company does not hold a clear majority of the stock of the Great Northern Railway Company. The complainant avers that such stock, so withheld or not transferred to the Northern Securities Company, is now in the hands of some person or persons (unknown to the complainant) friendly to and under the influence of the individual defendants named and their associates aforesaid, or some of them, and will either not be voted, or be voted in harmony with the Great Northern stock held by the Northern Securities Company, until the question of the legality of this corporate device for merging competing railway lines shall be finally and judicially determined, when such stock will either be turned over to the Northern Securities Company or continue to be held and voted outside said company but in harmony with the Great Northern stock held and voted by it, as may at the time seem advisable.

X.

In further pursuance of the unlawful combination or conspiracy aforesaid, the Northern Securities Company (subject, it may be, to the condition stated in the next preceding paragraph) is
90 about to and will, unless restrained by the order of this court, receive and acquire, and hereafter hold and control as owner and proprietor, substantially all of the capital stock of the defendant railway companies, issuing in lieu thereof its own capital stock to the full extent of the authorized issue, of which, upon the basis of exchange aforesaid, the former stockholders of the Great Northern Railway Company have received or will receive and hold about 55 per cent. thereof, the balance going to the former stockholders of the Northern Pacific Railway Company.

XI.

No consideration whatever has existed, or will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company, other than the issue of the stock of the Northern Securities Company to them in exchange therefor, for the purpose, after the manner, and upon the basis aforesaid.

The defendant, The Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depositary, custodian, holder, and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool. The Northern Securities Company does not have and never had any capital sufficient to warrant such a stupendous operation. Its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 is just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which is about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par.

XII.

If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, The
91 Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and Great Northern Railway Companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be affected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," may be circumvented and set at naught, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

XIII.

In furtherance of the purpose and object of the unlawful combination or conspiracy aforesaid to monopolize or attempt to monopolize the trade or commerce among the several States, and between such States and foreign countries, formerly carried on in free competition by the defendants, The Northern Pacific and Great Northern Railway Companies, and to place a restraint thereon, the individual defendants named and their associate stockholders of the defendant railway companies, have combined or conspired with one another and with other persons (whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained) to use and employ, in addition to the corporate scheme or device aforesaid, and in aid thereof, various other schemes, devices, and instrumentalities, the precise details of which are at present unknown to the complainant but will be laid before the court when ascertained, by means of which, unless prevented by the order of this court, the object and purpose of the unlawful combination or conspiracy aforesaid may and will be accomplished.

Prayer.

In consideration whereof, and inasmuch as adequate relief in the premises can only be obtained in this court, the United States
92 of America prays your honors to order, adjudge, and decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are in derogation of the common rights of all the people of the United States and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that the defendants and each and every one of them, and their officers, directors, stockholders, agents, and servants, and each and every one of them, be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same, and, in addition, that the several defendants be respectively enjoined as follows:

First. That the defendant, The Northern Securities Company, its stockholders, officers, directors, executive committee, and its agents and servants, and each and every one of them, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting (whether by proxy or otherwise), or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, surrendering in return therefor to the holders thereof the certificates of

stock in the respective railway companies in lieu of which they were issued.

Second. That the defendant, The Northern Pacific Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock, unless authorized by this court.

Third. That the defendant, The Great Northern Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from
93 in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock unless authorized by this court.

Fourth. That the individual defendants named, and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each, respectively, perpetually enjoined from in any manner holding, voting or acting as the owner of any of the stock of the Northern Securities Company, issued in exchange for the stock of either of the said railway companies, unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept therefor the stock of the defendant railway company in exchange for which the same was issued.

Fifth. That the individual defendants named, and their associate stockholders, and each and every person combining or conspiring with them, as charged in paragraph XIII hereof, and their trustees, agents, and assigns, present or future, and each and every one of them, be perpetually enjoined from doing any and every act or thing mentioned in said paragraph, or in furtherance of the combination or conspiracy described therein, or intended or tending to place the capital stock of the defendant railway companies, or the competing railway systems operated by them, or the competitive interstate or foreign trade or commerce carried on by them, under the control, legal or practical, of the defendant, The Northern Securities Company, or of any person or persons, or association or corporation, acting for or in lieu of said company, in the carrying out of the unlawful combination or conspiracy described in said paragraph.

The United States prays for such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America
94 may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpœna directed to the said defendants, The Northern Securities Company, The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and their associate stockholders of the Great Northern Railway Company, as their names may become known to complainant and the court be advised thereof, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, and their associate stockholders of the Northern Pacific Railway Company, as their names may become known to complainant and the court be advised thereof, and the persons referred to in paragraph XIII hereof, as their names may become known to complainant and the court be advised thereof, and to each of them, commanding them, and each of them, to appear herein and answer (but not under oath) the allegations contained in the foregoing petition, and abide by and perform such order or decree as the court may make in the premises; and that, pending the final hearing of this case, a temporary restraining order may issue enjoining the defendants and their associates, and each of them, and their stockholders, directors, officers, agents, and servants, as hereinbefore prayed.

MILTON D. PURDY,
Attorney of the United States
for the District of Minnesota.
PHILANDER C. KNOX,
Attorney-General of the United States.
JOHN K. RICHARDS,
Solicitor-General of the United States.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, } ss:

Milton D. Purdy, being duly sworn, says that he is the United States attorney for the district of Minnesota, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes them to be true. He further states that
95 he is authorized to sign the said bill of complaint for The United States of America, the complainant therein by the Attorney-General of the United States.

MILTON D. PURDY,
Attorney of the United States
for the District of Minnesota.

Subscribed in my presence and sworn to before me this 10th day of March, A. D. 1902.

[SEAL OF COURT.] HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota.

Certificate of Incorporation of Northern Securities Company.

STATE OF NEW JERSEY, ss:

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey entitled "An act concerning corporations" (revision of 1896), and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1.) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country.

(2.) To purchase, hold, sell, assign, transfer, mortgage,
96 pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership.

(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5.) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage, and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business), are as follows:

97 Name and post-office address.	Number of shares.
George F. Baker, Jr., 258 Madison avenue, New York, N. Y.	100
Abram M. Hyatt, 214 Allen avenue, Allenhurst, N. J.....	100
Richard Trimble, 53 East Twenty-fifth street, New York, N. Y.....	100

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year, the directors of the second class for a term of two years, and the directors of the third class for a term of three years; and at each annual election the successors of the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification, or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may

elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of
98 the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employee of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum, and to such extent as shall be provided in the by-laws such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers, and one or more assistant secretaries, and, to the extent provided in the by-laws, the persons so appointed, respectively, shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the payment of dividends, and to direct and to determine the use and disposition of any surplus
99 or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the

corporation to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

The board of directors may make by-laws, and from time to time may alter, amend, or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof we have hereunto set our hands and seals the 12th day of November, 1901.

GEO. F. BAKER, JR. [L. S.]
ABRAM M. HYATT. [L. S.]
RICHARD TRIMBLE. [L. S.]

Signed, sealed and delivered in the presence of—
GEO. HOLMES.

STATE OF NEW YORK, County of New York, Manhattan, } ss:

Be it remembered, that on this twelfth day of November, 1901, before the undersigned, personally appeared George F. Baker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed, and delivered the same as their voluntary act and deed.

GEO. HOLMES,
Master in Chancery of New Jersey.

(Endorsed.)

"Received in the Hudson Co., N. J., clerk's office, Nov. 15, A. D. 1901, and recorded in Clerk's Record No. —, on page —.
"MAURICE J. STACK, Clerk."

"Filed Nov. 13, 1901.
"GEORGE WURTS,
"Secretary of State."

Circuit Court of the United States, District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHern Railway Company, The Northern Pacific Railway Company, and Others, Defendants.

Præcipe for Chancery Subpœna.

To the clerk of above-named court:

Please issue chancery subpœna in the above-entitled case.
Dated March 10, 1902.

M. D. PURDY,
Attorney for the United States.

(Indorsed:) United States circuit court, district of Minnesota. 3rd division. The United States *vs.* Northern Securities Co. and others. Præcipe for chancery subpœna. Ent'd C. R. "B," page 84. Filed March 10, 1902. Henry D. Lang, clerk.

101 United States Circuit Court, District of Minnesota, Chancery Rule Register.

THE UNITED STATES OF AMERICA
vs.
NORTHERN SECURITIES COMPANY and Others.

C. Equity. No. 789. March 10, 1902.

The complainant having filed a bill of complaint in this cause on application of Milton D. Purdy, U. S. dist. att'y, dist. of Minn., P. C. Knox, Att'y Gen'l, and J. K. Richards, Sol. Gen'l of U. S., solicitors, ordered that a writ of subpœna issue as herein prayed.

HENRY D. LANG, Clerk.

(C. R., "B," page 84.)

(Original.)

UNITED STATES OF AMERICA,
District of Minnesota, Third Division.

The President of the United States of America to Northern Securities Company, Great Northern Railway Company, Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the district of Minnesota, on the first Monday of April next, at the

city of St. Paul, then and there to answer the bill of complaint of the United States of America, filed against you on the 10th day of March, A. D. 1902; hence, fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 10th day of March, 1902.

Issued at my office in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

[SEAL OF COURT.] HENRY D. LANG, Clerk.

102 MEMORANDUM.—The above-named defendants to enter their appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken *pro confesso*.

HENRY D. LANG, Clerk.

Milton D. Purdy, attorney of the U. S. for the district of Minnesota; Philander C. Knox, Attorney-General of the U. S.; John K. Richards, Solicitor-General of the U. S., complainant's solicitors.

(Endorsed:) Chancery subpœna. Returnable to April rules, 1902. Filed March 10th, 1902. Henry D. Lang, clerk.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant,
v.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILway Company, The Northern Pacific Railway Company, and Others, Defendants.

To Henry D. Lang, Esq., clerk of said court:

You will please enter the appearance, in this cause, of the defendants, The Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker, by the undersigned, their solicitors and counsel.

Yours respectfully, JOHN W. GRIGGS.
GEORGE B. YOUNG.

Dated St. Paul, Minn., April 4, 1902.

(Endorsed:) Præcipe for appearance for certain defendant-. Ent'd C. R. "B," page 85. Filed April 7th, 1902. Henry D. Lang, clerk.

103 United States Circuit Court, District of Minnesota, Chancery-Rule Register.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, GREAT Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of the defendants, The Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker, by John W. Griggs and George B. Young, their solicitors, be, and the same hereby is entered.

HENRY D. LANG, Clerk.

(C. R. "B," page 85.)

Circuit Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA
vs.
NORTHERN SECURITIES COMPANY, GREAT NORTHERN Railway Company, *et al.* } Appearance.

The clerk will enter my appearance for the defendant, Great Northern Railway Company.

M. D. GROVER,
St. Paul, Minn.

(Indorsed:) Appearance of M. D. Grover for Great Northern Railway Company. Ent. C. R. "B," page 86. Filed April 7th, 1902. Henry D. Lang, clerk.

104 United States of America, District of Minnesota, Chancery-Rule Register.

APRIL 7TH, 1902.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, GREAT Northern Railway Company, *et al.* } C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of the defendant Great Northern Railway Com.

pany, one of the above-named defendants, by M. D. Grover, its solicitor, be, and the same hereby is, entered.

HENRY D. LANG, Clerk.

(C. R. "B," page 86.)

Circuit Court of the United States, District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } Appearance.

The clerk will enter my appearance for The Northern Pacific Railway Company, one of the defendants.

C. W. BUNN,
St. Paul, Minn.

(Endorsed:) Appearance of C. W. Bunn for The Northern Pacific Railway Co., defendant. Filed April 7th, 1902. C. R. "B," page 85. Henry D. Lang, clerk.

105 United States Circuit Court, District of Minnesota, Chancery Rule Register.

APRIL 7TH, 1902.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of the defendant, The Northern Pacific Railway Company, by C. W. Bunn, its solicitor, be, and the same hereby is, entered.

HENRY D. LANG, Clerk.

(C. R. "B," page 85.)

Circuit Court of the United States, District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } Appearance.

The clerk will enter my appearance for the defendants, J. Pierpont Morgan and Robert Bacon.

FRANCIS LYNDE STETSON,
15 Broad St., New York.

(Endorsed:) Appearance of Francis Lynde Stetson for J. Pierpont Morgan and Robert Bacon, defendants. Ent. C. R. "B," page 86. Filed April 7th, 1902. Henry D. Lang, clerk.

106 United States Circuit Court, District of Minnesota, Chancery Rule Register.

APRIL 7TH, 1902.

THE UNITED STATES OF AMERICA
vs.
THE NORTHERN SECURITIES COMPANY, THE Great Northern Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of J. Pierpont Morgan and Robert Bacon, two of the defendants in this cause, by Francis Lynde Stetson, their solicitor, be, and the same hereby is, entered.

HENRY D. LANG, Clerk.

(C. R. "B," page 86.)

UNITED STATES OF AMERICA,
District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, *et al.*, Defendants.

To the clerk of the above-named court:

You will please enter my appearance in the above-entitled suit as solicitor for Daniel S. Lamont, one of the defendants.

DAVID WILCOX.

(Endorsed :) Appearance of David Wilcox. Ent. C. R. "B," page 86. Filed April 7th, 1902. Henry D. Lang, clerk.

107 United States Circuit Court, District of Minnesota, Chancery Rule Register.

APRIL 7TH, 1902.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE NORTHERN SECURITIES COMPANY, Northern Pacific Railway Company, Great Northern Railway Company, *et al.*, Defendants. } C. Equity. No. 789.

Pursuant to a præcipe this day filed in this cause, it is ordered that the appearance of the defendant Daniel S. Lamont, one of the defendants, by David Wilcox, his solicitor, be and the same hereby is entered.

HENRY D. LANG, Clerk.

(C. R. "B," page 86.)

Entered 789, C. E.

Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHern Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer of the Defendant Northern Securities Company.

John W. Griggs, George B. Young, solicitors for the defendant.

(Endorsed :) Filed May 5th, 1902. Henry D. Lang, clerk.

108 In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILway Company, The Northern Pacific Railway Company, and Others, Defendants.

The Answer of the Northern Securities Company to the Petition of the United States of America.

I.

This defendant admits and avers that the defendant railway companies were, at the time mentioned in the petition, and are now

common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

II.

This defendant admits that, on and prior to November 13, 1901, the capital stock of the defendant railway companies was owned and controlled by their respective shareholders, and it avers, on information and belief, that the outstanding capital stock of the Great Northern Railway Company was owned by more than eighteen hundred (1,800) separate owners, and the outstanding capital stock of the Northern Pacific Railway Company was owned by more than thirty-five hundred (3,500) separate owners; and that among the shareholders of the Great Northern Railway Company (hereinafter called the Great Northern Company) were the defendants Hill, Clough, James, Morgan, and Kennedy; and that among the shareholders of the Northern Pacific Railway Company (hereinafter called the Northern Pacific Company) were the defendants Morgan, Bacon, Baker, Hill, Kennedy, James, and Lamont. It avers that the persons named and meant to be designated in the peti-
109 tion as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Great Northern Company, did not at any time, nor in any manner, own or control a majority of said stock, nor as much as one-third (⅓) part thereof. Their holdings in said stock were at all time separate and individual, and not in association with each other, or with any other person or persons, and neither of them was under any obligation or promise to any of the others, or to any other person, to hold, use, or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest. The persons named and meant to be designated in the petition as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Northern Pacific Company, did not, at the date named, nor at any time, or in any manner, own or control a majority of such stock, nor as much as one-third (⅓) part thereof. Their holdings in said stock were at all times separate and individual, and neither of them had any control of the holdings of the other, or of any other person or persons, and neither of them was under any promise or obligation to the other, or to any person, to hold, use, or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest.

Except as herein admitted and averred, this defendant denies each and every allegation of subdivision II of the petition.

III.

This defendant admits that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle in Washington, and to Portland in Oregon; and that the Great Northern Company operated lines of railway extending from St. Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to Everett and Seattle in Washington, passing through Spokane in that State.

It admits that the said lines so operated by said companies
110 connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for the Great Northern Company.

It denies that the lines operated by said companies are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and denies that said companies were engaged in active competition with each other, except in the manner and to the extent hereinafter stated.

Except as hereinabove and hereinafter stated, it denies each and every allegation in subdivision III of said petition.

IV.

This defendant admits and avers that prior to 1893 those portions, and those portions only, of the lines of the Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and that in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

It admits that while in this condition a contract was made, as set forth in the report of the Pearsall case, referred to in the petition. It avers that said contract was made under and in conformity with the provisions of the act of incorporation of the Great Northern Company, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. It denies that the case, or that the decision therein, is correctly stated in the petition. And it avers that neither the said contract nor the issues raised and decided in the said case have any relevancy to the matters in controversy in this case.

V.

This defendant admits and avers that in the winter and spring of 1901 the defendant railway companies, for the purpose of
111 promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last-named company to the amount and at the price and upon the terms of payment stated in the petition. It admits that the lines operated by the Chicago, Burlington and Quincy Railroad Company and its connections are substantially as stated in the petition. It denies that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admits that some of the lines of each system compete with some lines of the other.

It denies that said purchase of stock was made in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, or that it was made for any other motive or with any other purpose than as hereinafter stated.

Except as herein admitted, it denies each and every allegation in subdivision V of the petition.

VI.

This defendant denies that prior to its organization the defendants James J. Hill or J. Pierpont Morgan, or said Hill and Morgan, or any persons associated with them, or either of them, owned or controlled a majority of, or held a controlling interest in, the stock of either of said railway companies.

It denies that said persons, or that any of the persons concerned in its organization, contrived or intended any of the things alleged in subdivision VI of the petition or entered into any agreement or conspiracy to do any of the things charged in said subdivision.

It admits and avers that said James J. Hill and other holders (not exceeding ten in number) of the stock of the Great Northern Company, but not including the defendants Morgan, Bacon, or Lamont, did plan its organization with an authorized capital of four hundred million dollars ($400,000,000) for the purposes, and those only, set forth in its certificate of incorporation. It denies that James J. Hill and J. P. Morgan agreed between themselves, or with other stockholders of either of the defendant railway companies, or
112 with either of said railway companies, or with anyone whomsoever, that a controlling interest of the stock of either of said railway companies should be turned over or transferred to this defendant, whether in exchange for its stock or otherwise.

It denies that any of the matters stated in said subdivision VI of the petition were contemplated or intended, or have resulted, or will result, from its formation and operation. And it denies the allega-

tion that it is the duty of the directors of said railway companies to pursue a policy which will promote the interest of both systems at the expense of the public.

It alleges that the motives and intentions of the persons so forming this defendant were and are such, and such only, as are in this answer stated, and it denies each and every allegation in subdivision VI of the petition not herein expressly admitted or specifically denied.

VII.

This defendant admits its formation under the laws of New Jersey with the articles, a copy of which is attached to the petition, and that the provisions of said articles were designedly inserted therein and were fully authorized by the general corporation laws of that State. And it says that the exercise of the powers of a stockholder provided for in said articles was not, as wrongly stated in the petition, confined to the stock of the defendant railway companies which this defendant might hold. It avers that the clause in said articles, partially quoted in paragraph VII of the petition, was not intended to, and does not, enlarge its powers, as the same are set forth in the preceding clauses of said articles, but makes clear its power to do such acts as making or procuring advances of money to any corporation whose securities are held by it, the indorsement or guaranty by it of the obligation, of such corporation, becoming surety therefor, or in any lawful manner using its name or resources in aid of such corporation.

VIII.

This defendant admits and avers that on or about the 14th day of November, 1901, its directors and officers were elected, and among them the defendant James J. Hill as a director and president, but denies that he was or is the controlling power in the management of the Great Northern Company.

113 It admits and avers that thereafter the defendant James J. Hill and other stockholders of the Great Northern Company, severally and each acting for himself alone, and without any agreement to that effect with any other stockholder, sold to this defendant a large amount of Great Northern stock at one hundred and eighty dollars ($180) per share in exchange for stock of this defendant at par, but it avers that the stock so sold was not within twenty-six million dollars ($26,000,000) of a majority of the stock of the Great Northern Company.

It admits and avers that thereafter and about November 22, 1901, it offered like terms of purchase to the other shareholders of the Great Northern Company, the offer to hold good for sixty days from its date, and that many of the shareholders of that company, each acting for himself alone, accepted such offer and made such sale.

It admits and avers that the defendant J. P. Morgan and other shareholders of the Northern Pacific Company sold to the defend-

ant a majority of the stock of the Northern Pacific Company; and that this defendant has received such dividends as have been paid on the shares held by it, in the same manner and at the same rate as other shareholders; but it denies that it has acted, whether as owner of stock or otherwise, in the management or direction of either of said railway companies or in receipt or control of the earnings of either of them, and it avers that no change whatever has taken place in the management of the said railway companies, or either of them, and each of them is managed by the same board of directors and officers as existed before the organization of this defendant.

It denies that any of the things done by the defendants James J. Hill and J. Pierpont Morgan, or by either of them, or by this defendant or its promoters, directors, officers, or stockholders, or any of them, were done in pursuance of the pretended combination or conspiracy alleged in subdivision VIII of the petition, or as an instrumentality to effect the purposes thereof, and it denies that by reason of the matters or any of them in the petition alleged a virtual or any consolidation of said defendant railway companies or their business has been effected or intended; and it denies any conspiracy or combination in restraint of trade or commerce among the States, or with foreign nations, or that the defendants or any of them
114 are attempting or intending to monopolize or restrain any such trade or commerce.

IX.

It denies each and every allegation in subdivision IX of the petition.

X.

This defendant says that it does not know and can not set forth how much additional stock of either defendant railway company it is likely to acquire, since each acquisition of shares by it depends, among other contingencies, on the willingness of the holders of the said stock to sell it upon terms which this defendant may be willing to accept.

XI.

This defendant says it has bought and paid for and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths (5 / 12) of the shares of that company's stock; and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths (4 / 12) of the total amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant, in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with

the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise, or understanding between any of the holders of said stock concerning the sale thereof to it, and it denies that any such agreement, promise, or understanding was ever made. All the sales and transfers of the said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.

This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of forty million dollars ($40,000,000) cash in the making
115 of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. There has been and is no agreement, promise, or understanding between any of the holders of said stock so acquired by this defendant, or between any of them and any other person or corporation, that any of said shares should at any time be held, used, or voted by this defendant for the purpose of combining or consolidating or placing under one common management or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many stockholders of the said companies have not sold, and may never sell, their shares to this defendant; and the said railway companies have not nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This defendant was organized in good faith, and it denies all the allegations in subdivision XI of the petition.

XII.

This defendant denies each and every allegation in subdivision XII of the petition.

XIII.

This defendant denies each and every allegation in subdivision XIII of the petition.

Second.

Further answering the petition, this defendant, upon information
and belief, says that the facts as to the purchase of the share
116 of the Chicago, Burlington and Quincy Railroad Company
(hereinafter called the Burlington Company) and the planning and forming of this defendant and the motives, intentions, and purposes of the persons and corporations concerned in these enterprises, or either of them, were not as erroneously stated in the petition, but were and are as follows:

I.

When projecting the line of the Great Northern Company to the Pacific coast, that company and its directors contemplated the necessity of creating for the line not merely State and interstate, but an international commerce. Nearly all of the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at a low mileage rate, such as could be made possible only by every practicable reduction in the cost of transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for which is in the prairie States of the Mississippi valley east of the Rocky mountains; but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars; the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions the Great Northern Company not only went to great additional expense in the construction of its line to
obtain gradients lower than those of any other line to the
117 Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country; and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating and has since been actively engaged in building up a commerce in which

the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia, have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large west-bound, as well as an increased east-bound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to eastern markets with a profit to the shippers.

One year before the Burlington purchase, this oriental traffic had reached such proportions that the Great Northern Company caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the largest in the world), will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of west-bound traffic, (and also of east-bound traffic) at the lowest cost.

In the interstate and international commerce which the Great Northern Company has thus built up, it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific), and at the oriental ports it competes for commerce of the world. Its rates are and must be made in competition with the rates of ocean carriers and by way of the Suez canal.

The policy thus followed by the Great Northern Company in building up an international, and thereby interstate, commerce has been followed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce both the Great Northern Company and
118 the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their traffic must be supplied. For many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both the Great Northern Company and the Northern Pacific Company in respect of markets for east-bound and freight for west-bound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the

great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi river reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Missouri river, relieving the people and the railways of that territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per
119 mile of main track covered by the stock than that for which the stock of any other large and well established system in the same general territory could then have been bought.

The purchase of the Burlington stock by the Northern Pacific and Great Northern Companies in equal parts served each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The Great Northern and Northern Pacific Companies therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on the Pacific coast. These connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific railway, and with European carriers, for the trade and commerce of the orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the

purchasers. Such purchase was not intended to have, and it can not have, any such effect.

The purchase of the Burlington stock was not made in view of the formation of this defendant, but solely from the motives and with the purposes already stated.

II.

The project of forming a holding company of any kind was not the result, in any way, of the failure of the plan which was
120 defeated by the decision of the Supreme Court in the Pearsall case. There was no connection whatever between the two.

The project of a holding company which finally developed into the formation of this defendant had its inception years before that date, among several gentlemen, not exceeding ten in number, who had been large shareholders in the Great Northern Company and its predecessor, the St. Paul, Minneapolis and Manitoba Railway Company; some of them from the original organization of the latter company in 1879, and others from dates not long after that time. They have never held a majority of the stock of the Great Northern Company, but have taken an active interest in its policy and administration; have aided it when necessary in financing its operations; have acted together in promoting its interests; have, with some exceptions, served from time to time as directors and officers (Mr. Hill having been president of the successive companies since 1882); and by reason of their active interest in the company and services to it have influenced to a large degree its policy and management. As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company. It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. These conclusions were the result of various consultations among the persons mentioned, or some of them, but no definite agreement was made for forming such a company or binding anyone to transfer his shares to it if formed.

From time to time, beginning with the reorganization of the Northern Pacific Company in 1896, Mr. Hill and said other Great Northern shareholders who had discussed with him the plan
121 of forming a holding company, had made large purchases of Northern Pacific shares, individually, each for himself, with-

out any concerted action, and solely as investments. About May 1, 1901, their aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,000) of the eighty million dollars ($80,000,000) common stock of the company, which also had a preferred stock, amounting to seventy-five million dollars ($75,000,000), with the same voting power as the common stock. At this time the firm of J. P. Morgan & Co. held about six million dollars ($6,000,000) of the common stock. In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of putting their holdings of Northern Pacific stock into the proposed holding company, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company, and that its capital stock should be made large enough to enable it to buy such holdings, though it was not known that the holders of any considerable amount of Great Northern stock, other than those above named, would desire to make such transfer.

At the time of the purchase of the Burlington shares it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing companies, or among their shareholders, was needed to preserve to each company its fair share of the advantages secured by the purchase. It was thought that the manifest interest of each company rendered any further guaranty or security needless. But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interest of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred, to the amount of about seventy-eight million dollars ($78,000,000), being a clear majority of the entire capital stock of that company. The apparent intent of such purchase was to defeat and, if successful, it would have defeated, the carrying out of the purposes for which the Burlington shares had been bought by the Great Northern and Northern Pacific Companies, and the development of the interstate and international commerce of each of them, and would have subordinated the policy of each to an interest adverse to both the Great Northern and
122 Northern Pacific Companies, and to the public served by their lines.

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock, which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars ($42,000,000), being a majority of the common stock. In view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders holding Northern Pacific shares, deemed it advisable that the projected holding company should have power to purchase not only their own Great

Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific Companies, respectively. At this time it was not expected by any of the persons concerned that any Northern Pacific shares except the said forty-two million dollars ($42,000,000) would be acquired by the proposed holding company. The organization of such company was not dependent on any agreement that it should acquire a majority of the shares of either defendant railway company. It would have been organized if the Burlington purchase had not been made, and if its promoters had had no other shares to transfer to it than the thirty-four million dollars ($34,000,000) Great Northern stock and the twenty million dollars ($20,000,000) Northern Pacific stock held by them on May 1, 1901. It was not known that all or how many of the shareholders of either of the railway companies would be likely to transfer their shares to this defendant when formed. After its organization this defendant bought and still holds about one hundred and fifty million dollars ($150,000,000) of the stock of the Northern Pacific Company; and it has also purchased and negotiated for the purchase of the stock of the Great Northern Company, as hereinbefore stated. Neither the said persons who were concerned in the formation of this defendant, nor the
123 said persons from whom it has acquired the stocks of said railway companies, nor this defendant itself since its formation, nor its stockholders, directors, or officers, have planned or intended that the stock of said railway companies acquired by this defendant, or any part thereof, should be held, used, or voted by it, or by its officers, agents or proxies, for the purpose of combining, consolidating or placing under one common management or control the railways of the Great Northern and Northern Pacific Companies, or the business thereof; or for the purpose of monopolizing or restraining competition between the said railway companies; or for any other purpose than the election by each of said railway companies of a competent and distinct board of directors, able and intending to manage each of them independently of the other, and for the benefit of their shareholders and of the public. By the acts of the legislature of the State of Minnesota incorporating the Great Northern Railway Company, and by the acts of the legislature of the State of Wisconsin incorporating the Northern Pacific Railway Company, it is, in substance, provided that the business and affairs of each railway company shall be managed by a board of directors to be elected by the stockholders, and that all the powers of each corporation relating to said matters shall be vested in such board.

Every share of stock issued by this defendant has been issued to the persons and corporations receiving the same in good faith, for full value paid to it, either in cash or its equivalent, and in accordance with the provisions of its articles of incorporation and with the

laws of the State of New Jersey. No agreement, promise or understanding has been made between this defendant and any of its stockholders, or between its stockholders themselves or any of them, or between said stockholders or any other persons or corporations, that the stock of this defendant should be held, used, or voted other than by each stockholder, separately and individually, and in such way as he should see fit; and there has been no agreement, promise, or understanding between said stockholders themselves, or any of them or between said stockholders and any other person or corporation, that they or any of them should use, hold, or vote their stock in this defendant in association or for any common purpose or object.

124 The owners and holders of stock of this defendant are more than thirteen hundred (1,300) in number, and the ownership of the stock is being changed from day to day by sales and transfers in the usual course of dealing. The said persons who formed or were otherwise concerned in the formation of this defendant, have never, altogether, held, owned or otherwise controlled an amount of stock of the said company equal to so much as one-third of the whole amount thereof now outstanding. This defendant has no contract or obligation to purchase or acquire any shares whatever in either railway company, in addition to those which it has purchased or negotiated to purchase as above stated. Its authorized capital was fixed by persons who planned its organization to enable it to give to each stockholder in each of the defendant railway companies an opportunity to sell his stock to it, should he see fit to do so, and should this defendant desire to acquire it. The sum fixed was deemed ample by those who planned the formation of this defendant to furnish the means to pay for all such shares as would likely be acquired by it, and to leave remaining a large amount to be used for the purchase of stock in other corporations, not common carriers, which this defendant might consider beneficial to acquire. This defendant was not formed as a scheme or a device to evade the act of Congress known as the "antitrust act," or any other law whatever, but solely for the purposes hereinbefore stated.

III.

This defendant was not formed, nor did any of those concerned in its formation, nor any of those who sold their shares of stock to it, have any purpose or intention, to restrain trade or commerce, or to lessen competition between said railway companies, or to monopolize traffic in any manner whatever; nor can any such results follow from the formation or operation of this defendant. In point of fact, since the organization of this defendant rates on the defendant railway companies' lines, including rates to and from points common to both, have voluntarily been so reduced as to decrease their earnings by upwards of a million of dollars annually. For all interstate commerce on the lines of either the defendant railway companies, except traffic beginning and ending on their own lines respectively, the

rates are fixed by joint tariffs with connecting lines. In re-
125 spect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate making power or control of traffic or rates. All joint tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic, that is, traffic between common points on the two roads, which is not competitive both as to rates and quality of service with other corriers having equal rate-making power with them, is less than 2 per cent. of the total interstate traffic of the two companies.

IV.

The sale and transfer of property, whether in the form of shares of corporate stock or otherwise, has never been adjudged to be, and is not, in violation of the act of Congress of July 2, 1890, known as the "antitrust act."

This defendant is not a railroad company, and it has no power to operate or manage railways or make or control rates of transportation, nor to monopolize or restrain traffic of any kind. So far from intending to violate any provision of said act of Congress, the persons who were concerned in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act. In common with the general public, they were aware that during the eleven years since the passage of that act in many instances the stock of a competing railway company had been acquired by its competitor or the shareholders thereof, such acquisition including many of the principal railways doing business throughout the country. This has been done without objection from any branch of the Government of the United States, and has invariably proven beneficial to the railway companies concerned and to the public, and those making sales of stocks to this defendant had no reason to believe that such sales were open to any legal objection or question whatever.

V.

This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the
126 Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organization of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by

law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

And this defendant says:

1. The "antitrust act" was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because:

The power to regulate commerce with foreign nations and among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest.

127 VI.

There is a defect of necessary parties defendant, because, as already set forth, the persons who made sales of stock of the said railway companies to this defendant were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of this defendant, and in their absence from this litigation no decree can be made affecting their rights in the premises.

VII.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant;

all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

THE NORTHERN SECURITIES COMPANY,
By JOHN W. GRIGGS,
GEO. B. YOUNG,
Solicitors and Counsel.

128 Entered 789, C. E.

Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer of the Defendants James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker.

George B. Young, solicitor for the defendants.

(Endorsed:) Filed May 5th, 1902. Henry D. Lang, clerk.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants.

The Answer of Defendants James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker to the Petition of the United States of America.

I.

They admit and aver that the defendant railway companies were at the time mentioned in the petition and are now common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

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II.

They admit and aver that prior to November 13, 1901, the outstanding capital stock of the Great Northern Railway Company was owned by more than eighteen hundred (1,800) separate owners, and the outstanding capital stock of the Northern Pacific Railway Company was owned by more than thirty-five hundred (3,500) separate owners; and that among the shareholders of the Great Northern Railway Company (hereinafter called the Great Northern Company) were the defendants Hill, Clough, James, Morgan, and Kennedy; and that among the shareholders of the Northern Pacific Railway Company (hereinafter called the Northern Pacific Company) were the defendants Morgan, Bacon, Baker, Hill, Kennedy, James, and Lamont. They aver that the persons named and meant to be designated as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Great Northern Company did not at any time, nor in any manner, own or control a majority of said stock, nor as much as one-third (⅓) part thereof. Their holdings in said stock were at all times separate and individual, and not in association with each other, or with any other person or persons, and neither of them was under any obligation or promise to any of the others, or to any other person, to hold, use, or vote his stock otherwise than as he should from time to time determine to be best for his own individual interest. The persons named and meant to be designated as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Northern Pacific Company did not, at the date named, nor at any time, or in any manner, own or control a majority of such stock, nor as much as one-third (⅓) part thereof. Their holdings in said stock were at all times separate and individual, and neither of them had any control of the holdings of the other, or of any other person or persons, and neither of them was under any promise or obligation to the other, or to any person, to hold, use, or vote his stock otherwise than as he should from time to time determine to be best for his own individual interest.

Except as herein admitted and averred, they deny each and every allegation of subdivision II of the petition.

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III.

They admit that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; and the Great Northern Company operated lines of railway extending from St. Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to

Everett and Seattle, in Washington, passing through Spokane, in that State.

They admit that the said lines so operated by said companies connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for the Great Northern Company.

They deny that the lines operated by said companies are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and deny that said companies were engaged in active competition with each other, except in the manner and to the extent hereinafter stated.

And except as hereinabove and hereinafter stated, they deny each and every allegation in subdivision III of said petition.

IV.

They admit and aver that prior to 1893 those portions, and *and* those portions only, of the lines of the Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

They admit that while in this condition a contract was made as set forth in the report of the Pearsall case, referred to in the
131 petition. They aver that said contract was made under and in conformity with the provisions of the act of incorporation of the Great Northern Company, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. For the terms of the decision of the Supreme Court of the United States, they refer to the report of the case. They deny that the case, or that the decision therein, is correctly stated in the petition. And they aver that neither the said contract nor the issues raised and decided in the said Pearsall case have any relevancy to the matters in controversy in this case.

V.

They admit and aver that in the winter and spring of 1901 the defendant railway companies, for the purpose of promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last-named company to the amount and at the price and upon the terms of pay-

ment stated in the petition. They admit that the lines operated by the Chicago, Burlington and Quincy Railroad Company and its connections are substantially as stated in the petition. They deny that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admit that some of the lines of each system compete with some lines of the other.

They deny that said purchase of stock was made in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, or that it was made for any other motive or with any other purpose than is hereinafter stated.

Except as herein admitted, they deny each and every allegation in subdivision V of the petition.

VI.

They deny that prior to the organization of the Northern Securities Company (hereinafter called the Securities Company)
132 the defendants James J. Hill or J. Pierpont Morgan, or said Hill and Morgan, or any person associated with them, or either of them, owned or controlled a majority of, or held a controlling interest in, the stock of either of said railway companies.

They deny that said persons, or that any of the persons concerned in the formation of the Securities Company, contrived or intended any of the things alleged in subdivision VI of the petition or entered into any agreement or conspiracy to do any of the things charged in said subdivision.

They admit and aver that said James J. Hill and other holders (not exceeding ten in number) of the stock of the Great Northern Company, but not including the defendants Morgan, Bacon, and Lamont, did plan the formation of the Northern Securities Company, with an authorized capital of four hundred million dollars ($400,000,000), for the purposes, and those only, set forth in its certificate of incorporation. They deny that James J. Hill and J. P. Morgan agreed between themselves, or with other stockholders of either of the defendant railway companies, or with either of said railway companies, or with the Securities Company, or with any one whomsoever, that a controlling interest of the stock of either of said railway companies should be turned over or transferred to the Securities Company, whether in exchange for its stock or otherwise.

They deny that any of the matters stated in subdivision VI of the petition were contemplated or intended in the formation of the Securities Company, or have resulted or will result from its formation and operation. And they deny the allegation that it is the duty of the directors of said railway companies to pursue a policy which will promote the interests of both systems at the expense of the public.

VII.

They admit the organization of the Securities Company on November 13, 1901, under the laws of New Jersey, with the articles a copy of which is attached to the petition, and that the provisions of said articles were designedly inserted therein and were fully authorized by the general corporation laws of that State. And they say
that the exercise of the powers of a stockholder provided for
133 in said articles was not, as wrongly stated in the petition,
confined to the stock of the defendant railway companies which the Securities Company might hold.

They aver that the clause in said articles partially quoted in paragraph VII of the petition was not intended to and does not enlarge the powers of said corporation as the same are set forth in the preceding clauses of said articles, but makes clear the power of the company to do such acts as making or procuring advances of money to any corporation whose securities are held by it, the indorsement or guaranty by it of the obligations of such corporation, becoming surety therefor, or in any lawful manner using its name or resources in aid of such corporation.

VIII.

They admit and aver that on or about the 14th of November, 1901, the Securities Company was organized by electing directors and officers, and among them the defendant, James J. Hill, as a director and president, but deny that he was or is the controlling power in the management of the Great Northern Company.

They admit that thereafter the defendant, James J. Hill, and certain other stockholders of the Great Northern Company, severally and each acting for himself alone, and without any agreement to that effect with any other stockholder, sold to the Securities Company a large amount of Great Northern stock at one hundred and eighty dollars ($180) per share in exchange for stock of the Securities Company at par, but they aver that the stock so sold was not within twenty-six million dollars ($26,000,000) of a majority of the stock of the Great Northern Company.

They admit that thereafter and about November 22, 1901, the Securities Company offered like terms of purchase to the other shareholders of the Great Northern Company, the offer to hold good for sixty days from its date, and that many of the shareholders of that company, each acting for himself alone, accepted such offer and made such sale.

They admit that the defendant, J. P. Morgan, and other shareholders of the Northern Pacific Company, sold to the Securities Company a majority of the stock of the Northern Pacific Company, and that the Securities Company has received such dividends as have been paid on the shares held by it in the same manner and at the

same rate as other shareholders; but they deny that the
134 Securities Company has acted, whether as owner of stock or otherwise, in the management or direction of either of said railway companies or in receipt or control of the earnings of either of them, and they aver that no change whatever has taken place in the management of the said railway companies or either of them, and that each of them is managed by the same board of directors and officers as existed before the organization of the Securities Company.

They deny that any of the things done by the defendants, James J. Hill and J. Pierpont Morgan, or by either of them, or by the Securities Company or its promoters, directors, officers, or stockholders, or any of them, were done in pursuance of the pretended combination or conspiracy alleged in subdivision VIII of the petition, or as an instrumentality to effect the purposes thereof, and they deny that by reason of the matters or any of them in the petition alleged a virtual or any consolidation of said defendant railway companies or their business has been effected or intended, and they deny any conspiracy or combination in restraint of trade or commerce among the States or with foreign nations, or that the defendants or any of them are attempting or intending to monopolize or restrain any such trade or commerce.

IX.

They deny each and every allegation in subdivision IX of the petition.

X.

The defendants say that they do not know and can not set forth how much additional stock of either defendant railway company the Securities Company is likely to acquire, since each acquisition of shares by it depends, among other contingencies, on the willingness of the holders of the said stock to sell it to the Securities Company upon terms which the latter shall be willing to accept.

XI.

These defendants say that the Securities Company, in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. They have no
135 knowledge of any agreement, promise, or understanding between any of the holders of said stock concerning the sale thereof to the Securities Company, and deny that any such agreement, promise, or understanding was ever made. All the sales and transfers of the said stock to the Securities Company were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.

There has been and is no agreement, promise, or understanding

between any of the holders of said stock so acquired by the Securities Company, or between any of them and any other person or corporation, that any of said shares should at any time be held, used, or voted by the Securities Company for the purpose of combining or consolidating or placing under one common management or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many stockholders of the said companies have not sold, and may never sell, their shares to the Securities Company; and the said railway companies have not nor have any of the directors of either of them, by any act, either formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to the Securities Company. They say that the Securities Company was organized in good faith, and they deny all the allegations in subdivision XI of the petition.

XII.

They deny each and every allegation in subdivision XII of the petition.

XIII.

They deny each and every allegation in subdivision XIII of the petition.

Second.

Further answering the petition, these defendants, say that the facts as to the purchase of the shares of the Chicago, Burlington and Quincy Railroad Company (hereinafter called the Burlington Company) and the projecting and forming of the Securities Com-
136 pany, and the motives, intentions, and purposes of the persons and corporations concerned in these enterprises, or either of them, are not as erroneously stated in the petition, but were and are as follows:

I.

When projecting the line of the Great Northern Company to the Pacific coast that company and its directors contemplated the necessity of creating for the line not merely State and interstate, but an international, commerce. Nearly all the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at a low mileage rate, such as could be made possible only by every practical reduction in the cost of

transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for which is in the prairie States of the Mississippi valley east of the Rocky mountains; but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line or reached by it could not furnish a market for commodities enough to load the returning cars; the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions the Great Northern Company not only went to great additional expense in the construction of its line to obtain gradients lower than those of any other line to the Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country;
137 and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating, and has since been actively engaged in building up, a commerce in which the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia, have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large westbound, as well as an increased eastbound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to eastern markets with profit to the shipper.

One year before the Burlington purchase this oriental traffic had reached such proportions that the Great Northern Company caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the largest in the world), will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of westbound traffic (and also of eastbound traffic) at the lowest cost.

In the interstate and international commerce which the Great Northern Company has thus built up it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific) and at the oriental ports it competes for commerce of the world. Its rates are, and must be, made in competition with the rates of ocean carriers and by way of the Suez canal.

The policy thus followed by the Great Northern Company in building up an international, and thereby interstate, commerce has been followed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce both the Great Northern Company and the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with
138 European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distributien from which their traffic must be supplied. And for many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both the Great Northern Company and the Northern Pacific Company in respect of markets for eastbound and freight for westbound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi river reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Missouri river, relieving the people and the railways of that great territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per mile of main track covered by the stock than that for which the
139 stock of any other large and well-established system, in the same general territory, could then have been bought.

The purchase of the Burlington stock by the Northern Pacific

Company and the Great Northern Companies in equal parts served each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The Great Northern and Northern Pacific Companies therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the region traversed or reached by the Great Northern and North*the*- Pacific lines, and by their connecting lines of shipping on the Pacific coast. These connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific railway, and with European carriers for the trade and commerce of the Orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the purchasers. Such purchase was not intended to have, and it can not have, any such effect.

The purchase of the Burlington stock was not made in view of the formation of the Securities Company, but solely from the motives and with the purposes already stated.

II.

The project of forming a holding company of any kind was not the result, in any way, of the failure of the plan which was defeated by the decision of the Supreme Court in the Pearsall case. There was no connection whatever between the two.

140 The project of a holding company which finally developed into the formation of the company incorporated November 13, 1901, had its inception years before that date, among several gentlemen, to wit, Mr. James J. Hill, Mr. John S. Kennedy, Mr. Samuel Thorne, Mr. D. Willis James, and others, not exceeding ten in number altogether, who had been large shareholders in the Great Northern Company and its predecessor, the St. Paul, Minneapolis and Manitoba Railway Company, some of them from the original organization of the latter company in 1879 and others from dates not long after that time. They have never held a majority of the stock of the Great Northern Company, but have taken an active interest in its policy and administration; have aided it when neces-

sary in financing its operations; have acted together in promoting its interests; have, with some exceptions, served from time to time as directors and officers (Mr. Hill having been president of the successive companies since 1882), and by reason of their active interest in the company and services to it have influenced to a large degree its policy and management. As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company. It was considered that if a company should be formed to which they might transfer their individual holdings their shares were likely to be held together so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. These conclusions were the result of various consultations among the persons mentioned, or some of them, but no definite agreement was made for forming such a company or binding anyone to transfer his shares to it if formed.

From time to time, beginning with the reorganization of the Northern Pacific Company in 1896, Mr. Hill and said other Great Northern shareholders who had discussed with him the plan
141 of forming a holding company had made large purchases of Northern Pacific shares individually, each for himself, without any concerted action and solely as investments. About May 1, 1901, their aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,000) of the eighty million dollars ($80,000,000) common stock of the company, which also had a preferred stock amounting to seventy-five million dollars ($75,000,000), with the same voting power as the common stock. At this time the firm of J. P. Morgan & Co. held about six million dollars ($6,000,000) of the common stock. In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of putting their holdings of Northern Pacific stock into the proposed holding company, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company, and that its capital stock should be made large enough to enable it to buy such holdings, though it was not known that the holders of any considerable amount of Great Northern stock, other than those above named, would desire to make such transfer, but no agreement of any kind was entered into.

At the time of the purchase of the Burlington shares it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing companies or among

their shareholders was needed to preserve to each company its fair share of the advantages secured by the purchase. It was thought that the manifest interest of each company rendered any further guaranty or security needless. But pending or just after the conclusion of the negotiations for the Burlington stock parties acting in the interest of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred, to the amount of about seventy-eight million dollars ($78,000,000), being a clear majority of the entire capital stock of that company. The apparent intent of such purchase was to defeat, and if successful it would have defeated, the carrying out of the purposes for which the Burlington shares had been bought by the Great Northern and Northern Pacific Companies and the development of the interstate and international commerce of each of them, and would have
142 subordinated the policy of each to an interest adverse to both the Great Northern and Northern Pacific Companies and to the public served by their lines.

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock, which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars ($42,000,000), being a majority of the common stock. In view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders holding Northern Pacific shares deemed it advisible that the projected holding company should have power to purchase not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific Companies, respectively. At this time it was not expected by any of the persons concerned that any Northern Pacific shares except the said forty-two million dollars ($42,000 000) would be acquired by the proposed holding company. The organization of that company was not dependent on any agreement that it should acquire a majority of the shares of either defendant railway company. It would have been organized if the Burlington purchase had not been made, and if its promoters had had no other shares to transfer to it than the thirty-four million dollars ($34,000,000) Great Northern stock and the twenty million dollars ($20,000,000) Northern Pacific stock, held by them on May 1, 1901. It was not known that all or how many of the shareholders of either of the railway companies would be likely to transfer their shares to the Securities Company. After its organization that company bought and still holds about one hundred and fifty million dollars ($150,000,000) of the stock of the Northern Pacific Company; and

it has also purchased and negotiated for the purchase of the stock of the Great Northern Company, as hereinbefore stated. Neither the said persons who were concerned in the formation of the
143 Securities Company, nor the said persons from whom the Securities Company has acquired the stocks of said railway companies, nor the Securities Company itself since its formation, nor its stockholders, directors, or officers, have planned or intended that the stock of said railways companies acquired by the Securities Company, or any part thereof, should be held, used, or voted by the Securities Company, or by its officers, agents, or proxies, for the purpose of combining, consolidating, or placing under one common management or control the railways of the Great Northern and Northern Pacific Companies or the business thereof; or for the purpose of monopolizing or restraining competition between the said railway companies; or for any other purpose than the election by each of said railway companies of a competent and distinct board of directors, able and intending to manage each of them independently of the other, and for the benefit of their shareholders and of the public. By the acts of the legislature of the State of Minnesota incorporating the Great Northern Railway Company, and by the acts of the legislature of the State of Wisconsin incorporating the Northern Pacific Railway Company, it is, in substance, provided that the business and affairs of each railway company shall be managed by a board of directors to be elected by the stockholders, and that all the powers of each corporation relating to said matters shall be vested in such board.

Every share of stock issued by the Northern Securities Company has been issued to the persons and corporations receiving the same in good faith, for full value paid to the Securities Company, either in cash or its equivalent, and in accordance with the provisions of its articles of incorporation and with the laws of the State of New Jersey. No agreement, promise, or understanding has been made between the Securities Company and any of its stockholders, or between its stockholders themselves, or any of them, or between said stockholders or any other persons or corporations, that the stock of the Securities Company should be held, used, or voted other than by each stockholder, separately and individually, and in such way as he should see fit, and there has been no agreement, promise, or understanding between said stockholders themselves, or any of them, or between said stockholders and any other person or
144 corporation, that they, or any of them, should use, hold, or vote their stock in the Securities Company in association or for any common purpose or object. The owners and holders of stock of the Securities Company are more than thirteen hundred (1,300) in number, and the ownership of the stock is being changed from day to day, by sales and transfers, in the usual course of dealing. The said persons who formed or were otherwise concerned in the formation of the said Securities Company have never, all together, held, owned, or otherwise controlled an amount of stock

of the said company equal to so much as one-third of the whole amount thereof now outstanding. The authorized capital of the Securities Company was deemed by those who planned its formation ample to furnish the means to pay for all such shares of the defendant railway companies as would likely be acquired by it, and to leave remaining a large amount to be used for the purchase of stock in other corporations not common carriers which the Securities Company might consider beneficial to acquire. The Securities Company was not formed as a scheme or a device to evade the act of Congress known as the "antitrust act," or any other law whatever, but solely for the purposes hereinbefore stated.

III.

The Securities Company was not formed, nor did any of the projectors of such company, nor any of those who sold their shares of stock to it, have any purpose or intention to restrain trade or commerce, or to lessen competition between said railway companies, or to monopolize traffic in any manner whatever; nor can any such results follow from the organization or operation of that company. In point of fact, since the organization of the Securities Company rates on the defendant railway companies' lines, including rates to and from points common to both, have voluntarily been so reduced as to decrease their earnings by upward of a million of dollars annually. For all interstate commerce on the lines of either the defendant railway companies, except traffic beginning and ending on their own lines, respectively, the rates are fixed by joint tariffs with connecting lines. In respect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate-making power or control of traffic or rates. All joint
145 tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic—that is, traffic between common points on the two roads, which is not competitive both as to rates and quality of service with other carriers having equal rate-making power with them—is less than 2 per cent. of the total interstate traffic of the two companies.

IV.

These defendants say that the Securities Company was not organized for the purpose of acquiring a majority of the stock of either the Northern Pacific or Great Northern Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have such effect.

The transactions referred to in the petition have consisted in the organization of a lawful corporation and the purchase of property

by it, and the persons who were concerned in the organization of the Securities Company, and those who have sold their shares to it, had every reason to believe, and did believe, that such sales were not in contravention of the act of Congress known as the "antitrust act."

In common with the general public they were aware that during the eleven years since the passage of that act in many instances the stock of a competing railway has been acquired by its competitor, or the shareholders thereof, such acquisitions including many of the principal railways doing business throughout the country. This has been done without objection from any branch of the Government of the United States, and has in every instance proved beneficial to the railways concerned and to the public. The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies and defeat the great enterprise they had undertaken of establishing a large international and interstate traffic, and the effect of its organi-
146 zation upon interstate commerce must be determined upon consideration of the enterprise as a whole. If these lawful transactions, consisting of the purchase and sale of property, should hereafter have any effect in restraint of trade or commerce among the States or with foreign nations (which is hereby denied), that effect would be indirect, remote, incidental, not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which the defendants believe is destined, to result from the enterprise of the two railway companies that culminated in the purchase of the Burlington stock.

And these defendants say:

1. The "antitrust act" was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because—

The power to regulate commerce with foreign nations and among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because—

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest.

V.

There is a defect of necessary parties defendant herein, because, as already set forth, the persons who made sales of stock of the said railway companies to the Securities Company were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of that company, and in their absence from this litigation no decree can be made affecting their rights in the premises.

147 VI.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES J. HILL,
WILLIAM P. CLOUGH,
D. WILLIS JAMES,
JOHN S. KENNEDY,
GEORGE F. BAKER,
By GEO. B. YOUNG,
Solicitor and Counsel.

Entered 789, C. Eq.

Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer of the Defendant Great Northern Railway Company.

M. D. GROVER,
Solicitor for the Defendant.

(Indorsed:) Filed May 5, 1902. Henry D. Lang, clerk.

148 In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainants,
v.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILway Company, The Northern Pacific Railway Company, and Others, Defendants.

The Answer of the Great Northern Railway Company to the Petition of the United States of America.

I.

This defendant admits and avers that the defendant railway companies were, at the time mentioned in the petition and are now, common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

II.

This defendant admits that on and prior to November 13, 1901, the capital stock of the defendant railway companies was owned and controlled by their respective shareholders, and it avers that the outstanding capital stock of this defendant was owned by more than eighteen hundred (1,800) separate owners, and that among its shareholders were the defendants Hill, Clough, James, Morgan, and Kennedy. It avers that the persons named and meant to be designated in the petition as owning, controlling, or as being associated in the ownership and control of a majority of the stock of this defendant, did not at any time nor in any manner own or control a majority of said stock, nor as much as one-third (⅓) part thereof. Their holdings in said stock were at all times separate and individual, and not in association with each other, or with any other person or persons.

Except as herein admitted and averred, the defendant denies each and every allegation of subdivision II of the petition.

149 III.

This defendant admits that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle in Washington, and to Portland in Oregon; and that this defendant operated lines of railway extending from St.

Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to Everett and Seattle in Washington, passing through Spokane in that State.

It admits that the said lines connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for this defendant.

It denies that said lines are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and denies that this defendant and the Northern Pacific Company were engaged in active competition with each other, except in the manner and to the extent hereinafter stated. Except as hereinabove and hereinafter stated, it denies each and every allegation in subvivision III of said petition.

IV.

The defendant admits and avers that prior to 1893 those portions, and those portions only, of the lines of the Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and that in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

It admits that while in this condition a contract was made, as set forth in the report of the Pearsall case, referred to in the petition.

It avers that said contract was made under and in conformity
150 with the provisions of the act of incorporation of this defendant, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. It denies that the case or that the decision therein is correctly stated in the petition. And it avers that neither the said contract nor the issues raised and decided in the said case have any relevancy to the matters in controversy in this case.

V.

This defendant admits and avers that in the winter and spring of 1901, it and the Northern Pacific Company, for the purpose of promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last named company to the amount and at the price and upon the terms of payment stated in the petition. It admits that the lines operated by the Chicago, Burlington and Quincy Railroad Company

and its connections are substantially as stated in the petition. It denies that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admits that some of the lines of each system compete with some lines of the other.

It denies that said purchase of stock was made in contemplation of the ultimate placing of the system of this defendant and that of the Northern Pacific Company under a common source of control, or that it was made for any other motive or with any other purpose than as hereinafter stated.

Except as herein admitted, it denies each and every allegation in subdivision V of the petition.

VI.

This defendant says that it knows not and has not been informed, save by the petition, and cannot set forth its belief or otherwise as to any of the matters or things alleged or charged in subdivisions VI and VII of the petition as having been done, contrived, or attempted by the parties in said subdivision named or any of them.

151 VII.

This defendant further says it knows not and has not been informed, save by the petition, and can not set forth its belief, or otherwise, in respect to any of the matters changed in subdivisions VIII, IX, X, XI, XII, and XIII of the petition, except that it admits the organization of the Northern Securities Company, with the articles of incorporation, of which a copy is annexed to the petition.

VIII.

Further answering the petition, this defendant says that the facts as to the purchase of the shares of the Chicago, Burlington and Quincy Railroad Company (hereinafter called the Burlington Company) were and are as follows:

When projecting the line of this defendant to the Pacific coast, its directors contemplated the necessity of creating for the line not merely State and interstate, but an international commerce. Nearly all the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at low mileage rate, such as could be made possible only by every practicable reduction in the cost of transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for which is in the prairie States of the Mississippi valley east of the Rocky mountains, but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars;
152 the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions this defendant company not only went to great additional expense in the construction of its line to obtain gradients lower than those of any other line to the Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country; and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating and has since been actively engaged in building up a commerce in which the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large westbound, as well as an increased eastbound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to eastern markets with a profit to the shippers.

One year before the Burlington purchase, this oriental traffic had reached such proportions that this defendant caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the largest in the world). will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of westbound traffic (and also of eastbound traffic) at the lowest cost.

In the interstate and international commerce which this defendant has thus built up, it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific), and at the oriental ports it competes for commerce of the world. Its rates are and must be made in competition with the rates of ocean carriers and by way of the Suez canal.

The policy thus followed by this defendant in building up an in-

ternational, and thereby interstate, commerce has been fol-
153 lowed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce, both this defendant and the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their traffic must be supplied. And for many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both this defendant and the Northern Pacific Company in respect of markets for eastbound and freight for westbound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi river reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia;
and its light gradients and consequent low cost of transporta-
154 tion make it possible to supply such coal to points on the lines of each defendant railway company east of the Missouri river, relieving the people and the railways of that great territory from entire dependance upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per mile of main track covered by the stock than that for which the stock of any other large and well-established system in the same general territory could then have been bought.

The purchase of the Burlington stock by the Northern Pacific Company and this defendant in equal parts served each company

as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

This defendant and the Northern Pacific Company therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the lines of this defendant and those of the Northern Pacific Company and by their connecting lines of shipping on the Pacific coast. These connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific railway, and with European carriers, for the trade and commerce of the orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the purchasers. Such purchase was not intended to have, and it can not have, any such effect.

The purchase of the Burlington stock was not made in view
155 of the formation of the Northern Securities Company, but solely from the motives and with the purposes already stated.

This defendant says, for all interstate commerce on the lines of either of the defendant railway companies, except traffic beginning and ending on their own lines respectively, the rates are fixed by joint tariffs with connecting lines. In respect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate-making power or control of traffic or rates. All joint tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic—that is, traffic between common points on the two roads—which is not competitive both as to rates and quality of service with other carriers having equal rate-making power with them, is less than 2 per cent. of the total interstate traffic of the two companies.

And this defendant says, that the control of the direction of one of the defendant railway companies, by a rival interest, might defeat the great enterprise they had undertaken of establishing a large international and interstate traffic, and impose upon the other all the burdens of the joint obligations incurred, amounting to more

than $220,000,000, while taking from it all the benefits of the purchase of the Burlington shares.

IX.

And this defendant says, that its acts of incorporation provide that the shares of its capital stock shall be deemed personal property, and shall be transferable in such manner as its regulations or by-laws shall prescribe. The by-laws of this defendant, made pursuant to the said acts, direct that transfers of shares of its stock may be made by the surrender of the certificate issued therefor, and a written assignment thereof, signed by the owner, or his duly authorized attorney in fact, upon a book, to be called the "register of transfers," and that without such surrender and assignment no transfer of stock will be recognized by this defendant.

Prior to the filing of the petition herein, holders of regular certificates for this defendant's stock, individually and separately, and in the usual course of dealing, surrendered such certificates
156 to this defendant, and at the same time duly assigned, in writing, upon the said register of transfers, the shares covered thereby to the defendant, The Northern Securities Company, and thereupon, in each of such instances, this defendant recognized such transfer, and issued to the Securities Company its certificate therefor, as by law it was required to do.

The said transfers covered, in the aggregate, not to exceed five-twelfths (5-12) of the total number of shares of this defendant's stock now outstanding.

And this defendant says:

1. The "antitrust act" was not intended to prevent or defeat an enterprise, in aid of a great competitive interstate and international commerce, merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because:

The power to regulate commerce with foreign nations and among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because

Persons may not be deprived of their property, without the process of law, by taking from them the right to sell it, as their interest may suggest.

X.

There is a defect of necessary parties defendant, because, as already set forth, the persons who made sales of stock of the defendant rail-

way companies to the defendant The Northern Securities Company were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of the said Securities Company, and in their absence from this litigation no decree can be made affecting their rights in the premises.

157 XI.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GREAT NORTHERN RAILWAY COMPANY,
By M. D. GROVER, Solicitor and Counsel.

Entered 789, C. Eq.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer of the Defendant The Northern Pacific Railway Company.

C. W. Bunn, solicitor for the defendant.

(Endorsed:) Filed May 5th, 1902. Henry D. Lang, clerk.

158 In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

The Answer of the Defendant The Northern Pacific Railway Company to the Petition of the United States of America.

I. This defendant admits the allegations of paragraph I of the petition that this defendant and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

This defendant denies each and every other allegation of paragraph I of the petition.

II. This defendant admits the allegations of paragraph II of the petition that prior to November 13, 1901, the stock of this defendant was owned and controlled by its shareholders, and that among them were the parties in that behalf alleged.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph II of the petition.

III. This defendant admits the allegations of paragraph III of the petition that this defendant at the times mentioned owned and operated a railway extending from Ashland in Wisconsin via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and Washington,
159 passing through Spokane and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about five thousand five hundred miles for this defendant and about four thousand one hundred and twenty-eight miles for the Great Northern Company.

This defendant denies each and every other allegation of paragraph III of the petition.

IV. This defendant admits the allegations of paragraph IV of

the petition that, prior to the year 1893, a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of this defendant, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that, while in this condition, a plan of reorganization was entered into by the bondholders of said company, and that an arrangement was proposed between the said bondholders and the Great Northern Company which was never carried out. This defendant admits that a case entitled Pearsall against The Great Northern Railway Company was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph IV of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. This defendant admits the allegations in paragraph V of the petition that early in the year 1901 this defendant and the Great Northern Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in twenty years from date, with interest at 4 per cent. per annum, at the rate of $200 in bonds for each
160 $100 in stock, and in this manner the said companies severally purchased and acquired each about 49 per cent. of said stock; that the lines operated by said Burlington Company and its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

This purchase was made by these defendants primarily in order to secure a terminus in Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable to the agricultural and mineral products of the Northwest, and also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself. It had no connection with the future formation of any company whatsoever and was not made with intent to violate the statute or common law of any State or of the United States, and was not in violation of any such law.

This defendant denies each and every other allegation of paragraph V of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of paragraph VI of the petition.

VII. This defendant admits the allegation of paragraph VII of

the petition, that the defendant Northern Securities Company was heretofore organized, as it is informed and believes, under the general laws of the State of New Jersey.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph VII of the petition.

VIII. This defendant admits the allegations of paragraph VIII of the petition that the defendant, Northern Securities Company, has purchased and now holds and owns a large majority of the capital stock of this defendant, and that the Securities Company has received such dividends as have been paid on any shares held by it.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph VIII of the petition.

IX. This defendant denies any knowledge or information
161 sufficient to form a belief of each and every allegation of paragraph IX of the petition.

X. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of paragraph X of the petition.

XI. This defendant denies each and every allegation of paragraph XI of the petition.

XII. This defendant denies each and every allegation of paragraph XII of the petition. It is informed and believes that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of paragraph XIII of the petition.

XIV. As this defendant is informed and believes, the purchase by the Northern Securities Company of shares of stock of this defendant and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, that would not be their direct effect, but would be merely indirect, remote, incidental, and collateral, and would, therefore, not bring said transactions within said act of Congress above mentioned. Any other construction would render the statute unconstitutional, as beyond the power of Congress, and as depriving the sellers of the stock thus sold and also the stockholders of this defendant who have not sold their shares to the Securities Company, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their

property. If complainant's contention is sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. This result would
162 seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by State statutes under which the same has been or may hereafter be taken.

XV. There is a defect of necessary parties defendant herein, because in this suit it is sought to annul all sales of shares made by shareholders of this defendant to the Northern Securities Company and to cancel all certificates of stock of the latter company issued in purchase of the same. The parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in this defendant to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XVI. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN, Solicitor.

C. W. BUNN AND
FRANCIS LYNDE STETSON,
Counsel for said Defendant.

163 Entered 789, C. Eq.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer *to* the Defendants J. Pierpont Morgan and Robert Bacon.

Francis Lynde Stetson, solicitor for said defendants, Mills building, New York city.

Endorsed: Filed May 5, 1902. Henry D. Lang, clerk.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant,
against
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

The Answer of the Defendants J. Pierpont Morgan and Robert Bacon to the Petition of the United States of America.

I. These defendants admit the allegations of paragraph I of the petition that the Northern Pacific Railway Company and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

164 These defendants deny each and every other allegation of paragraph I of the petition.

II. These defendants admit the allegations of paragraph II of the petition that prior to November 13, 1901, the stock of the said railway companies was owned and controlled by their respective shareholders and that among the shareholders of said companies, respectively, were the parties in that behalf alleged.

These defendants deny each and every other allegation of paragraph II of the petition.

III. These defendants admit the allegations of paragraph III of

the petition that the Northern Pacific Company at the times mentioned owned and operated a railway extending from Ashland, in Wisconsin, via Duluth, Minn., and from St. Paul, Minn., across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Spokane and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about 5,500 miles for the Northern Pacific Company and about 4,128 miles for the Great Northern Company.

These defendants deny any knowledge or information sufficient to form a belief of each and every other allegation of paragraph III of the petition.

IV. These defendants admit the allegations of paragraph IV of the petition that, prior to the year 1893, a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of the present Northern Pacific Company, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that
165 while in this condition a plan of reorganization was entered into by the bondholders of said company and that an arrangement was proposed between the said bondholders and the Great Northern Company, which was never carried out. These defendants admit that a case, entitled Pearsall against The Great Northern Railway Company, was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

These defendants deny any knowledge or information sufficient to form a belief of each and every other allegation of paragraph IV of the petition. They are informed and believe that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. These defendants admit the allegations of paragraph V of the petition that early in the year 1901, the defendants The Great Northern Company and The Northern Pacific Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in twenty years from date, with interest at 4 per cent. per annum at the rate of $200 in bonds for each $100 in stock, and in this manner the said companies severally purchased and acquired each about 49 per cent.

of said stock; that the lines operated by said Burlington Company and its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

These defendants deny any knowledge or information sufficient to form a belief of each and every other allegation of paragraph V of the petition. They are informed and believe that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. These defendants admit that the defendant James J. Hill and certain other persons decided upon the formation of a securities company for the purposes set forth in the certificate of incorporation of the Northern Securities Company attached to the petition and in all respects as therein stated.

These defendants deny each and every other allegation of paragraph VI of the petition.

VII. These defendants admit the allegations of paragraph
166 VII of the petition that on November 13, 1901, the defendant Northern Securities Company was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000, and that a copy of the articles of incorporation of said company correctly stating its powers is attached to the petition.

These defendants deny each and every other allegation of paragraph VII of the petition.

VIII. These defendants admit the allegations of paragraph VIII of the petition that on or about November 14, 1901, the defendant Northern Securities Company was organized by the election of directors and officers; that the defendant James J. Hill was chosen a director and president thereof; that thereupon the said James J. Hill and other stockholders of the Great Northern Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Great Northern Company for the price of $180 par value of the capital stock of the Securities Company for each share of the capital stock of the Great Northern Company; that these defendants and other stockholders of the Northern Pacific Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Northern Pacific Company; that the Securities Company also offered, for a limited period, like terms of purchase to the other shareholders of the Great Northern Company; that the Securities Company now holds and owns a large majority of the capital stock of the Northern Pacific Railway Company, and a large amount, though less than a controlling interest, of the stock of the Great Northern Company, and has negotiated for the purchase of additional shares of that company, and that the Securities Company has received such dividends as have been paid on any shares held by it.

These defendants deny each and every other allegation of paragraph VIII of the petition.

IX. These defendants deny each and every allegation of paragraph IX of the petition.

X. These defendants deny any knowledge or information sufficient to form a belief of each and every allegation of paragraph X of the petition.

167 XI. These defendants deny each and every allegation of paragraph XI of the petition.

XII. These defendants deny each and every allegation of paragraph XII of the petition. They are informed and believe that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. These defendants deny each and every allegation of paragraph XIII of the petition.

XIV. In July, 1896, the capital stock of the Northern Pacific Railway Company was fixed at $155,000,000, of which $75,000,000 were preferred and $80,000,000 common stock. The preferred stock of the company was issued in exchange for various obligations of the former Northern Pacific Railroad Company because the holders thereof would not accept new common stock therefor. At the same time it was contemplated that the time would arrive when said preferred stock would properly be retired, and it was, accordingly, then provided that the preferred stock might be retired in whole or in part at par on any first day of January, up to and including January 1, 1917. Both classes of stock were made subject to a voting trust in this defendant Morgan and others, continuing until November 1, 1901, but terminable by the trustees in their discretion at an earlier date.

The Northern Pacific Company shared in the recent prosperity of the country, and its common stock appreciated in value until it was deemed practicable to carry out the original intention of retiring the preferred stock and also to terminate the voting trust. Accordingly said trust was terminated by the trustees upon January 1, 1901, and the preferred stock was retired. Although the latter action was in contemplation and was practically decided upon some time before the termination of the voting trust, it was not made the subject of formal action by the board of directors until November 13, 1901, and was completed upon January 1, 1902.

XV. As hereinbefore stated, early in 1901, the Northern Pacific Company, and the Great Northern Company, each purchased about 49 per cent. of the capital stock of the Chicago, Burlington and Quincy Railroad Company. This purchase was made by the

168 Northern Pacific Company primarily in order to secure a terminus at Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable for the agricultural and mineral products of the Northwest, but also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself.

These purchases were not made, as the petition alleges, "in contemplation of the ultimate placing of the Great Northern and Northern Pacific system under a common source of control." They had no connection whatever with the future formation of the Northern Securities Company, or any other company whatsoever, and had no connection with the fact alleged in the petition that the Union Pacific Railway system is to some extent a competing system with the Burlington system.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States; were not in violation of any such law, and are not charged in the petition to have been in any respect unlawful.

XVI. During the reorganization of the Northern Pacific system the firm of J. P. Morgan & Co., of which these defendants are members, acted as reorganization managers, and ever since the reorganization of the Northern Pacific Company has been its fiscal agent. Said firm has accordingly at all times desired to further the best interests of the company and all its stockholders, and especially to aid in steadily developing the business of the company and the prosperity of the country which it serves. Said firm considered that these results were accomplished, so far as possible, by the policy of the company during the existence of the voting trust, as above stated. Not long after the termination of the voting trust, however, and very early in May, 1901, said firm became aware that unusually large purchases of both classes of stock were in progress in the stock market, apparently in a single interest. Said firm was apprehensive that these purchases were for the purpose of securing control of the direction of the Northern Pacific Company and thus managing it, not for what said firm conceived to be the best interest of the company, but for some ulterior purpose of which said firm was not informed.

Accordingly said firm, prior to May 7, 1901, purchased common stock of the Northern Pacific Company in considerable
169 amounts, and their holdings upon that day amounted to about two hundred thousand shares. In making these purchases said firm acted on its own account and in behalf of no other person whomsoever, and was actuated by no motives save those above stated.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States, and were not in violation of any such law.

XVII. For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and

possible inconsistency from time to time. In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons, determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific Companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.

By this time it had become known that the purchases in the market of shares of the Northern Pacific Company to which reference is made above, had been made in behalf of a corporation known as the Oregon Short Line Railroad Company, controlled by the Union Pacific Railroad Company; that there were held in that interest shares of the Northern Pacific Company to about the amount of $41,000,000 of preferred stock, which, however, *was* to be retired on January 1, 1902, and $37,000,000 of common stock, together making 780,000 shares and constituting an absolute majority of the total capital stock of the Northern Pacific Company. Thereupon and therefore, with the view and for the purpose of protecting
170 the Northern Pacific Company and the holders of its common stock against the possible control of the direction of said company in an adverse interest, these defendants determined and also advised their friends to sell their Northern Pacific stock to the new company.

As set forth in the petition, the Northern Securities Company was duly organized pursuant to the laws of New Jersey upon November 13, 1901. It was organized according to law, and possesses all the powers set forth in its certificate of incorporation, and has full power to do every act which it has in fact done, and the petition does not allege the contrary.

It having become known that the Oregon Short Line Company was not disinclined upon satisfactory terms to sell its holdings of the major part of the Northern Pacific stock, the firm of J. P. Morgan & Company, deeming such action for the best interest of the Northern Pacific Company, purchased from said Oregon Short Line Company all its holdings of the capital stock of the Northern Pacific Company.

After its organization the Northern Securities Company duly purchased all the shares of the Northern Pacific Company and of the Great Northern Company hereinbefore mentioned, including those purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Company, for which it paid partly in cash and partly in its own shares. It also was willing to purchase the shares of any other shareholders of the Great Northern Company, who desired to sell the same, for the price of one hundred and eighty dollars for each share of the Great Northern Company, payable in its own shares, and did actually purchase and pay for considerable amounts of said stock at such price.

None of these purchases by the Northern Securities Company were made with intent to violate the statute or common law of any State or of the United States, or were in violation of any such law.

XVIII. The foregoing is a correct statement of all the matters mentioned in the petition, omitting its many irrelevant adjectives, adverbs, and conclusions, and of some other facts in addition thereto. The transactions prior to the formation of the Northern Securities Company had no connection whatever with the formation
171 thereof, save as above stated. That company was organized, not for the purpose of acquiring a ma-ority of the stock of either the Great Northern or the Northern Pacific Company, but as above set forth. It was not organized for the purpose of affecting railway rates or competition in the slightest degree, and has not had any such effect. In the transactions above stated these defendants and, so far as they are aware, the other parties who have been engaged therein have never sought or intended to violate the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209, c. 647), or to enter into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

The transactions have consisted merely in the organization of a lawful corporation of New Jersey and the sale to and purchase by it of property lawfully salable. All acts done in relation to the organization of the Securities Company and the purchase by it of shares of stock of the railway companies and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, such effect would not be their direct effect, but would be merely indirect, remote, incidental, and collateral and aside from any intention of the parties, and therefore would not bring said transactions within said act of Congress. Any other construction would render the statute unconstitutional as beyond the power of Congress, and as depriving these defendants and the sellers generally of the stock thus sold, of liberty and property without
due process of law, because, thus construed, it would be an
172 inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of

property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. Such a result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by State statutes under which the same has been taken.

XIX. There is a defect of necessary parties defendant herein because in this suit it is sought to annul all sales of shares made by shareholders of the Great Northern Company and the Northern Pacific Company to the Northern Securities Company, and to cancel all certificates of stock of the latter company issued in purchase of the same. As already set forth, the parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares in the railway companies to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such affect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in the railway companies to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XX. And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court
173 shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. PIERPONT MORGAN,
ROBERT BACON,
By FRANCIS LYNDE STETSON, Solicitor.

FRANCIS LYNDE STETSON,
DAVID WILLCOX,
Counsel for said Defendants.

Entered 789, C. Eq.

In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant, *against* NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

Answer of the Defendant Daniel S. Lamont.

David Willcox, solicitor for said defendant, 22 Nassau street, New York city.

(Indorsed:) Filed May 5th, 1902. Henry D. Lang, clerk.

174 In the Circuit Court of the United States for the District of Minnesota.

THE UNITED STATES OF AMERICA, Complainant, *against* NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } May, 1902.

The Answer of the Defendant Daniel S. Lamont to the Petition of the United States of America.

I. This defendant admits the allegations of paragraph I of the petition that the Northern Pacific Railway Company and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

This defendant denies each and every other allegation of paragraph I of the petition.

II. This defendant admits the allegations of paragraph II of the petition that prior to November 13, 1901, the stock of the said railway companies was owned and controlled by their respective shareholders, and that among the shareholders of said companies respectively were the parties in that behalf alleged.

This defendant denies each and every other allegation of paragraph II of the petition.

III. This defendant admits the allegations of paragraph III of the petition that the Northern Pacific Company at the times men-

tioned, owned and operated a railway extending from Ashland, in Wisconsin, via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and
175 Washington, passing through Spokane, and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about five thousand five hundred miles for the Northern Pacific Company and about four thousand one hundred and twenty-eight miles for the Great Northern Company.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph III of the petition.

IV. This defendant admits the allegations of paragraph IV of the petition that prior to the year 1893 a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of the present Northern Pacific Company, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that while in this condition a plan of reorganization was entered into by the bondholders of said company, and that an arrangement was proposed between the said bondholders and the Great Northern Company, which was never carried out. This defendant admits that a case entitled Pearsall against The Great Northern Railway Company was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph IV of the petition. He is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. This defendant admits the allegations of paragraph V of the petition that early in the year 1901 the defendants The Great Northern Company and The Northern Pacific Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in
176 twenty years from date with interest at four per cent. per annum at the rate of two hundred dollars in bonds for each one hundred dollars in stock, and in this manner the said companies severally purchased and acquired each about forty-nine per cent. of said stock; that the lines operated by said Burlington Company and

its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of paragraph V of the petition. He is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. This defendant admits that the defendant James J. Hill and certain other persons decided upon the formation of a securities company for the purposes set forth in the certificate of incorporation of the Northern Securities Company attached to the petition and in all respects as therein stated.

This defendant denies each and every other allegation of paragraph VI of the petition.

VII. This defendant admits the allegations of paragraph VII of the petition that on November 13, 1901, the defendaat Northern Securities Company was organized under the general laws of the State of New Jersey, with its principal office in Hoboken in said State and with an authorized capital stock of four hundred millions of dollars, and that a copy of the articles of incorporation of said company correctly stating its powers is attached to the petition.

This defendant denies each and every other allegation of paragraph VII of the petition.

VIII. This defendant admits the allegations of paragraph VIII of the petition that on or about November 14, 1901, the defendant Northern Securities Company was organized by the election of directors and officers; that the defendant James J. Hill was chosen a director and president thereof; that thereupon the said James J. Hill and other stockholders of the Great Northern Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Great Northern Company for the price of one hundred and eighty dollars par value of
177 the capital stock of the Securities Company for each share of the capital stock of the Great Northern Company; that this defendant and other stockholders of the Northern Pacific Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Northern Pacific Company; that the Securities Company also offered, for a limited period, like terms of purchase to the other shareholders of the Great Northern Company; that the Securities Company now holds and owns a large majority of the capital stock of the Northern Pacific Railway Company, and a large amount, though less than a controlling interest, of the stock of the Great Northern Company, and has negotiated for purchase of additional shares of that company, and that the Securities Company has received such dividends as have been paid on any shares held by it.

This defendant denies each and every other allegation of paragraph VIII of the petition.

IX. This defendant denies each and every allegation of paragraph IX of the petition.

X. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of paragraph X of the petition.

XI. This defendant denies each and every allegation of paragraph XI of the petition.

XII. This defendant denies each and every allegation of paragraph XII of the petition. He is informed and believes that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. This defendant denies each and every allegation of paragraph XIII of the petition.

XIV. In July, 1896, the capital stock of the Northern Pacific Railway Company was fixed at $155,000,000, of which $75,000,000 were preferred and $80,000,000 common stock. The preferred stock of the company was issued in exchange for various obligations of the former Northern Pacific Railroad Company because the holders thereof would not accept now common stock therefor. At the same time it was contemplated that the time would arrive when said preferred stock should properly be retired, and it was, accordingly, then provided that the preferred stock might be retired in whole or
178 in part at par on any first day of January, up to and including January 1, 1917. Both classes of stock were made subject to a voting trust in the defendant Morgan and others, continuing until November 1, 1901, but terminable by the trustees in their discretion at an earlier date.

The Northern Pacific Company shared in the recent prosperity of the country, and its common stock appreciated in value until it was deemed practicable to carry out the original intention of retiring the preferred stock and also to terminate the voting trust. Accordingly said trust was terminated by the trustees upon January 1, 1901, and the preferred stock was retired. Although the latter action was in contemplation and was practically decided upon some time before the termination of the voting trust, it was not made the subject of formal action by the board of directors until November 13, 1901, and was completed upon January 1, 1902.

XV. As hereinbefore stated, early in 1901 the Northern Pacific Company and the Great Northern Company each purchased about forty-nine per cent. of the capital stock of the Chicago, Burlington and Quincy Railroad Company. This purchase was made by the Northern Pacific Company primarily in order to secure a terminus at Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable for the agricultural and mineral products of the Northwest, but also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself.

These purchases were not made as the petition alleges "in contemplation of the ultimate placing of the Great Northern and North-

ern Pacific system under a common source of control." They had no connection whatever with the future formation of the Northern Securities Company, or any other company whatsoever, and had no connection with the fact alleged in the petition that the Union Pacific Railway system is to some extent a competing system with the Burlington system.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States; were not in violation of any such law, and are not charged in the petition to have been in any respect unlawful.

179 XVI. During the reorganization of the Northern Pacific system the firm of J. P. Morgan & Co. acted as reorganization managers, and ever since the reorganization of the Northern Pacific Company has been its fiscal agent and closely identified with the furtherance of its interests. Said firm, prior to May 7, 1901, purchased common stock of the Northern Pacific Company in considerable amounts and their holdings upon that day amounted to about two hundred thousand shares. As this defendant is informed and believes, in making these purchases said firm acted on its own account and in behalf of no other person whomsoever.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States, and were not in violation of any such law.

XVII. As this defendant is informed and believes, for some years the defendant Hill and others who were interested in the Great Northern Company, but not including this defendant, had in contemplation the formation of a corporation for the purpose of purchasing their interests in that company, with the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time. In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific Companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.

As set forth in the petition, the Northern Securities Company was duly organized pursuant to the laws of New Jersey upon November 13, 1901. It was organized according to law, and possesses all the powers set forth in its certificate of incorporation, and has full power to do every act which it has in fact done, and the petition does not allege the contrary.

180 After its organization the Northern Securities Company duly purchased all the shares of the Northern Pacific Com-

pany and of the Great Northern Company hereinbefore mentioned, and also a large amount of shares of the Northern Pacific Company purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Railroad Company, for which it paid partly in cash and partly in its own shares. It was also willing to purchase the shares of any other shareholders of the Northern Pacific and the Great Northern Companies, who desired to sell the same, for the price of one hundred and fifteen dollars for each share of the Northern Pacific Company and one hundred and eighty dollars for each share of the Great Northern Company, payable in its own shares, and did actually purchase and pay for considerable amounts of said stock at those prices.

None of these purchases by the Northern Securities Company were made with intent to violate the statute or common law of any State or of the United States, or were in violation of any such law.

XVIII. The transactions prior to the formation of the Northern Securities Company had no connection whatever with the formation thereof, save as above stated. That company was organized, not for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but as above set forth. It was not organized for the purpose of affecting railway rates or competition in the slightest degree, and has not had any such effect. In the transactions above stated this defendant, and, so far as he is aware, the other parties who have been engaged therein, have never sought or intended to violate the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209, c. 647), or to enter into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

The transactions have consisted merely in the organization of a lawful corporation of New Jersey and the sale to, and pur-
181 chase by it, of lawfully salable property. All acts done in relation to the organization of the Securities Company and the purchase by it of shares of stock of the railway companies, and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, that would not be their direct effect, but would be merely indirect, remote, incidental, and collateral, and aside from

any intention of the parties, and would, therefore, not bring said transactions within said act of Congress above mentioned. Any other construction would render the statute unconstitutional as beyond the power of Congress and as depriving this defendant, and the sellers generally of the stock thus sold, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. This result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by State statutes under which the same has been taken.

XIX. There is a defect of necessary parties defendant herein because in this suit it is sought to annul all sales of shares made by shareholders of the Great Northern Company and the Northern Pacific Company to the Northern Securities Company, and to cancel all certificates of stock of the latter company issued in purchase of the same. As already set forth, the parties making such sales are numerous, and many of them had no connection with the
182 matter save to sell their shares in the railway companies to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in the railway companies to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XX. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

DANIEL S. LAMONT,
By DAVID WILLCOX, Solicitor.

FRANCIS LYNDE STETSON,
DAVID WILLCOX,
Counsel for said Defendant.

183 The Circuit Court of the United States in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of the United States of America, the Above-named Complainant, to the Answer of The Northern Securities Company, Defendant.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, The Northern Securities Company, for replication thereunto saith: That it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law, to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minnesota, June 2nd, 1902.

(Endorsed:) Replication to answer of Northern Securities Company. Filed June 2nd, 1902. Henry D. Lang, clerk.

184 The United States Circuit Court in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of The United States of America, the Above-named Complainant, to the Answer of James J. Hill and Others, Defendants.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, James J. Hill and others, for replication thereunto, saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual, in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true, all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minn., June 2, 1902.

(Indorsed:) Replication to answer of James J. Hill and others. Filed June 2, 1902. Henry D. Lang, clerk.

185 The United States Circuit Court in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of The United States of America, the Above-named Complainant, to the Answer of The Great Northern Railway Company, Defendant.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, The Great Northern Railway Company, for replication thereunto saith, that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minn., June 2, 1902.

(Endorsed:) Replication to answer of Great Northern Railway Company. Filed June 2, 1902. Henry D. Lang, clerk.

186 The United States Circuit Court in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
v.
NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of The United States of America, the Above-named Complainant, to the Answer of The Northern Pacific Railway Company, Defendant.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which

may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, The Northern Pacific Railway Company, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant; and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minn., June 2, 1902.

(Indorsed:) Replication to answer of Northern Pacific Ry. Co. Filed June 2, 1902. Henry D. Lang, clerk.

187 The United States Circuit Court in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of the United States of America, the Above-named Complainant, to the Answer of J. Pierpont Morgan and Robert Bacon, Defendants.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiences of the answer of the defendants, J. Pierpont Morgan and Robert Bacon, for replication thereunto saith, that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true: all which matters and things this replicant is ready to

aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minnesota, June 2, 1902.

(Indorsed:) Replication to answer of J. Pierpont Morgan and Robert Bacon. Filed June 2, 1902. Henry D. Lang, clerk.

188 The United States Circuit Court in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN SECURITIES COMPANY, THE NORTHERN Railway Company, The Northern Pacific Railway Company, and Others, Defendants. } In Equity.

The Replication of The United States of America, the Above-named Complainant, to the Answer of Daniel S. Lamont, Defendant.

This replicant, The United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant Daniel S. Lamont, for replication thereto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, lor avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILTON D. PURDY,
United States Attorney for the District of Minnesota.

St. Paul, Minn., June 2, 1902.

(Indorsed:) Replication to answer of Daniel S. Lamont. Filed June 2, 1902. Henry D. Lang, clerk.

189 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I, Henry D. Lang, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, viz:

Appearance of M. D. Purdy *et al.* for complainant and order,
Bill in equity,
Præcipe for chancery subpœna and order.
Chancery subpœna.
Præcipe for appearance for Northern Securities Company *et al.* and order,
Præcipe for appearance Great North- Railway Company and order,
Appearance for Northern Pacific Railway Company and order,
Appearance of J. Pierpont Morgan and Robert Bacon and order,
Appearance of Daniel S. Lamont and order,
Answer of defendant Northern Securities Company,
Answer of defendants J. J. Hill *et al.*,
Answer of defendant Great Northern Railway Company,
Answer of defendant Northern Pacific Railway Company,
Answer of J. Pierpont Morgan and Robert Bacon,
Answer of Daniel S. Lamont,
Replication to answer of Northern Securities Company,
Replication to answer of J. J. Hill and others,
Replication to answer of Great Northern Railway Company,
Replication to answer of Northern Pacific Railway Company,
Replication to answer of J. Pierpont Morgan and Robert Bacon,
Replication to answer of Daniel S. Lamont,

with the original files and records thereof, which are in my custody as such clerk, and that said copies are true copies of the original files and records, and of the whole thereof, on file and of record in the cause therein named.

Witness my hand as clerk, and the seal of said court.

Done at my office in St. Paul, Minnesota, this 23rd day of December, A. D. 1902.

[SEAL.] HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

190 EXHIBIT D TO BILL OF COMPLAINT.

United States Circuit Court for the District of Minnesota, January Term, A. D. 1903.

THURSDAY MORNING, April 9, 1903.

Court opened pursuant to adjournment.

Present: Hon. Walter H. Sanborn, circuit judge; Hon. Charles C. Houpt, United States district attorney; Hon. William H. Grimshaw, United States marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA *v.* THE NORTHERN SECURITIES COMPANY, THE Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont.	}	C. Equity. No. 789.

Decree.

This cause came on to be heard at this term and was argued by counsel (Hon. Philander C. Knox, the Attorney-General; Mr. D. T. Watson, special counsel; Mr. James M. Beck and Mr. W. A. Day, Assistant Attorneys-General, and Mr. John M. Froeman appearing for the United States, and Mr. George B. Young, Mr. John W. Griggs, Mr. M. D. Grover, Mr. C. W. Bunn, Mr. Francis Lynde Stetson, and Mr. David Willcox appearing for the defendants); and thereupon upon consideration of the evidence and the arguments,

It was ordered, adjudged and decreed as follows, to wit: That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful re-

191 straints and monopolies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Com-

pany be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners
192 of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor.

HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

A true record.
Attest: HENRY D. LANG, Clerk.

EXHIBIT E TO BILL OF COMPLAINT.

Northern Securities Company.

Directors.

Robert Bacon,	Daniel S. Lamont,
George F. Baker,	John S. Kennedy,
George C. Clark,	Edward T. Nichols,
William P. Clough,	George W. Perkins,
Edward H. Harriman,	Jacob H. Schiff,
James J. Hill,	James Stillman,
D. Willis James,	Nicholas Terhune,

Samuel Thorne.

26 LIBERTY STREET,
NEW YORK, March 22, 1904.

To the stockholders of the Northern Securities Company:

Since the formation of your company with a view of promoting, developing and enlarging the commerce and traffic of the country served by the Great Northern and Northern Pacific Railway Companies and by the Chicago, Burlington and Quincy Railroad Company, the traffic and earnings of the three railways have largely increased. Rates paid by the public have been materially reduced. The respective railways have been extended and their condition and facilities improved and increased.

The stock of the Northern Securities Company was issued solely for the shares of the Northern Pacific and Great Northern Railway Companies, and other properties purchased by it.

193 In forming the company and disposing of its shares, no commissions were paid, nor has the company incurred any expenses save those necessary for obtaining its charter, and for the economical conduct of its affairs.

The company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States—an opinion which has received the approval of four justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the company to hold and vote the shares. However, the majority of the court, disregarding as irrelevant any beneficial increase of commerce, was of the opinion, that as a matter of law your company's holding of the stocks of the two railway companies in itself constituted a restraint of interstate commerce prohibited by the so-called Sherman act of 1890. Accordingly the railway com-

panies have been forbidden to permit your company to vote or to collect dividends on the shares held by it.

Therefore, your directors, at a meeting held this day, have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the company, and to distribute to its shareholders the shares of stock of said railway companies now held by it.

To this end they have adopted resolutions recommending to the stockholders:

First. That the capital stock of this company be reduced from 3,954,000 shares, now outstanding, to 39,540 shares, being a reduction of 99 per centum.

Second. That said 99 per cent. of the present outstanding shares be called in for surrender and cancellation.

Third. That against each share of the stock of this company so to be surrendered, there will be delivered

$39.27 stock of the Northern Pacific Railway Company,

$30.17 stock of the Great Northern Railway Company, and proportionate amounts thereof for each fraction of a share of stock of this company so to be surrendered.

As required by the laws of the State of New Jersey, under which the company was created, a special meeting of the shareholders of this company has been called by the board of directors, for Thursday, April 21, 1904, at eleven o'clock in the forenoon, at the
194 office of the company, 51 Newark street, Hoboken, N. J., to vote upon said resolutions and upon such other business as may be brought before said meeting.

For the purpose of this meeting, the stock transfer books will be closed April 18, 1904, at three o'clock p. m.

Holders of this company's stock to a large extent have already expressed their approval of the recommendations of the board, but the laws of New Jersey require a two-thirds vote of the shareholders to permit the company to reduce its capital stock. Such vote is the first step necessary for the proposed distribution of the railway companies' shares. The collection of the May and subsequent dividends on such shares being forbidden by the decree until such distribution has been made, the importance of promptly executing and forwarding proxies is obvious.

The assets of the company remaining in its treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit, producing income, and conservatively valued at an amount in excess of the $3,954,000, to which it is proposed to reduce the stock of your company.

Notice of the due approval by the special meeting of the recommendations of the board of directors will be immediately published, whereupon stockholders should deliver their *entire* holdings of stock at this office promptly on and after April 23, 1904. Against such delivery, certificates for the one per centum thereof to be retained by stockholders, will be returned to them, together with amount of

stock of each of said railway companies, to which they may become entitled as above, on account of the ninety-nine per centum of their holdings of Northern Securities stock surrendered for cancellation. Fractional parts of shares will be adjusted by the delivery of scrip certificates.

All stock surrendered must be fully executed for transfer, either upon the certificates or upon an attached power of transfer.

By order of the board of directors.

JAMES J. HILL, President.
EDWARD T. NICHOLS, Secretary.

195 Circuit Court of the United States, District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
versus
NORTHERN SECURITIES COMPANY, Defendant.
} On Bill, &c.

Order.

(Filed April 20, 1904.)

The complainants above named, having filed a bill of complaint in the above entitled cause, together with certain affidavits annexed thereto, and desiring to move for a preliminary writ of injunction according to the prayer of said bill, and having applied to the court to fix the time and place for the hearing of a motion for such injunction;

It is ordered that Monday, the 25th day of April, A. D. nineteen hundred and four, at the hour of eleven o'clock, in the forenoon, be fixed as the time, and the circuit court rooms in the post-office building in the city of Trenton in the State of New Jersey as the place for the hearing of said motion, and that the complainants give notice to the defendant accordingly.

And it appearing to the court that there is danger of irreparable injury being caused to the complainants from delay before said application for a preliminary writ of injunction can be heard and decided, it is

Ordered that, until the hearing and decision upon said motion, the defendant Northern Securities Company, its directors, officers, agents and employees, be and they are hereby enjoined from in any way parting with, transferring, assigning, distributing or otherwise disposing of the shares of the capital stock of the Northern Pacific Railway Company received by it from the complainants Harriman and Pierce in November, 1901, as alleged in the bill of complaint,

or any of the common stock of said railway company into
196 which any preferred stock received from said complainants may have been converted, or any certificates now representing said shares or any of them.

And it is further ordered that delivery to the defendant or any of its officers or directors and to its registered agent in the State of New Jersey of a true but uncertified copy of the said bill of complaint, with the affidavits annexed, and of this order, on or before the twenty-first day of April, A. D. nineteen hundred and four, shall be sufficient service of this order and of notice of said motion for a preliminary injunction.

Dated, Trenton, N. J., April 20, 1904.

ANDREW KIRKPATRICK, Judge.

Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, and THE EQUITABLE TRUST COMPANY OF NEW YORK, Complainants,

versus

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, Defendants.

Affidavit of Edward H. Harriman.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA,
Southern District of New York, State, } *ss:*
County and City of New York,

Edward H. Harriman, being duly sworn, deposes and says:

I. I am one of the complainants in the above entitled suit. At the time said suit was commenced and until recently I was absent in California and other Western States in connection with an inspection of the railroad companies of which I am a director and officer. Since my return, I have read the amended bill and
197 am familiar with its contents. The matters and things therein set forth, so far as they relate to the acts and deeds of the Oregon Short Line Railroad Company, Mr. Pierce and myself, are true to my own knowledge, and so far as they relate to the acts and deeds of other parties I believe them to be true. The matters and things set forth as to the acts and deeds of the Northern Securities and Northern Pacific Companies are true to the best of my knowledge and belief. Such knowledge and belief have been derived by me as a director of said companies.

II. Since prior to November, 1901, I have been a director and executive officer of the complainant Oregon Short Line Railroad

Company and of the Union Pacific Railroad Company and a director of the Northern Pacific Railway Company. Since November 14, 1901, I have been a director of the Northern Securities Company.

III. The Oregon Short Line Railroad Company and the Union Pacific Railroad Company are railroad corporations severally organized under the laws of the State of Utah, and they have express statutory authority and charter power to acquire and hold the stock of the Northern Pacific Railway Company. I am advised by counsel and believe that the acquisition and holding of such stock by either of said companies is not in violation of the statutes of the United States or of any State.

IV. Neither the railroad of the Oregon Short Line Railroad Company nor that of the Union Pacific Railroad Company is a parallel and competing line with the railroad of the Northern Pacific Railway Company. I am familiar with all the railroad lines of said three companies. Their roads serve entirely different markets and territories and do not compete for the same traffic or connect at any competitive point or terminals. The road of the Oregon Short Line Railroad Company runs north and south, whilst the lines of the Northern Pacific Railway Company run east and west. The lines of the Union Pacific Railroad Company are hundreds of miles from the lines of the Northern Pacific Railway Company, and said lines do not run through the same States or reach or serve the same territory or terminals. The railway of the Chicago, Burlington and Quincy Railroad Company is not operated by the Northern Pacific Railway Company, and the latter company does not own a majority of the stock of the Burlington Company, but on the contrary owns less than one-half of such stock. The Northern Pacific Railway Company does not exercise control of the management and operation of the Burlington Company and cannot exercise any
198 control of it in any way except in combination by and through co-operation with the Great Northern Railway Company. The Burlington road is in no sense a part of the Northern Pacific system.

V. During the winter and spring of 1900–1901, it was determined that it would be of great benefit to the Oregon Short Line Railroad Company and the public served by it as well as to all its affiliated lines, if it could secure and control interchange of business with the territory and markets of the Northwest which were served by the lines of the Northern Pacific Company. Such a connection would open new markets to the patrons and shippers on the lines of the Oregon and Union Pacific Companies, would greatly facilitate the interchange of the products and manufactures of the Northwest with those of the Middle West, South, Southwest and Pacific slope, and *vice versa*, and would, by such interchange and by supplying freight for carriage both ways, tend to decrease the cost of transportation and the rates to be charged to the public, and to increase

the business and earnings of both the Oregon and Northern Pacific Companies.

In pursuance of this policy, the Oregon Short Line Company acquired about $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, which had been purchased prior to May 9, 1901. Its purchases consisted of $41,085,000 par value of preferred stock and $37,023,000 par value of common stock. Such purchases constituted a clear majority of the entire authorized and outstanding issue of the capital stock of the Northern Pacific Railway Company, namely, $155,000,000 par value, divided into $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, and carried the control of the company.

VI. Subsequently, I was informed by Mr. James J. Hill that he and his associates, together with Messrs. J. P. Morgan & Co. had acquired and then held or controlled a majority of the Northern Pacific common stock, consisting of about $42,000,000 par value thereof, and that it was intended to retire the preferred stock of the Northern Pacific Company and convert it into common stock without affording the holders of the preferred stock the right to participate in any new securities that might be issued. This statement of Mr. Hill was confirmed by members of the firm of J. P. Morgan & Co. The result of such a plan, if consummated, would be to deprive the Oregon Short Line Company of its majority holding of the stock of the Northern Pacific Company and the control
199 which such holding would represent. The plan as outlined was to retire the existing preferred stock by means of certificates convertible into common stock, to be offered for subscription solely to the holders of existing common stock at the rate of seventy-five eightieths (75-80ths) of their holdings. At that time and during the entire year of 1901, Mr. Hill and his associates, together with Messrs. Morgan & Co., controlled the board of directors of the Northern Pacific Company, and a majority of such board were their nominees and appointed in their interest. After such proposed conversion, Messrs. Hill and Morgan and their associates would hold in one combination of men acting together a majority of the stock of the Northern Pacific Company.

VII. The plan or scheme to combine the holdings of a majority of the capital stock of the Great Northern and Northern Pacific Companies in a holding company attacked and condemned in the Government suit was conceived and initiated by Mr. Hill and his associates prior to November, 1901, without the knowledge of Mr. Pierce or myself or the Oregon Short Line Company, and in hostility and antagonism to the interests which we represented. Neither Mr. Pierce nor I nor the Oregon Short Line Company had anything whatever to do with any combination or agreement among holders of Great Northern or Northern Pacific stock prior to or antedating the organization of the Northern Securities Company, nor did we at any time become a party to any such combination. The first information we had of the plan was from Mr. Hill and J. P. Morgan &

Co. to the effect that Mr. Hill and his associates had determined to organize a holding company and that they intended to transfer to such holding company a majority of the capital stock of both the Northern Pacific and the Great Northern Companies. My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of said firm, but I cannot remember exactly what each said, and at the present time can only recollect the substance and result of my conversations with them.

I was then urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company on the ground that it would be a minority holding under the plan of conversion if consummated, that the majority would be held by the holding company, and that there would probably be no market for any such minority holding. They further stated that upon the organization of the proposed holding company, they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the
200 stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take in the common stock held by them and Mr. Hill and his associates, and all other parties, and they thereupon offered me those terms. I took the matter under consideration and conferred with members of the board of directors of the Oregon Short Line Company. The conversion under conditions reducing the Oregon Short Line holdings to a minority was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash. Some time after the terms of the agreement had been settled, and on November 18, 1901, Messrs. J. P. Morgan & Co. notified me to deliver the Northern Pacific stock to the Northern Securities Company, and informed me that such company would close the transaction, and that we would receive from it the stock and cash payment agreed upon. In pursuance of such notification, I attended with Mr. Pierce at the office of the Northern Securities Company on that day, when the certificates for said shares of preferred and common stock of the Northern Pacific Company standing in the names of myself and Mr. Pierce, namely, $78,108,000 par value, duly endorsed, were delivered to the Securities Company, and Mr. Hill delivered to us certificates for $82,491,871 par value

of stock of the Securities Company in the joint names of Mr. Pierce and myself. The said $82,491,871 par value of the capital stock of the Northern Securities Company was then and has ever since remained registered in our names, and the certificates therefor are in the possession of the Equitable Trust Company of New York as pledgee under the deed of trust of July 17, 1902, annexed as Exhibit B to the amended bill. Neither Mr. Pierce nor myself had or have any personal interest in said stock, and at all times the same was held by us and is still registered in our names as trustees
201 for the use and benefit of the Oregon Short Line Company, which company was then and at all times has been and still is the beneficial owner thereof. At the time I agreed with Messrs. J. P. Morgan & Co. to turn over the stock of the Northern Pacific Company held by the Oregon Short Line Company, it had been understood between them and myself that all of the outstanding preferred stock of the Northern Pacific Company would be converted into common stock.

VIII. As a director of the Northern Pacific Railway Company, I know that all of its preferred stock issued and outstanding in November, 1901, consisting of $75,000,000 par value of shares of $100 each, has been converted into common stock of the company through the medium of convertible certificates, which were immediately after issue changed into a like amount of the common stock of the company at par. As a director of the Northern Securities Company, I know that the company did not in November or December, 1901, have any funds with which to pay cash for $34,709,062 of Northern Pacific convertible certificates except through or by means of the preferred stock so delivered by Mr. Pierce and myself on November 18, 1901. As to the proceeds or credits in respect of the remaining $6,375,938 par value of the preferred stock, I have no knowledge, but I always understood that the whole amount of the $41,085,000 of preferred stock so delivered to the Northern Securities Company by Mr. Pierce and myself had been actually converted into common stock. The facts stated in the affidavit of Mr. William Mahl, sworn to May 16, 1904, have only come to my knowledge within the last few days, and as the result of an examination of the books of the Securities Company made on the 12th and 13th of May, 1904.

IX. I attended a meeting of the board of directors of the Northern Securities Company held on the 22d day of March, 1904, at which the preamble and resolutions set forth in paragraph XIV of the amended bill were adopted. I declined to vote at such meeting. Mr. Hill, the president of the company, reported to the board that he had written a letter to the Attorney General of the United States of which a copy is annexed as Exhibit A to this affidavit.

X. The Northern Pacific Company since November 18, 1901, has declared dividends equal to fourteen (14) per cent. During the same period, the Oregon Short Line Company has collected in dividends on the $82,491,871 Northern Securities stock the sum of $7,939,835.75.

XI. I have been for thirty years engaged in business in
202 the city of New York as a broker, banker and executive officer of corporations. I know the market values of securities, and particularly those of railroad companies. I am familiar with the properties of the Northern Pacific and Great Northern Companies and with their intrinsic values and present earnings. Under the proposed plan of *pro rata* distribution, the Oregon Short Line Company would be compelled to take $32,070,612 par value of Northern Pacific stock, and $24,638,919 par value of Great Northern stock.

XII. The present market value of the Northern Pacific stock is about $135 per share, and of the Great Northern stock about $170 per share. The present basis of dividends upon both the Northern Pacific and Great Northern stock is equal to the rate of seven per cent. per annum.

E. H. HARRIMAN.

Subscribed and sworn to before me this 16th day of May, 1904.
[L. S.] JOHN P. TUOMEY,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

EXHIBIT A TO AFFIDAVIT OF EDWARD H. HARRIMAN, VERIFIED MAY 16, 1904.

Northern Securities Company, 26 Liberty Street.

NEW YORK, March 21st, 1904.

Honorable Philander C. Knox, Attorney-General.

SIR: The decree of the circuit court of Minnesota having been affirmed by the Supreme Court of the United States, the Northern Securities Company, without question or delay, will comply therewith. In order that there may be no room for misleading or untruthful reports, we deem it advisable to state to you this fact. The company contemplates a speedy dissolution; but it is deemed by the directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders.

I enclose a copy of the resolutions which have been passed by the board. Without delay, after the stockholders have acted, the capital stock will be so reduced as to permit a distribution of the rail-
203 way shares amongst the stockholders of the Northern Securities Company in the only way feasible, in the judgment of the board. The method of distribution proposed by the board of directors will accomplish the purpose of the Government, and will preserve the equitable rights of all the stockholders as amongst themselves.

Respectfully yours, J. J. HILL, President.

Circuit Court of the United States, District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,
versus
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILroad Company, Defendants.

Affidavit of Winslow S. Pierce.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA,
Southern District of New York, State, County, and City of New York, } *ss:*

Winslow S. Pierce, being duly sworn, deposes and says:

I. I am one of the complainants mentioned in the amended bill in the above entitled suit, and the deponent who subscribed and swore to the affidavit of April 20, 1904, filed with the original bill. I reiterate the statements made in such affidavit as fully as if here set forth at length.

II. After the filing of the original bill in the above entitled suit, I attended the meeting of the stockholders of the Northern Securities Company pursuant to the notice, Exhibit E to the original and amended bill, and at such meeting read to the stockholders a notice, of which a copy is hereto annexed as Exhibit No. 1, and after reading the same delivered it to the secretary of the company, Mr. Nichols.

204 III. I annex hereto as Exhibit No. 2 extracts from the testimony of James J. Hill, Mr. Charles Steele, Mr. J. Pierpont Morgan, Mr. George W. Perkins, Mr. John S. Kennedy and Mr. William P. Clough contained in the record of the suit in the circuit court of the United States for the district of Minnesota, as printed by the clerk of the Supreme Court of the United States. I am informed by Mr. Guthrie, one of the complainants' counsel, that he has agreed with Mr. Stetson, one of the counsel for the Northern Securities Company, that either party on the motion for a preliminary injunction can read from said record extracts of the testimony of any witness, provided the extracts are served upon the other side prior to the hearing. I am informed and verily believe that all of the depositions from which extracts are annexed were actually made by said witnesses and introduced and read in evidence in said suit, and this appears from the official transcript of record printed by the clerk of the Supreme Court of the United States and filed in his

office, of which I have examined a copy in the possession of complainants' counsel.

WINSLOW S. PIERCE.

Subscribed and sworn to before me this 16th day of May, 1904.

[L. S.] JAMES L. MOCK,
Notary Public, Kings County, N. Y.

Certificate filed in New York county.

EXHIBIT No. 1 TO AFFIDAVIT OF WINSLOW S. PIERCE, VERIFIED MAY 16, 1904.

Notice is hereby given to the special meeting of stockholders of the Northern Securities Company, that the undersigned claim that the shares of the capital stock of the Northern Pacific Railway Company delivered by Edward H. Harriman and Winslow S. Pierce to the Northern Securities Company on or about November 18, 1901, and consisting of $37,023,000 par value of the common stock of said railway company and $41,085,000 par value of the preferred stock of said railway company and the common stock into which said preferred stock had been converted belong to the Oregon Short Line Railroad Company as the legal and equitable owner thereof, that the Northern Securities Company is not now and never became the owner thereof, but is simply a custodian, and that the under-
205 signed are entitled to the return and delivery to them of certificates for said stock of the Northern Pacific Railway Company upon the surrender by them of $82,491,871 par value of the capital stock ofthe Northern Securities Company and the payment of $8,915,629 in cash received by them upon such delivery of said Northern Pacific stock to the Northern Securities Company as aforesaid.

Notice is further given that the said Northern Securities Company has no right to distribute the said Northern Pacific stock *pro rata* among the stockholders of the Northern Securities Company, or otherwise dispose of the same, except to return the same to the undersigned.

Notice is further given that the undersigned have instituted a suit in the circuit court of the United States for the district of New Jersey, to have it adjudged that they are entitled to the return of said Northern Pacific stock to them, and that in said suit a restraining order has been granted by the Honorable Andrew Kirkpatrick, United States judge, restraining and enjoining the Northern Securities Company until the hearing and decision of the application of the undersigned for a preliminary writ of injunction from parting with, disposing of, assigning, transferring or distributing said stock of the Northern Pacific Railway Company so received from the said Harriman and Pierce, or the certificates which now represent the

same, and that a copy of said restraining order and of the bill of complaint, exhibits and affidavits on said motion for a preliminary injunction have been duly served on the officers of the Northern Securities Company.

April 21, 1904.

(Signed) EDWARD H. HARRIMAN,
By WINSLOW S. PIERCE.
WINSLOW S. PIERCE.
OREGON SHORT LINE RAILROAD CO.,
By WM. D. CORNISH, Vice-President.

EXHIBIT No. 2 TO AFFIDAVIT OF WINSLOW S. PIERCE, VERIFIED MAY 16, 1904.

I.

Extracts from the testimony of James J. Hill, George W. Perkins, Charles Steele, and William P. Clough in the Government suit touching the transfer of the Northern Pacific stock owned by
206 the Oregon Short Line Company to the Northern Securities Company.

Mr. HILL testified (fols. 371, 374, 376, 378–380):

"I knew from time to time something of the negotiations, but the negotiations were carried on and closed, whenever they were closed, by Morgan & Co. * * * I was not, however, the main party in carrying on the negotiations." * * *

"Q. I will ask you this, Mr. Hill: Do you know whether or not there was an agreement for the sale of this stock previous to November?

A. I know of no such agreement. I think and feel certain that if any such agreement had been made I would have known something of it." * * *

"Q. I want to make this quite clear, if I can, Mr. Hill. Do you now know of your own knowledge that at the time when the sale was actually made by Mr. Harriman to J. Pierpont Morgan & Co., that it was agreed that Mr. Harriman should receive, as part consideration for that stock, Northern Securities Company stock to a large amount?

A. I knew that that was the course that was pursued, but when I got that knowledge I can't recollect. I can't recall whether it was before or at the time the stock was delivered to the Securities Company. Now, it might be that I knew a day or two before. It might be that I knew three or four days, because the transaction was large and the time that would elapse between the purchase of the stock by Morgan, or what arrangement he made for the purchase, rather— t was part cash——

Q. What I want to get at is this: Are you able to state now whether or not you knew prior to the actual transfer or sale of the Harriman stock to J. Pierpont Morgan & Co., that as a part consideration for that transfer and sale, Northern Securities Company's stock to a large amount was to be turned over to the Harriman interests? That is what I want to know.

A. I could not testify as to when I got that knowledge. That is the best testimony I can give."

Mr. PERKINS testified (fols. 926–927, 931–934):

"Q. Did you purchase that stock upon your own account or did you purchase it as a broker, with a previous agreement
207 with the Northern Securities Company as to what should be done with it?

A. We had no previous agreement with any one save the Union Pacific people, who wanted us to make this transaction, which we finally completed for them. They were desirous of securing the Northern Securities stock.

Q. And at the time of the purchase from the Union Pacific interests it was understood that you were to turn this stock over to the Northern Securities Company, and the stocks and cash of the Northern Securities Company was to be turned over to you and by you to the Union Pacific interests?

A. If we could get it. If we could make the transaction. * * *

Q. What was your understanding or arrangement in case you had failed to make a deal with the Northern Securities Company for the turning in of all this stock to it; would you have had it on your hands—78,000,000 or $80,000,000 of preferred stock?

A. No, sir; the Union Pacific would have had it.

Q. So that in that transaction throughout your firm was acting as a broker for the disposition of that stock or for the turning of that stock in or for the sale of that stock to the Northern Securities Company, was it not?

A. I don't know that the word 'broker' is the proper word. I don't know what you would call it. We were negotiating for the Union Pacific for this transaction, a very common position for us to be in.

Q. I have no doubt of it. I understand that, Mr. Perkins, but you were negotiating a sale of that stock for the Harriman or Union Pacific interests.

A. For something else, if we could get that something else delivered.

Q. And if you had failed to make that sale to the Northern Securities Company you would not have had that stock on hand, but it would have belonged to the Union Pacific interests?

A. I suppose we might have, or take something else for it.

Q. It would have to be a new trade?

A. Further negotiations; yes, sir.

Q. Did your firm, as a matter of fact, agree absolutely to
208 take this stock from the Union Pacific interests and obligate yourselves for the purchase price, regardless of further negotiations with the Northern Securities Company?

A. Hardly, I should think."

Mr. STEELE testified (fols. 1158–1164):

"Q. What did your firm have to do with the purchase of the Harriman interests in the Northern Pacific, Mr. Steele?

A. My impression is it was my firm that conducted that negotiation entirely.

Q. Will you state what those negotiations were?

A. I will as nearly as I can, and I think I know the substance of them, Mr. Boutelle. It was after the meeting of the Northern Pacific board, as I recollect it, at which it was resolved that the preferred stock was to be retired. Whether the suggestion came from Mr. Harriman or not, I couldn't quite say, but the question was taken up between Mr. Harriman and ourselves as to the disposition of the Northern Pacific stock which they had.

Q. When was this, pardon me?

A. I think it was a little after the middle of November, after the meeting of the Northern Pacific board, at which it was resolved to retire the Northern Pacific stock. They expressed a desire to be allowed to part with their stock. It had become, or would become, by the retirement of the preferred stock, a minority interest, and it was rather an unsalable commodity, as the stock had practically been withdrawn from the market, and they asked us if we wouldn't undertake—I say they asked us, it came up between us, I am not sure which one suggested it—undertake to get the Northern Securities Company to buy their stock. We finally agreed upon a basis by which they agreed to sell their stock for a lump sum, which was to be payable partly in cash and partly in stock of the Northern Securities Company. At that time Mr. Harriman—I shall have to apologize whenever I say Union Pacific, because, I never really knew whether that was so—Mr. Harriman and his friends held both common and preferred stock, in the proportion, I think of about 37,000,000 common to 41,000,000 preferred, in round figures, and
209 their proposition was to sell us that stock in one block for a fixed sum which was to be paid partly in cash and partly in Northern Securities Company stock, and we undertook to try and get the Northern Securities Company to buy that stock on those terms, we acting as bankers between them.

Q. You acted, then, in that transaction, as I understand it, as middle man?

A. As bankers.

Q. That is, it was not a purchase outright by your firm?

A. No.

Q. Or a purchase in which your firm obligated themselves to pay a fixed amount of cash?

A. No; it was only a purchase by us if we succeeded in getting the Northern Securities Company to take it, and the terms were that we were to turn over just exactly what we got.

Q. You were really, then, in negotiation with the Northern Securities Company; you were really negotiating for the Union Pacific, or Harriman, or Short Line interests?

A. We were bankers in between. I wouldn't say we represented either side particularly. We were very often put in that position.

Q. You were financial agents and you were requested or instigated to make the transaction or attempt the transaction by the Harriman interests?

A. Well, we did undertake it for them.

Q. And at their request?

A. With their approval, at any rate."

Mr. CLOUGH testified (fols. 2610–2611):

"Q. The stock was purchased by J. P. Morgan & Co., and then turned over to you and you carried out the terms?

A. Yes, sir.

Q. The purchase as arrived at between J. P. Morgan & Co. and Harriman and Pierce was transferred to the Northern Securities Company, and the Northern Securities Company carried out the sale by direct dealing with Harriman and Pierce on the 18th day of November of last year.

Q. It issued to Harriman and Pierce some eighty-two millions of its own common stock?

A. Yes, sir."

210 And again (fols. 3125–3126):

"Q. Now, state whether the transfers were individual, absolute, without reservation, and without solicitation from the Northern Securities Company—fully?

A. To answer the first question, every purchase of stock that has been made by the Northern Securities Company, (whatever stock it may be) has been by direct individual transactions and negotiations with the owner of that stock except in the one instance that I have referred to in my previous testimony of the purchase of the Harriman and Pierce stock, where J. P. Morgan and Company negotiated the purchase and the purchase was assigned to the Northern Securities Company."

II.

Extracts from the Testimony of James J. Hill and William P. Clough in the Government Suit as to the Method of Conversion of the Northern Pacific Preferred Stock into Common Stock.

Mr. HILL testified (fols. 385–386):

"A. As soon as the notice was given to redeem the preferred stock of the Northern Pacific, my recollection is that a number of the pre-

ferred stockholders surrendered their stock, took their certificates for their common and converted them. Now, it may be, and I think quite likely, that that is what was done by Mr. Morgan or his firm with the Harriman preferred stock. I know that others did that."

And again (fols. 2741–2744):

"Q. Did you at that time take any account of what ought to be provided in case of your getting additional common stock for your preferred, on the retirement of the preferred.

A. That was considered. Those steps came one after another. They were considered, I should say, after the latter part of August, and prior to the organization of the company. One condition as it took shape called for a relative change in the plan of the stock, that is, an increase in the amount of the stock. I might answer that further, that Mr. Morgan, acting as he had been for the Northern Pacific for a great many years, since its reorganization, was very urgent that whatever was done for his shares, any other holder should have the same right. That had to be considered.

211 Q. In case of a retirement of the preferred stock of the Northern Pacific, to be replaced by common stock, if you had taken your proportion, you and the Morgan interest, your proportion of the new common stock, what what would have been the amount then of your holdings? You would have taken 75/80 of $42,000,000, I suppose?

A. Yes, sir.

Q. That would have brought you up to about in the neighborhood of 90,000,000, or about 80,000,000?

A. Yes, a little over 80; between 80 and 90.

Q. Now, what I wanted to get at was whether at this time, at the end of August, when you were fixing your proposed capital for the holding company, you took into account the increase of your holding which would or might result from a retirement of the preferred stock?

A. That had to be considered; it was considered."

And Mr. CLOUGH testified (fols. 2613–2618):

Q. Now, as to the purchaser of thirty-seven millions of common and of forty-one-odd millions of preferred stock of the Northern Pacific, the Northern Securities Company became entitled to do certain things. It became entitled, in the first place, did it not, to subscribe for convertible bonds?

A. If you will just let me explain that in my own way.

Mr. RICHARDS: Just strike out my question, Mr. Reporter, and let Colonel Clough go on and complete his statement.

WITNESS: By the terms of the resolutions of the Northern Pacific Railway Company retiring the preferred stock of that company it was provided that the holders of the then existing common stock of that

company of record at a certain future day, which I think now was the 10th of December, 1901, would be entitled to subscribe at par for convertible bonds that were to be issued by the Northern Pacific Railway Company in the process of retiring the preferred stock to the amount of 75/80 of their holdings in the existing common stock. All stock that was transferred on the record of the Northern Pacific Railway Company prior to the date of the closing of the books,
212 which, as I have stated before, as I remember, was on December 10, would carry with it this right of subscription, so that when the Northern Securities Company purchased the Harriman and Pierce stock, common stock, or any other common stock of the Northern Pacific, prior to December 10, with their purchase they got the right of subscription which the resolutions which I have mentioned gave. Now, does that explain it fully?

Q. Yes, that explains that portion of it. Now, as a matter of computation, 75/80 of 37,000,000 is about 34,000,000, isn't it?

A. Yes, sir; it is about 34,000,000. And I think that the subscription right which the Northern Securities Company exercised was obtained by it almost wholly from its purchase of the thirty-seven and odd millions of the Harriman and Pierce stock. Is that what you want to get at?

Q. That is it.

A. I haven't made the computation. I can make it in a minute, you know.

Q. Now, you have explained the right you acquired by the purchase of the common stock, but you have not explained the right you acquired by the purchase of the preferred stock of forty-one millions. What right did you acquire by that?

A. The right on the 1st day of January, 1902, to have that stock redeemed by the Northern Pacific Railway Company at par in cash.

Q. And was it redeemed at par at that time?

A. It was on the 1st day of January, 1902, all presented to the Northern Pacific Railway Company for retirement and was redeemed at par. The Northern Securities Company received from the Northern Pacific Railway Company on the 1st day of January, 1902, an amount in cash equal to the par of the preferred stock which it turned in.

Q. That amount substantially reimbursed you for those expenditures of cash, didn't it—within one or two million dollars?

A. That is a matter of computation easily made."

III.

Extracts from the testimony of James J. Hill, John S. Kennedy George W. Perkins, Charles Steele, J. Pierpont Morgan
213 William P. Clough, and Edward H. Harriman in the Government suit, that the Oregon Short Line interests were not represented among those who participated in the organization of the Northern Securities Company.

Mr. HILL testified (fols. 346–347, 365–366, 376, 389):

"Q. Who finally decided upon the plan that was adopted in the organization of the Northern Securities Company

A. Practically, Mr. Kennedy, Mr. George Baker, Mr. James, Mr. Thorne, Mr. Clough, Mr. Perkins, and myself.

Q. And were there no others, than those whose names you have just given, who had anything to do with the actual perfecting of the plan of organization of the Northern Securities Company?

A. No one outside of the counsel who drew the papers. I think I had as much to do with it as anybody." * * *

"Q. Mr. Hill, at the time when the Northern Securities Company was decided upon, which took place some time in the summer of 1901 at that time, to your knowledge, were there any negotiations being carried on, or had been carried on prior to that time, with Mr. Harriman, or with persons representing Mr. Harriman or the Oregon Short Line, looking to the purchase of the entire holdings of the Union Pacific or the Oregon Short Line, or Mr. Harriman?

A. There was absolutely no such negotiations, directly or indirectly, and I think there could not have been any without my knowing it." * * *

"Q. I will ask you this, Mr. Hill: Do you know whether or not there was an agreement for the sale of this stock previous to November?

A. I know of no such agreement. I think and feel certain that if any such agreement had been made I would have known something of it." * * *

"Q. Now, Mr. Hill, was there any connection whatever between the organization of the Northern Securities Company and the purchase of the Harriman stock? That is, taking those two things together, was there any connection between those two things and the selection of Mr. Morgan as arbitrator to name the board of directors of the Northern Pacific Railway Company?

A. There was absolutely no connection whatever."

214 Mr. KENNEDY testified as to the organization of the Northern Securities Company (fol. 862):

"Q. Do you know whether it had any relation or anything to do with the purchase of the Harriman stock?

A. Not so far as I know. I believe it had not, and never heard of such a thing."

Mr. PERKINS testified (fol. 911–913):

"Q. Mr. Perkins, had the firm of J. P. Morgan & Co. any agreement or understanding with either Mr. Harriman, Mr. Schiff, or the officers of the Union Pacific, or of the Oregon Short Line, for that purchase prior to the formation of the Northern Securities Company?

A. Not to my knowledge. I believe not.

Q. Had you any personal knowledge of the negotiations which led up to the actual purchase which you have described?

A. Yes, sir.

Q. You were selected by members of your firm?

A. I conducted those negotiations.

Q. Now, when did they commence?

A. I cannot give you the date, but after the Northern Securities Company was organized and in existence.

Q. And no negotiations, to your knowledge, were had by your firm with either Mr. Harriman or Mr. Schiff, or any of the officers of the Union Pacific or the Oregon Short Line prior to the actual formation and incorporation of the Northern Securities Company?

A. Not to my knowledge; no, sir."

Mr. STEELE testified (fols. 1204–1205):

"Q. I understand you, Mr. Steele, that when the Northern Securities Company was organized, the so-called Harriman stock had not been purchased by you, or by any one for that company?

A. It had not been purchased by us.

Q. And, so far as you know, no arrangements for this sale to the Northern Securities Company had ever been made?

A. No, sir.

Q. Well, was there, so far as you know, any connection between the organization of the Northern Securities Company and the acquisition of the Harriman stock?

215 A. None whatever."

Mr. MORGAN, cross-examined by his counsel, Mr. Stetson, testified (fol. 1444):

"Q. Was it agreed by anyone, so far as you know, before the Northern Securities Company was organized that the so-called Harriman or Union Pacific stocks in the Northern Pacific should be placed in the Northern Securities Company?

A. No; we did not require it.

Q. And you did not know that it would be done until after the consummation?

A. Not until after."

And Mr. HARRIMAN testified (fol. 3592):

"Q. Were you consulted at all regarding the formation of this holding company?
A. No, sir.
Q. You didn't know whether it was going to be organized?
A. No, sir.
Q. And had nothing to do with it?
A. No, sir."

Mr. CLOUGH testified (fols. 3297–3298):

"Q. I repeat the question: Before you reached the conclusion to take out a New Jersey charter, Mr. Morgan's interests and the Great Northern interests had agreed to place their holdings in a common corporation?
A. Before that was done, as I have stated before, the gentlemen who were stockholders of the Great Northern and who also held stock of the Northern Pacific, and Mr. Morgan himself (the holdings of Great Northern being, I think it was, about 33 millions and of the Northern Pacific about 42 millions all together, somewhere in that neighborhood, about 40 or 42) had decided that they would sell their stocks to the new company when created. Now, it was after that decision relating to those stocks and, as I said, only a few days before the articles of incorporation were actually filed, that the conclusion was ultimately reached to incorporate under the laws of the State of New Jersey."

IV.

Extracts from the testimony of James J. Hill, John S. Kennedy, and J. Pierpont Morgan in the Government suit, going to
216 show that the Hill-Morgan party, in forming the illegal combination, were actuated by fear of competition on the part of the interests represented by Harriman and Pierce, and that the primary object of the combination was to defeat such competition.

Mr. HILL testified (fols. 328–331):

"A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning making their holding together permanent, and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe, discussed the matter with me, going over the entire situation, the relations of the Burlington; the relations growing out of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific,

and suggested whether we should not include in our holding company our holdings in the Northern Pacific.

Q. And for the same purpose?

A. For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.

Q. For the purpose of unifying the interests that you had in the two roads?

A. Yes, sir; for the purpose of unifying the interests in each road; because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of the shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock.

Q. Of the Northern Pacific?

A. Of the Northern Pacific, if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. The
217 control of the Great Northern would have passed to the Union Pacific because we would not have held it a day longer than we could have sold it."

And again (2724–2727):

"Q. Do you remember the date when the resolution of the board of directors of the Great Northern Company was passed authorizing the purchase——

A. I couldn't give the exact date.

Q. —of the Burlington stock?

A. I couldn't give the exact date. It would be in the month of April.

Q. You were present at that meeting?

A. Yes, sir.

Q. State whether or not a suggestion was made at that meeting that, in order to protect the Great Northern Company, the control of the Northern Pacific common stock should be acquired in its interest.

A. As I remember it, one of the directors raised a question that inasmuch as the purchase of the Burlington stock and the creation of a bond to pay for it involved the joint and several liability of the entire amount of the purchase, it was a matter of consequence to the Great Northern to know that the Northern Pacific would not pass into the hands of people who might be interested in other directions, in developing in other directions or other sections of the country; and I remember I answered that with what myself and friends held at that time, and what Morgan & Company held we

would have somewhere in the neighborhood of 35 or 40 millions of the stock out of a total of 155 millions, which was larger than is usually held in any of the large companies. I did not think at the time that it was at all likely that anybody would undertake to buy in the market the control of 155 millions of stock."

And again (fols. 2748–2753):

"Q. What was the purpose after the purchase of the Burlington Company and after the very large purchases of Northern Pacific stock made in the Union Pacific interests,—what was the purpose after that time of you gentlemen who promoted the Northern Securities Company in forming that company and putting into it a majority of the stock of the Northern Pacific Company?

218 A. We were particularly anxious to put a majority of that stock where it could not be raided again as it had been. We wanted to put it in a corporation that was not a railroad company,—a company that would hold it as an investment, and the larger the company the more difficult it would be to secure a majority of it. Then again, a reason why we preferred an investment company: Railroad charters, I think I may say almost entirely, are drawn or granted on terms that do not permit railroad companies to buy the shares or own the shares of investment companies. Railway companies, under certain conditions, can buy the shares of other railways, as a means of consolidation, or they might buy the shares of a road that they would otherwise build. We were advised that we would be safer with the shares held by an investment company, the stock of which could only be held by individuals or by corporations that were not railway companies, and to that extent we would be more free from such raids by interests that were anxious to destroy or restrict the growth of this country,—such raids as had been made by the Union Pacific interests, so-called.

Q. What injury did you consider was likely to result to the stockholders of the Great Northern Company or the stockholders of the Northern Pacific Company, or to those corporations, if a majority of the stock of the Northern Pacific or a controlling interest in that company should be obtained by a hostile railway interest?

A. With the Northern Pacific as a half owner in the shares of the Burlington and responsibility for one-half of the purchase price of these shares, the transfers of the shares of the Northern Pacific or the control of the Northern Pacific to an interest that was adverse or an interest that had greater investments in other directions, the control being in the hands of companies whose interests would be injured by the growth and development of this country would, of course, put the Great Northern in a position where it would be almost helpless, because we would be, as it were, fenced out of the territory south which produces the tonnage we want to take west and which consumes the tonnage we want to bring east, and

219 the Great Northern would be in a position where it would have to make a hard fight—either survive or perish, or else

sell out to the other interests. The latter would be the most business-like proceeding."

Mr. KENNEDY testified (fols. 773–774, 779–780):

"A. It was our intention to have a majority of the Northern Pacific, but as to the Great Northern, it was simply an intention to let the members in who chose to come in, and it remained to be seen whether it would be a majority or minority.

Q. Why did you plan on getting a majority of the Northern Pacific and not of the Great Northern, Mr. Kennedy?

A. Well, my idea was in consequence of what took place last May; we didn't want to be subject to such an attack as took place last year.

Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

A. Yes, sir.

Q. Under all circumstances?

A. Under all circumstances." * * *

"Q. Didn't you hear any reference made by any of your friends, or by Mr. Hill's associates, with reference to the object and purpose of preventing another attack on either the Great Northern or the Northern Pacific?

A. I remember that being talked of in connection with the Northern Pacific, but I have no recollection of it in connection with the Great Northern.

Q. It was a fact, Mr. Kennedy, that so far as your own feelings went you were perfectly satisfied that a successful attack could not be made on the Great Northern?

A. I was satisfied of this, that if we held the controlling majority of the stock of the Northern Pacific the chances were remote that they would make an attack on the Great Northern."

And Mr. MORGAN testified (1341–1346):

"Q. We have heard a little in this court room about a contest some time last May for the purchase of the Northern Pacific stock. When did you first hear that somebody else was trying to buy the stock of the Northern Pacific?

220 A. Do you mean the Union Pacific interest?

Q. Yes. When did you hear of that?

A. Oh, it must have been about the last of April or the first of May.

Q. Not before then?

A. I didn't hear they were trying to buy it. I heard that it was understood, and, in fact, thought it practically settled, that they had control when it came to me. It was not an imaginary fact; it was a complete transaction, as I was informed. There was no contest in the matter.

Q. I was alluding now to the famous 9th of May.

A. That was after it was bought. That was when the thing was done.

Q. Now, directly, you heard that the Union Pacific interest—you understand when I refer to them it means Harriman or the Oregon Short Line?

A. I don't understand anything of the kind. I know nothing about that. I know no man, woman or child, except the Union Pacific interests. I don't know what Mr. Harriman did. I don't want to be misunderstood. When I speak of the Union Pacific interests it may have been Mr. Harriman, or Mr. Pierce, or Mr. Schiff, or somebody else. I know nothing about the names. I only know I heard in Aix, where I was, that the Union Pacific interests had acquired control of the Northern Pacific.

Q. And you, having been the fiscal agent of the Northern Pacific, took steps at the same time to protect the control of the road, undoubtedly?

A. In that connection I will tell you that part of it here now.

Q. You might just as well.

A. When I heard that, I felt in this position: We had reorganized the Northern Pacific. We had placed all the securities of the Northern Pacific, and I knew, as I had always supposed, that there were people—friends of ours and other people—who held practically enough Northern Pacific—we always supposed we had with us people upon whom we could depend to protect our moral control of the property—and consequently when that news came to me I hadn't any doubt about the fact of the matter, and at the same time
221 this news came so strong, whoever had acquired it, I felt something must have happened. Somebody must have sold. I knew where certain stocks were, and I figured it up. I feel bound in all honor when I reorganize a property and am morally responsible for its management to protect it, and I generally do protect it; so I made up my mind that it would be desirable to buy 150,000 shares of stock, which we proceeded to do, and with that I knew we had a majority of common stock, and I knew that actually gave us the control, and they couldn't take the minority and have it sacrificed to the Union Pacific interests." * * *

And again (fols. 1372–1375):

"Q. And then you had that in your own mind to have a holding company for the Northern Pacific.

A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger; that is to say our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want to go on indefinitely, and I thought the best plan was to go to some trust company. My idea was first to go to some trust company to take the Northern Pacific stock and hold it?

Q. That is, to hold control?

A. Hold control of the stock. Just to surrender it to them and take their receipt.

Q. For the purpose of keeping control in one place?

A. No; not alone to keep it in one place, but to keep it so that the policy of the company upon which its future depended could be continued. We didn't want convulsions going on. You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. What I wanted to accomplish was to put that stock so that it could be protected—to maintain the policy of the company as it then existed.

Q. Held in one hand, in other words?

A. No; not in one hand, because it could be held in third
222 hands. I wanted it so that I could go to Europe and not hear next day that somebody had bought it for the Boston and Maine, or I don't know what other company. I wanted the Northern Pacific stock put where nothing could interfere with the policy I had inaugurated and for the carrying out of which we were perfectly satisfied and morally responsible."

Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

vs.

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of William Mahl.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA, State and County of New York, } ss:

William Mahl, being duly sworn, deposes and says:

I. I reside in the city, county and State of New York and for several years have been comptroller of complainant, Oregon Short Line Railroad Company and of other railroad companies and have had many years' experience as an accountant, auditor and comptroller.

II. On the 12th day of May, 1904, at the request of Mr. E. H. Harriman, president of the Oregon Short line Railroad Company, I I examined, in the office of the Northern Securities Company, entries in the journal, ledger and cash book of said company relating to the shares of the capital stock of the Northern Pacific Railway Company deposited with said Securities Company on November

18th, 1901, by E. H. Harriman and Winslow S. Pierce who held the same for said Oregon Short Line Railroad Company. The books of said Securities Company were produced for such examination by Mr. Edward T. Nichols, the secretary of
223 said company who was present during the examination. On the 13th day of May, 1904, I examined at the office of the Northern Pacific Railway Company in New York city entries in the cash book of said railway company relating to the conversion of the preferred stock of said railway company of the aggregate par value of $41,085,000, delivered by said Harriman and Pierce to said Securities Company, which book was produced for such examination by Mr. George H. Earl, secretary and assistant treasurer of said railway company, who was present during such examination. I was unable to examine the ledger and journal of the Northern Pacific Railway Company because I was informed by Mr. Earl that said books were kept in St. Paul, Minnesota, and that his books pertained only to cash transactions.

III. I found that the books of the Northern Securities Company show that said company received from E. H. Harriman and Winslow S. Pierce the $37,023,000, par value of the common stock and $41,085,000, par value of the preferred stock of the Northern Pacific Railway Company referred to in the original and amended bills of complaint in this suit. Upon such books is an account styled "Investment account No. 1," which purports to show the preferred stock of the Northern Pacific Railway Company held by said Securities Company and another account styled "Investment account No. 2" purporting to show the common stock held by said Securities Company and another account styled "Investment account No. 3" showing stock of the Great Northern Railway Company held by said Securities Company. Upon the journal of said Securities Company there are two entries reading as follows:

1901, Nov'b'r 18th.

Investment Account No. 1—To Capital Stock a/c.

For 410,850 shs. N. P. pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day.....	8,915,629
Balance paid in stock.....,	32,169,371

Say 321,693 shs. & $71. scrip issued as fully paid up stock @ par."

224 " Nov'b'r 18.

Investment Account No. 2—To Capital Stock a/c.

For 370,230 shs. North'n Pac. common stock purchased from E. H. Harriman & Winslow S. Pierce with the rights conferred thereon by resolution of the directors of the N. P. Ry. Co. adopted Nov. 13th, 1901, and paid for with 503,225,087½ shs. capital stock of Northern Securities Co. issued as fully paid up stock @ par..... 50,322,500.87½"

These entries appear to have been regularly carried into the capital and investment accounts of the Securities Company. I was informed by Mr. Nichols that the charges of $32,169,371, and of $50,322,500.87½ on account of the preferred and common stock of the Northern Pacific Railway Company referred to in said entries were merely an arbitrary apportionment of the cost of the entire stock received from Harriman and Pierce.

The only preferred stock of the Northern Pacific Railway Company which was ever deposited with the Northern Securities Company or passed into its possession, so far as I was able to ascertain from said books was the $41,085,000. par value delivered to it by complainants Harriman and Pierce.

IV. The books of said Securities Company show that the alleged retirement of $34,703,000 of said preferred stock, the purchase of $34,709,062.50 of the convertible bonds or "convertible certificates of indebtedness" of the Northern Pacific Railway Company and the conversion of said bonds into the common stock of said railway company referred to in the affidavit of Edward T. Nichols, verified on the 2 day of May, 1904, occurred on the same day, to wit, the 27th day of December, 1901, and appear to have been different parts of and together constituting actually but one transaction. There is an entry upon the journal of the Northern Securities Company showing that on December 27, 1901, it paid to the Northern Pacific Railway Company $34,709,062.50 for the "convertible certificates of indebtedness" of said railway company issued in the process of converting its preferred stock into common stock. I asked to see the cheque with which such payment was made and was shown by said Edward T. Nichols the original cheque which was dated December 27, 1901, was drawn by said Northern Securities Company upon J. P. Morgan & Co. in favor of the Northern Pacific Railway Company and was endorsed by said railway
225 company for payment to the order of J. P. Morgan & Co. A true copy of said cheque and of the endorsement thereon is annexed hereto as Exhibit No. 1. Said cheque was marked paid December 27, 1901. There was upon the cash book of said Securities Company an entry showing that said company received on the 27th day of December, 1901, from the Northern Pacific Railway Company $34,709,000. to pay off and retire that amount of the

$41,085,000. preferred stock of said railway company delivered to said Securities Company by complainants Harriman and Pierce. I was informed by said Edward T. Nichols that said payment was made by the cheque of said railway company. Subsequently upon my request I was shown said cheque by George H. Earl, the assistant treasurer of the Northern Pacific Railway Company. It was dated December 27, 1901, was drawn by said railway company upon J. P. Morgan & Co. in favor of the Northern Securities Company and was endorsed by said Securities Company for payment to the order of J. P. Morgan & Co. and was marked paid December 27, 1901. A true copy of said cheque and of the endorsement thereon is annexed hereto and marked Exhibit No. 2. I also saw in the books of said companies entries showing that on December 27, 1901, the "convertible certificates of indebtedness" of the Northern Pacific Railway Company of the face value of $34,709,062.50 purporting to have been bought as above stated on December 27, 1901, were on the same day converted into the common stock of the Northern Pacific Railway Company. Upon an examination in the office of George H. Earl, assistant treasurer of the Northern Pacific Railway Company, made by me as aforesaid on the 13th day of May, 1904, I found that a "temporary certificate for common stock" No. 2 for 347,090 shares dated December 27, 1901, was issued to the Northern Securities Company in exchange for $34,709,062.50 of the convertible certificates of indebtedness of said railway company. Said temporary certificate No. 2 is marked "cancelled January 11, 1901, J. P. M. & Co." and has noted thereon "exchanged for engraved certificate." I was informed by Mr. George H. Earl, assistant secretary and treasurer of the Northern Pacific Railway Company that in converting $34,709,000. of the preferred stock of the Northern Pacific Railway Company into new common stock the Securities Company subscribed for $34,709,062.50 convertible bonds "so as to put the railway company in funds with which to pay for the same amount of preferred stock" and that thereupon the railway company drew its cheque in favor of the Securities Company for
226 $34,709,000. to pay for preferred stock for that amount. Mr. Earl informed me that a special bank account was kept exclusively for the transactions in connection with the conversion of the preferred stock and the cheques drawn against said account were headed "Retirement of preferred stock of Northern Pacific Railway Company." The account was kept with J. P. Morgan & Co. It appears to have been opened on the 26th day of December, 1901, the deposits during the 26th and 27th days of December, 1901, aggregated $36,269,287.50 of which the cheque of the Northern Securities Company above referred to for $34,709,062.50 was a part, while the cheques drawn against said account during said 26th and 27th days of December amounted to $35,671,500. which included the cheque for $34,709,000. drawn in favor of the Northern Securities Company on the 27th of December, 1901, as above stated.

V. The journal of the Northern Securities Company contains an entry under date of January 2, 1902, which reads as follows:

"1902, Jan'y 2.

Bills Payable to Investment Account No. 1.

For proceeds of 63,760 shs. North. Pac. pfd. stock handed to J. P. Morgan & Co. of collection from N. P. Ry. Co. @ par J. P. M. & Co. collected same and applied proceeds in liquidation of their loan of $9,000,000 Nov'b'r 18th, 1901, to Northern Securities Co. See J. P. M. & Co.'s letter of Jan'y 2nd, 1902, as authority for this entry..... $6,376,000.00"

Upon my request therefor said Edward T. Nichols exhibited to me the letter from J. P. Morgan & Co., dated January 2, 1902, which contained a reference to the subject of the above entry as follows: "We are also crediting your account today with $6,376,000. proceeds of 63,760 shares Northern Pacific preferred stock retired." Upon inquiry on May 13, 1904, of said George H. Earl, I was informed that the said sum so collected by the said Morgan & Co. was included in a cheque drawn by said railway company in favor of J. P. Morgan & Co. and upon J. P. Morgan & Co., dated December 30, 1891, for $9,251,800. A memorandum on the cheque book of said railway company showed that such cheque was given to retire the preferred stock of said railway company but did not show the individuals in whose names such shares were standing. A copy of said cheque is annexed hereto as Exhibit No. 3.

VI. I was informed by counsel for complainant that it was
227 necessary that the affidavit giving the result of my examination must be prepared in time to be served May 16, 1904, and therefore I did not have time to and did not make an examination of all of the entries in the books of the Northern Securities Company or Northern Pacific Railway Company relating to the holding by the Securities Company of the stock of the Northern Pacific Railway Company nor did I examine the said books in any respect except as herein stated. I made no examination of the stock records and transfer books of either of said companies.

WM. MAHL.

Subscribed and sworn to before me this 16th day of May, 1904.

[L. S.] J. B. MAXWELL,
Notary Public No. 51, New York County, New York.

EXHIBIT No. 1.

No. 21. NEW YORK, December 27th, 1901.

J. P. Morgan & Co.

Pay to the order of Northern Pacific Railway Co. thirty-four million seven hundred nine thousand and sixty-two 50/100 dollars.

NORTHERN SECURITIES CO.,
By W. P. CLOUGH, 4th Vice Pres't.
EDW'D T. NICHOLS, Treasurer.

$34,709,062.50.

[Copy of endorsement on back.]

Pay to the order of J. P. Morgan & Co. Northern Pacific Railway Company.

GEO. H. EARL,
Ass't Treasurer.

228 EXHIBIT No. 2.

"Redemption of Preferred Stock of Northern Pacific Railway Company.

No. 5. NEW YORK, Dec. 27, 1901. $34,709,000.

J. P Morgan & Co.

Pay to the order of Northern Securities Company thirty-four million, seven hundred nine thousand no/— dollars.

NORTHERN PACIFIC RAILWAY COMPANY,
By GEO. H. EARL, Assistant Treasurer."

Countersigned:
D. S. LAMONT,
Vice President."

[Copy of endorsement on back.]

"Pay to the order of J. P. Morgan & Co.
EDW. T. NICHOLS, Treas'r."

EXHIBIT No. 3.

Redemption of Preferred Stock of Northern Pacific Railway Company

No. 177. NEW YORK, Dec. 30, 1901. $9,251,800.

J. P. Morgan & Co.

Pay to the order of J. P. Morgan & Co. nine million two hundred fifty one thousand, eight hundred no / 100 dollars.

NORTHERN PACIFIC RAILWAY COMPANY,
By GEO. H. EARL, Assistant Treasurer.

Countersigned:

D. S. LAMONT,
Vice President.

229 Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

vs.

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC Railway Company, Defendants.

Affidavit of Otto C. Kahn.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA, State, County, and City of New York, } ss:

Otto C. Kahn, being duly sworn deposes and says:

I. I am the transfer agent of the Union Pacific Railroad Company, and its affiliated companies, and was appointed transfer agent in October 1898, since which time I have had charge of the issue and transfer of the capital stock of said companies, and am and have been for many years familiar with the method of issuing and transferring stocks. I have read the affidavit herein of Alexander Millar, verified the 20th day of April 1904, and concur in the statement made by him in the fourth paragraph thereof, that it is "entirely feasible and a common occurrence to trace the origin of a certificate of stock outstanding and to show to whom the first issue of the stock was made and for what consideration, and to whom it

has subsequently been transferred, no matter how many transfers have been made in the meantime."

II. On May 13, 14 and 16, 1904, I examined the books of the Northern Securities Company. In the time at my disposal, I was unable to make a full and complete examination of said books, as it would require a great deal of time to make a thorough and sufficient examination thereof.

I have read the affidavit filed in this suit verified by Edward T. Nichols on the 2nd day of May, 1904, in which he speaks of the transfers of the certificates of stock of the Northern Securities Company, and I do not agree with the statement made by him that

"whenever the stock of the company represented by a cer-
230 tificate has passed through collective transfers, it cannot be traced back to any original issue without making arbitrary assumptions." I have carefully noted the tracings by him in said affidavit of the last certificate of the stock of the Northern Securities Company issued April 18, 1904, for fifty shares and numbered B–6673. I have also carefully examined the transfers of this certificate of stock on the books of the Northern Securities Company. In my opinion, there is no room for any arbitrary assumption as to the original issue to which such certificate can be traced. The certificate can, in my opinion, be traced directly through the various transfers to the original certificate of stock for 50 shares numbered A–437, for 36,656 shares issued against Northern Pacific stock.

The apparent difficulty suggested by Mr. Nichols lies in the tracing of the certificate through the transfer of stock of December 14, 1903, which appears as follows on the books of the Northern Securities Company:

Date.	Certificates surrendered.			Certificates issued.		
	Ctf. No.	Shares.	Standing in name of	Ctf. No.	Shares.	Issued in name of
1903. Dec. 14	36116-7	200	Paul Dana, adm'r estate Eunice M. Dana.	B—6116-19	200	Paul Dana, adm'r estate Eunice M. Dana.

The foregoing is an abbreviated form of the following entry:

Date.	Certificates surrendered.			Certificates issued.		
	Ctf. No.	Shares.	Standing in name of	Ctf. No.	Shares.	Issued in name of
1903. Dec. 14	36116	100	Paul Dana, adm'r estate Eunice M. Dana.	B—6116	50	Paul Dana, adm'r E. M. D. est.
				B—6117	50	Paul Dana, adm'r E. M. D. est.
	36117	100	Paul Dana, adm'r estate Eunice M. Dana.	B—6118	50	Paul Dana, adm'r E. M. D. est.
				B—6119	50	Paul Dana, adm'r E. M. D. est.

The first two certificates on the credit side of the account numbered B–6116 and B–6117 represent the stock represented by the first certificate on the debit side of the account, viz., certificate 36116 for 100 shares of the stock of the Northern Securities Company.

If the entry of certificate 36116 had been at the bottom of the page of the stock book, and if the entry of certificate 36117
231 had been at the top of the next page of the stock book, Mr. Nichols would probably have no hesitation in saying that the certificates B–6116 and B–6117 for 50 shares each represented the stock which had theretofore been represented by the 100 share certificate 36116 opposite thereto; and no one would have doubted but that the certificates B–6118 and B–6119 for 50 shares each on the credit side of the stock book opposite the entry of certificate 36117 originated from said certificate 36117. The fact that the certificates surrendered were entered upon the same page in the stock book would make no difference whatever as to the tracing the new certificates to their original issue, inasmuch as it is well understood by all transfer agents and persons familiar with the keeping of such books and the methods of issuing and transferring stock that the new certificates of stock upon the credit side of the stock book represent the original certificates for the same amount on the debit side of the stock book opposite thereto. In other words, in such a case as that suggested by Mr. Nichols, the two new certificates for 50 shares each which are *first entered in the stock book* represent the old certificate for 100 shares which is also *first entered therein*.

III. While I have been unable in the short time at my command to make an exhaustive and sufficient examination of the books of the Northern Securities Company, yet from such examination as I have had an opportunity to make, I find that such a situation as that suggested by Mr. Nichols was of comparatively rare occurrence in all the transfers of the stock of the Northern Securities Company, and even if Mr. Nichols had been correct in his statement that the stock transferred, as in the illustration given by him, could not be traced back to any original issue without making arbitrary assumptions (which statement I deny), yet such a contingency has occurred so seldom in the transfers of the shares of the stock of the Northern Securities Company that it is a matter of little significance when compared with the great mass of transfers of stock.

IV. In the affidavit of Mr. Nichols above referred to, he states that "the Northern Securities Company has made purchases as one transaction, from the same persons, of both Northern Pacific and Great Northern stocks in varying amounts, and has issued and delivered in payment therefor certificates of its own stock aggregating such purchase price, but in no way specifically related to the purchase price of either one or the other of said railway stocks."

I find on examining the books at the office of the Northern
232 Securities Company that in addition to the transfer books, there are two books of original entry, one called the

"Northern Pacific Record" and the other the "Great Northern Record," showing the original deposit of the stock of the said companies and the issue of certificates of stock of the Northern Securities Company in return therefor. I have examined these two books of original entry, and find that the statement of Mr. Nichols just quoted is not strictly accurate, and that there is only a single instance of the purchase *as one transaction* of both Northern Pacific and Great Northern stock, and in this instance, there were no "persons" concerned, but only a single person—Mr. James J. Hill.

OTTO C. KAHN.

Subscribed and sworn to before me this 16th day of May, 1904.

[L. S.] CHARLES FRANKLIN,
Notary Public No. 69, New York County.

Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
versus
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of Winslow S. Pierce.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, } *ss:*

Winslow S. Pierce, being duly sworn, deposes and says:

Referring to my affidavit, verified May 16, 1904, in this suit, my attention has been called to the fact after the arrangement with Messrs. J. P. Morgan & Co. to accept shares of the holding
233 company for the Northern Pacific stock held by the Oregon Short Line Company, as stated in Mr. Harriman's affidavit of May 16, 1904, and shortly before the organization of the Northern Securities Company (the exact date I do not recollect), I attended a meeting at which were present counsel representing Mr. Hill and his associates, counsel representing Messrs. J. P. Morgan & Co., and counsel representing the Oregon Short Line interests. At such meeting a form of certificate of incorporation of a holding company was submitted by counsel representing Mr. Hill and was discussed. The form thus submitted and discussed was to the best of my recol-

lection substantially the same as that subsequently used in the incorporation of the Northern Securities Company. The formation of the holding company had been previously decided upon by interests other than our own and in the decision to form such a company I had no part.

WINSLOW S. PIERCE.

Subscribed and sworn to before me this 19th day of May, 1904.

[L. S.] JAMES L. MOCK,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

Mandate.

(Filed June 15, 1904.)

UNITED STATES
vs.
NORTHERN SECURITIES COMPANY.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the [SEAL.] district of Minnesota, Greeting:

Whereas, lately in the circuit court of the United States for the district of Minnesota, before you or some of you, in a cause between The United States of America, complainant, and The Northern Securities Company, The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William
234 P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, defendants, No. 789, in equity, wherein the decree of the said circuit court, entered in said cause on the 9th day of April, A. D. 1903, is in the following words, viz:

"This cause came on to be heard at this term and was argued by counsel (Hon. Philander C. Knox, the Attorney General, Mr. D. T. Watson, special counsel, Mr. James M. Beck and Mr. W. A. Day, assistant attorneys general and Mr. John M. Freeman, appearing for the United States, and Mr. George B. Young, Mr. John W. Griggs, Mr. M. D. Grover, Mr. C. W. Bunn, Mr. Francis Lynde Stetson and Mr. David Willcox, appearing for the defendants); and thereupon, upon consideration of the evidence and the arguments.

"It was ordered, adjudged and decreed as follows, to-wit.

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July

2, 1890, entitled an 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.

"That all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.

"That the Northern Securities Company, its officers, agents, servants and employés be and they are hereby enjoined from acquiring, or attempting to acquire further stock of either of the aforesaid railway companies;

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the
235 Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold;

"And that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Companies or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor.

"HENRY C. CALDWELL,
"Presiding Judge,
"WALTER H. SANBORN,
"AMOS *N.* THAYER,
"Circuit Judges."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and three, the said cause
236 came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby affirmed, with liberty to the circuit court to proceed in the execution of its decree as the circumstances may require.

March 14, 1904.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of April, in the year of our Lord one thousand nine hundred and four.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Prudential Building, 763 Broad Street,
NEWARK, N. J., June 14, 1904.

Hon. Edward G. Bradford, Wilmington, Del.

DEAR SIR: I send you herewith a certified copy of the mandate of the Supreme Court in United States *vs.* The Northern Securities Company. Mr. Johnson telegraphs me his consent that the mandate and the decree, which is embodied in it, shall be considered by the court on the application for a preliminary injunction in the Harriman case and you may take this letter as *as* giving our consent and also our consent that it be filed as an exhibit on behalf of the complainants.

I am yours truly, R. V. LINDABURY.

Enclosure.

Received Hotel Wilmington, Wilmington, Del.
6 P MB SN 18 paid 6/11/4
Phila 11

Edward G. Bradford, U. S. circuit court, Wilm'n:

I have written landabury expressing entire acquiescence and have asked him to forward copy of decree and mandate.

JOHN G. JOHNSON 1129 AM

237 Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company, Complainants,
against
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of Edward T. Nichols.

(Filed May 20, 1904.)

STATE OF NEW YORK, City and County of New York, } *ss:*

Edward T. Nichols, of full age came before me this day and having been first duly sworn, did depose and say: I am secretary of the said defendant Northern Securities Company. Annexed hereto are true copies of portions of volume 1 of "Transcript of Record, Supreme Court of the United States, October term, 1903, No. 277, The Northern Securities Company and others, appellants, *vs.* The United States," on appeal from the circuit court of the United States, from the district of Minnesota; said portions being depositions and testimony of Edward H. Harriman and W. P. Clough, respectively, introduced and read in evidence in the said suit, as appears upon said copies.

EDW. T. NICHOLS,

Subscribed and sworn to before me this 2nd day of May, A. D. 1904.

FRANCIS M. KELLER,
[L. S.] Notary Public, N. Y. C.

Depositions of E. H. Harriman.

Testimony of Edward H. Harriman, given before the Interstate Commerce Commission, at Chicago, Illinois, on January 25, 1902, and introduced in evidence by the plaintiff in the suit of The United States of America *vs.* Northern Securities Company and others, in the circuit court of the United States for the district of Minnesota.

238 EDWARD H. HARRIMAN, being duly sworn, testified as follows:

Mr. Day: Please give the stenographer your full name.

Mr. Harriman: Edward H. Harriman.

Mr. Day: And state your official relations to the Union Pacific railway.

Mr. Harriman: Chairman of the executive committee.

Mr. Day: Of the board of directors?

Mr. Harriman: Of the executive committee, and a member of the board of directors.

Mr. Day: And your official relations to the Oregon Short Line?

Mr. Harriman: President.

Mr. Day: And the Oregon Railway and Navigation Company?

Mr. Harriman: I think that is chairman of the executive committee.

Mr. Day: And the Southern Pacific?

Mr. Harriman: President.

Mr. Day: And member of the board of directors?

Mr. Harriman: Yes, sir.

Mr. Day: Have you any relations to the Chicago and Alton Railway Company?

Mr. Harriman: A director. I am a member of the executive committee. I think I am chairman of that, too.

Mr. Day: Are you officially related to the Chicago and Alton Railroad Company?

Mr. Harriman: I am a director I say.

Mr. Day: Of the old organization?

Mr. Harriman: I think so.

Mr. Day: Who appointed Mr. Stubbs, the traffic manager of your system?

Mr. Harriman: The various companies.

Mr. Day: What companies?

Mr. Harriman: The ones that he may be director of traffic of. It is all set out—Union Pacific and Southern Pacific.

Mr. Day: What part did you take in his appointment, in selecting him, in naming him as traffic director?

Mr. Harriman: One vote in the board of directors.

Mr. Day: You simply voted for him in the board of directors?

Mr. Harriman: Yes, sir.

Mr. Day: Was his appointment agreed upon before the vote was taken?

Mr. Harriman: I can not say it was agreed upon. There is a difference between agreeing and understanding.

239 Mr. Day: Well, understanding?

Mr. Harriman: Of course, in all such matters that come before the board of directors they are not asked to be decided at once. Usually they are talked over in board meetings and decided at a future meeting. I can not say now how the selection of Mr. Stubbs was brought about.

Mr. Day: Now, the understanding which preceded his final appointment, what was said to be the scope—what was said respecting the scope of the new office about to be created, called a traffic director?

Mr. Harriman: Well, that is very difficult to remember just what was said. I think the intention was, if that is what you want, that Mr. Stubbs was too far away from the center of traffic controlled or too valuable a man to keep out of the Pacific slope. He could not come into contact with the other bright minds arranging the traffic of the different railroads and the methods of conducting it.

Mr. Day: What were proposed to be the duties of the traffic director; what was said?

Mr. Harriman: A general supervision of the traffic in coöperation with the various presidents of the different systems.

Mr. Day: Was he given control—direction of traffic?

Mr. Harriman: No, sir.

Mr. Day: By the routes and lines of your system?

Mr. Harriman: No, sir.

Mr. Day: What was said in respect to that?

Mr. Harriman: That he should advise with the traffic officers of the various systems and presidents.

Mr. Day: You mean the various lines comprising the system?

Mr. Harriman: Yes, sir.

Mr. Day: Was anything said about an excess of traffic going by one route over another, or one line or route getting a less share of the traffic than some might think was its due?

Mr. Harriman: No, sir.

Mr. Day: Was that subject discussed at all?

Mr. Harriman: No, sir.

Mr. Day: About a division of the traffic, and apportioning it fairly and justly between the lines composing your system?

Mr. Harriman: No, sir.

Mr. Day: At no time among the members of the board of directors, so far as you know, was that discussed?

Mr. Harriman: I do not remember that that subject ever came up. I think the word "director" is perhaps misunderstood.

240 He is not director of the traffic to go by one line as against the other, but in the sense of being a director having charge of the traffic departments of the several lines, so that he could work

in coöperation with the officers of those lines, just as I am a director of these various lines, but I can not direct the affairs of those companies.

Mr. Day: You are one of a number that my direct them?

Mr. Harriman: Decide questions brought before them.

Mr. Day: Mr. Stubbs is not a director of any of the railroads?

Mr. Harriman: Not at present.

Mr. Day: Was the power to raise or make rates committed to Mr. Stubbs?

Mr. Harriman: In coöperation with the officers of the various lines.

Mr. Day: That was discussed?

Mr. Harriman: In the board of directors?

Mr. Day: Yes, sir.

Mr. Harriman: I think not.

Mr. Day: Well, whether sitting as a board or members of the board together discussing the subject, what are the limits of Mr. Stubbs' powers as traffic manager?

Mr. Harriman: Well, I think I have answered that. He can arrange the matters pertaining to the traffic departments by advising with and coöperating with the executive officers and traffic officers of the systems.

Mr. Day: Has he power to direct whether traffic shall go by the route of the old Southern Pacific, the most southerly route to the Pacific coast, rather than what was originally the Union Pacific and Central Pacific?

Mr. Harriman: I do not think Mr. Stubbs or any other man could direct that.

Mr. Day: Well, there are instances where the shipper does not direct that?

Mr. Harriman: I do not know of any instance. In any event, Mr. Stubbs has no more control of that now than he had before he was brought to Chicago.

Mr. Day: I remember an instance testified to in this city where many hundred carloads of traffic were consigned by the shipper over one of the trunk lines and that trunk line turned it over to a rival trunk line. The shipper had no voice.

Mr. Harriman: We are not a trunk line. I do not know about those matters. But I do not know of any instance in the Southern Pacific.

241 Mr. Day: I am asking you whether he has the power to do that?

Mr. Harriman: You are giving an illustration, and I do not think it is a fair one. The affairs of the Southern Pacific have always been conducted on certain lines and are still conducted that way.

Mr. Day: What I am endeavoring to do is to determine what those lines are on which it is now conducted. What are the powers of Mr. Stubbs? I can only know from what you say and Mr. Stubbs testifies. I have no other knowledge. I want to know the limits of

his powers, what he is expected to do and does do under the direction of your board or chairman of the executive committee.

Mr. Harriman: I tried to answer that.

Mr. Day: You have answered fully?

Mr. Harriman: I think I have. I do not know that there is anything more.

Mr. Day: Well, we will pass that. Now, the Union Pacific Railway Company; what are the relations between the Union Pacific and Southern Pacific Company?

Mr. Harriman: Connecting lines.

Mr. Day: Anything else?

Mr. Harriman: No, sir.

Mr. Day: Has the Union Pacific any stock interest in the Southern Pacific?

Mr. Harriman: Yes, sir.

Mr. Day: What is that?

Mr. Harriman: You mean the amount?

Mr. Day: Yes, sir; the extent of it.

Mr. Harriman: I think between 35 and 40 per cent.

Mr. Day: Of the entire capital stock?

Mr. Harriman: Yes, sir.

Mr. Day: How was that interest acquired?

Mr. Harriman: By purchase.

Mr. Day: Any other interest in the Southern Pacific except what results from that ownership?

Mr. Harriman: No, sir.

Mr. Day: No lease?

Mr. Harriman: No, sir.

Mr. Day: No guaranty of dividends?

Mr. Harriman: No, sir.

Mr. Day: Or bonds?

Mr. Harriman: Nothing whatever.

242 Mr. Day: Approximately in round numbers what does that at par value amount to?

Mr. Harriman: About $75,000,000.

Mr. Day: And the capital stock of the Southern Pacific is what?

Mr. Harriman: Two hundred millions; within a million or two of that.

Commissioner Clements: Is that held by the Union Pacific Company itself, or the people interested in it?

Mr. Harriman: That is held by the Union Pacific.

Commissioner Clements: The corporation?

Mr. Harriman: The corporation.

Mr. Day: Is it carried on the books of the Southern Pacific as the property of the Union Pacific?

Mr. Harriman: I do not remember whether it is or not.

Mr. Day: Who votes the stock?

Mr. Harriman: I think that stock stands in the name of one or two directors of the Union Pacific.

Mr. Day: As trustees?

Mr. Harriman: In their individual names, I think; I do not remember.

Mr. Day: In your annual report it is carried as the property of the Union Pacific Railroad Company.

Mr. Harriman: It so states in the report; yes, sir.

Mr. Day: Who are those gentlemen that vote that stock?

Mr. Harriman: I think I am one. I know I am one. I think the other is Mr. Pierce.

Mr. Day: Winslow?

Mr. Harriman: Winslow Pierce; I think so.

Mr. Day: You are president of the Oregon Short Line, are you not?

Mr. Harriman: Yes, sir.

Mr. Day: What interest has the Union Pacific in the Oregon Short Line?

Mr. Harriman: It owns its stock.

Mr. Day: Approximately all of it?

Mr. Harriman: Well, I think approximately all.

Mr. Day: Has the Union Pacific Company any interest in the Great Northern Railroad Company?

Mr. Harriman: No, sir.

Mr. Day: Proprietary; share owner, or otherwise?

Mr. Harriman: No, sir.

Mr. Day: Has it in the Northern Pacific railway?

243 Mr. Harriman: No, sir.

Mr. Day: Has the Oregon Short Line any interest in the Northern Pacific Railway Company?

Mr. Harriman: No, sir.

Mr. Day: Has the Union Pacific had any interest as a share owner in the Northern Pacific Railway Company?

Mr. Harriman: No, sir.

Mr. Day: Has the Oregon Short Line had?

Mr. Harriman: Yes, sir; that states in the report that we had about seventy-eight millions of Northern Pacific stock.

Mr. Day: When did the Oregon Short Line acquire that?

Mr. Harriman: Last spring. I do not remember exactly.

Mr. Day: Prior to last spring had the Oregon Short Line any interest as owner in the Northern Pacific Railroad Company?

Mr. Harriman: Prior to last spring, not to my knowledge. It may have some years back. I do not know.

Mr. Day: What is the total capital stock of the Oregon Short Line?

Mr. Harriman: I think between twenty-seven and twenty-eight millions.

Mr. Day: It purchased how much stock of the Northern Pacific?

Mr. Harriman: Seventy-eight millions.

Mr. Day: How did it pay for that stock?

Mr. Harriman: Some in cash and some by issuing its own obligations against that stock.

Mr. Day: How much cash did it pay approximately?

Mr. Harriman: Fifteen or twenty million dollars.

Mr. Day: That came out of its own treasury?

Mr. Harriman: Yes, sir.

Mr. Day: How was the money raised by the Oregon Short Line to acquire the balance of $60,000,000?

Mr. Harriman: By issuing its own certificates of indebtedness.

Mr. Day: Who did it issue the certificates to. What I want——

Mr. Harriman: What you want is to find out if the Union Pacific has any interest in that purchase?

Mr. Day: Yes, sir.

—. Harriman: I want to be frank about it. The Union Pacific helped the Oregon Short Line to finance it and purchased from the Oregon Short Line the certificates of indebtedness, the money for which it was used in paying for the Northern Pacific stock.

Mr. Day: The sixty-one millions of that purchase money came out of the Union Pacific treasury, practically?

244 Mr. Harriman: Yes, sir.

Mr. Day: Directly or indirectly?

Mr. Harriman: Yes, sir.

Mr. Day: Now, the Union Pacific owns $75,000,000 of the Southern Pacific stock—a controlling interest?

Mr. Harriman: Oh, no.

Mr. Day: Practically so?

Mr. Harriman: I do not know.

Mr. Day: The Union Pacific does control it?

Mr. Harriman: There are some of them members of the board of directors, but there are others also.

Mr. Day: Speaking to the substance of the thing, rather than the legal aspects, the Union Pacific now does control it?

Mr. Harriman: Anybody that had seventy-five millions out of two hundred millions would have a strong influence in making up the board.

Mr. Day: But, as a matter of fact, the Union Pacific does control the Southern Pacific system, does it not, to-day?

Mr. Harriman: For instance, the Union Pacific might tomorrow sell its seventy-five millions and then it would not.

Mr. Day: I am speaking of to-day—your actual possession, irrespective of the seventy-five millions. Does the Union Pacific interest to-day control the Southern Pacific railroad.

Mr. Harriman: You mean without any other voice; any other interest?

Mr. Day: Does it not operate it to the same extent it operates the Oregon Railway and Navigation Company?

Mr. Harriman: Not quite. Hardly. There are other interests represented in the Southern Pacific, and it is not always harmonious.

Mr. Day: But the actual control of the property?

Mr. Harriman: Usually the voice of the Union Pacific representatives controls; that is, they impress on the board of directors the

matters they have in hand for the benefit of the Southern Pacific or those that are best to be done. For instance, I will give an illustration of that. As you probably all know, the Union Pacific has during the last two or three years expended a very large amount in repairs, you might say, and improving its own property. It has done so to the extent of $25,000,000 or $30,000,000 and has put itself in a position where it can operate to the best advantage and give the best service in the territory served by it. In taking the Southern Pacific in hand, the Union Pacific interests considered that
245 that same method should be adopted as to the Southern Pacific. Some of the representatives of the other stockholders thought not, but the voice of the Union Pacific representatives prevailed. There are some twenty millions to be expended this year in improving the Southern Pacific on the same basis as the Union Pacific.

Commissioner Prouty: What part of it?

Mr. Harriman: It will be distributed over the lines from New Orleans to Los Angeles, and from Los Angeles to San Francisco, and from San Francisco to Ogden.

Commissioner Prouty: Not especially between San Francisco and Ogden?

Mr. Harriman: No, sir. A large amount is to be expended there; I think one-third of it. It has been carefully gone over, and I think distributed over the whole line; and there is also motive power to be distributed over the line; there are, I think, 180 engines—large locomotives—to be provided.

Commissioner Fifer: What is the character of the improvements?

Mr. Harriman: Reduction of grades, elimination of curvature, and elimination of the old light equipment.

Commissioner Prouty: How do you raise the money for that?

Mr. Harriman: We have not raised it all. Perhaps we would like a little advice on that subject. It is quite a large amount.

Commissioner Prouty: You do not seem to have had much difficulty in raising seventy-five or eighty millions when you wanted it?

Mr. Harriman: There is nothing like having good credit.

Mr. Day: Speaking of the facility for raising money, the sixteen millions that the Oregon Short Line did not get from the Union Pacific, did it get that out of its treasury or borrow it?

Mr. Harriman: It had a surplus in its treasury. I think it had several million surplus and it borrowed the rest.

Mr. Day: Not on the certificates.

Commissioner Prouty: Have you increased the mortgage obligations of the Union Pacific?

Mr. Harriman: In what time?

Commissioner Prouty: In making your improvements?

Mr. Harriman: Very little. We have not issued any direct obligations of the Union Pacific to make these improvements. When

I speak of the Union Pacific I refer to the Union Pacific system that includes the Oregon Short Line as well. But most of the improvements have been made through the Rocky Mountain districts; in fact, the improvement there was really—the elimination of
246 curvature was possibly 200 per cent. and the elimination of grades was substantially 100 per cent.

Commissioner Prouty: Is that substantially done?

Mr. Harriman: Substantially done; yes, sir.

Mr. Day: You have increased the bonded indebtedness of the Union Pacific the last year, or has it not been increased?

Mr. Harriman: I do not understand that question.

Commissioner Prouty: I asked as to the mortgage indebtedness, I think.

Mr. Harriman: No, sir; we have not increased it.

Mr. Day: How much of an increase in your bonded indebtedness has been effected in the past year, or to take the last year, the year preceding?

Mr. Harriman: Have you the Union Pacific report there?

Mr. Day: Yes, sir.

Mr. Harriman: You have not the one for the year previous, have you?

Mr. Day: No.

Mr. Harriman: I can only speak from memory.

Mr. Day: I will ask you this, then. How was the purchase of Southern Pacific stock financed? How was the cash acquired for the purchase of the Southern Pacific?

Mr. Harriman: I think we borrowed the money in the first instance.

Mr. Day: Then did you not issue some bonds to pay for that?

Mr. Harriman: You refer to convertible bonds?

Mr. Day: Yes, sir.

Mr. Harriman: I am not trying to hide the fact that I issued one hundred millions of convertible bonds. That is one of the things we can not hide. There are one hundred millions of convertible bonds used in the purchase of these various securities that you see in the annual report of the Southern Pacific. I can not detail them now.

Mr. Day: You raised one hundred millions on those bonds?

Mr. Harriman: About one hundred million I think it was.

Mr. Day: Was any of that money used for improvements?

Mr. Harriman: No, sir.

Mr. Day: That was all used for the acquisition of new lines?

Mr. Harriman: New lines; yes, sir.

Mr. Day: And among others, the stock of the Southern Pacific?

Mr. Harriman: Some of it. I do not know whether it was altogether that. There may have been some other properties we acquired.

247 Commissioner Prouty: Have those bonds been actually sold?

Mr. Harriman: Yes sir.
Commissioner Prouty: What interest do they bear?
Mr. Harriman: Four per cent.
Commissioner Prouty: Did they sell for par?
Mr. Harriman: At par; yes, sir?
Mr. Day: Let me see if I understand you. The Union Pacific Railway Company owns seventy-five millions of the stock of the Southern Pacific Railroad Company or the Southern Pacific Company. The Union Pacific Company owns all, or nearly all, of the stock of the Oregon Short Line. The Oregon Short Line owns all, or nearly all, of the stock of the Oregon Railroad and Navigation Company.
Mr. Harriman: The Union Pacific?
Mr. Day: No; the Oregon Short Line.
Mr. Harriman: The Short Line has a considerable interest in the Navigation Company. I think our report shows that the Union Pacific owns considerable interest in that company.
Mr. Day: What the Union Pacific does not hold in the Oregon Railroad and Navigation Company the Short Line does?
Mr. Harriman: Not all.
Mr. Day: Practically?
Mr. Harriman: Practically.
Mr. Day: And the Oregon Short Line purchased seventy-eight millions of the common and preferred stock of the Northern Pacific Railroad Company last spring?
Mr. Harriman: That is about right.
Mr. Day: How is that stock held?
Mr. Harriman: In the Oregon Short Line railroad.
Mr. Day: In the name of that company?
Mr. Harriman: It is held for that company.
Mr. Day: In whose name?
Mr. Harriman: Harriman and Pierce.
Mr. Day: As trustees?
Mr. Harriman: No; I think in their names.
Mr. Day: But there is a memorandum, I suppose, of the trust under which you hold it?
Mr. Harriman: I think there must be. There would be naturally.
Mr. Day: Where is that memorandum?
Mr. Harriman: I suppose it is in the office of the Oregon Short Line.
Mr. Day: You are president of that company?
248 Mr. Harriman: Yes, sir.
Mr. Day: Is that stock still held in your name and that of your co-trustee, Mr. Pierce?
Mr. Harriman: Now, let us jump again. What you are trying to get at is whether we sold that stock. I had a talk with Commissioner Knapp and he said he would try to let me go on the train to-day, so I want to save time.

Mr. Day: Well, proceed and tell the whole history of that transaction.

Mr. Harriman: The Northern Pacific stock has been sold.

Mr. Day: All of it?

Mr. Harriman: All of it.

Mr. Day: I thought you wanted to go ahead and tell the whole story.

Mr. Harriman: Well, that is all you asked. There is no more story to tell.

Mr. Day: To whom was it sold?

Mr. Harriman: To individuals.

Mr. Day: Who are the individuals?

Mr. Harriman: I do not remember.

Mr. Day: When was the sale effected?

Mr. Harriman: Some time during the summer, I think, the last of August or September. It has been sold since July, September, or October, or August.

Mr. Day: How long before the meeting of the board of directors of the Northern Pacific Company was it sold?

Mr. Harriman: Oh, some time—I do not remember—thirty or sixty days, perhaps.

Mr. Day: Who negotiated for the sale of that stock?

Mr. Harriman: I did, principally.

Mr. Day: Were you authorized to make the sale by a vote of the board of directors of the Short Line?

Mr. Harriman: No, sir.

Mr. Day: Your action was without consultation with your co-directors?

Mr. Harriman: We had many talks.

Mr. Day: What were the terms of sale—what was the agreement respecting the sale?

Mr. Harriman: I do not mean for you to understand that there was no action by the board of directors of the Oregon Short Line but the final transaction; the Oregon Short Line authorized the sale to be made on the terms that were reported to it. In this instance it took no action as to authorizing negotiations.

249 Mr. Day: What were the terms reported to it?

Mr. Harriman: The sale of the stock.

Mr. Day: What were the terms of it?

Mr. Harriman: You mean what price we got?

Mr. Day: No; I do not care about the price, but the terms—the conditions of the sale?

Mr. Harriman: No conditions.

Mr. Day: A price was named?

Mr. Harriman: Yes, sir.

Mr. Day: You did not know who the purchasers were?

Mr. Harriman: I know to whom the stock was delivered. There were other people. I do not think it was all purchased by one house or one person.

Mr. Day: Do you know who it was purchased for?

Mr. Harriman: No, sir.

Mr. Day: Who participated in the conferences with you respecting the sale of that stock?

Mr. Harriman: Mr. Pierce, a partner of the firm of J. P. Morgan & Co., and, I think, Mr. Hill, and, possibly, Mr. Schiff.

Mr. Day: Where did those conferences take place?

Mr. Harriman: Some in the office of Morgan & Co., and some in my office.

Mr. Day: There had been a great contest between interests with which you were personally allied and interests with which Mr. Morgan, we may say, or Mr. Hill were allied, respecting the control of the Northern Pacific railroad last year?

Mr. Harriman: I am very glad of a chance to explain that. I do not think there had been any contest. The facts are that some of us allied with the Oregon Short Line or Union Pacific thought it would be advantageous to the Oregon Short Line to have an interest in the Northern Pacific, and we went about acquiring that interest and purchased the stock that was lying loose all over this country and in Europe. I suppose it was held by 6,000 or 7,000 people, and to our mind it ought not to make any difference to any other interest whether we owned the stock or whether it was held by several thousand other people. We made no contest for the purchase of the stock and no contest for the control of the road, and I may say here that prior to the supposed contest in the market that stock was acquired, and no stock was acquired during those days of panic in it, nor were any orders given by us.

Commissioner Prouty: You had already bought, and the question was whether the other fellow could deliver.

250 Mr. Harriman: Who do you mean by the other fellow?

Commission- Prouty: I do not mean Mr. Hill and his crowd, but the man from whom you bought the Northern Pacific stock. Had not you and others bought Northern Pacific stock from people that did not own or deliver it?

Mr. Harriman: I think this: Of course you know there are markets for American railway securities not only in this country, but in Germany, Holland, and England, and some of the stock that we had purchased had not been delivered, but was on its way from those various markets. It had been purchased in those markets and agreed to be delivered in New York, and of course in the meantime they were using stock of other people to make their deliveries. It was not all coming by any means to interests; it had been delivered very largely with interests associated with me.

The Chairman: Does that mean that it was not bought from persons that did not own it?

Mr. Harriman: No, sir; it was purchased in New York of agents who repurchased in these other markets. They tried to deliver in New York by borrowing from persons that owned it here. Then, when the contest took place and other parties went into the market

and purchased Northern Pacific at very high prices and demanded delivery of the stock, naturally those persons that purchased in other markets to deliver here found it difficult to get that stock to fill contracts in New York, and our interests in every instance gave them all the time they wanted to have the stock brought from the various markets from which they had purchased to deliver to us.

Commissioner Fifer: Were those the influences that sent Northern Pacific stock up to nearly a thousand dollars a share last year?

Mr. Harriman: Which ones?

Commissioner Fifer: Northern Pacific went up very high last May in New York, did it not?

Mr. Harriman: Yes, sir.

Commissioner Fifer: What were the influences?

Mr. Harriman: That is the contest, I think, that you gentlemen refer to. We were not in that contest and had no hand in it.

Mr. Day: That was not the contest my question referred to.

Commissioner Prouty: You say you did not suppose it made any difference to anybody whether you owned this stock or whether 7,000 persons owned it. If you had secured a few more millions of common stock of the Northern Pacific it would have made a difference to somebody, would it not?

251 Mr. Harriman: We could have secured it.

Commissioner Prouty: Do you mean you did not want it?

Mr. Harriman: We did not want it at anything like the price eventually paid for it.

Commissioner Prouty: You have sold that stock, the whole of it. Was that enterprise a profitable one or the reverse? I take it that finally the public has to pay for it if you lost money there; have to pay it in freight rates or in some way. Now, as bearing on the question whether railroad companies ought to have a right to speculate in stocks, I would like to know whether that enterprise was profitable.

Mr. Harriman: That was not gone into by the railroad company as a speculation in any way. We thought that a dominating influence, or a large influence, in the ownership of the Northern Pacific would secure to the Union Pacific system what was already a valuable connection, and keep open avenues of traffic which we thought our interests and the interests of the public and our duty to the public demanded.

Commissioner Prouty: And in that attempt you failed?

Mr. Harriman: Oh, no, we have not failed. We feared that there might be some change in the relations of the Northern Pacific and the territory served by it and the territory served by the Union Pacific, and perhaps the territories which the Union Pacific contemplated extending into.

Commissioner Prouty: Well, I understand that you started out to obtain a controlling interest in the Northern Pacific—a dominating interest in the Northern Pacific?

Mr. Harriman: Which we did do.

Commissioner Prouty: You have disposed of that interest?

Mr. Harriman: Yes, sir.

Commissioner Prouty: Why did you dispose of it—because it was not sufficiently dominating?

Mr. Harriman: No, sir; we disposed of it because we were satisfied that the natural conditions and the strength of the Union Pacific system in itself would protect it from any of the restrictions that might be put on the traffic originating on the lines of the Northern Pacific and prevent it from going over the natural avenues open to it.

Commissioner Prouty: In other words, when you looked over the whole situation you thought better of it?

Mr. Harriman: I hardly think that is fair to put it that way.

Commissioner Prouty: I would like to know why you changed your mind between the time you bought Northern Pacific
252 stock and the time you sold. Did Mr. Hill convince you that he was going to do the fair thing?

Mr. Harriman: I do not think we rely on anybody's assurance that there is going to be any fair thing done. Mr. Hill might not be in control of the properties he is in control of now. Who knows? He says he has only thirty or forty millions of it.

Commissioner Prouty: He very likely knows where he can find a few millions more.

Mr. Harriman: That may be. That is all right; and let me say Mr. Hill is all right also.

Commissioner Prouty: You did not answer my question, and I do not know that I am disposed to insist on it if you do not want to.

Mr. Harriman: I want to answer every question I can.

Commissioner Prouty: It seems to me the Union Pacific went into an attempt to buy the Northern Pacific and afterwards receded from that attempt, and it seems to me if the Union Pacific lost money——

Mr. Harriman: They had accomplished it.

Commissioner Prouty: There were certain difficulties in the way of bringing that to a permanent fruition?

Mr. Harriman: No; I think not.

Commissioner Prouty: Well, I know very little about the financial operations.

Mr. Harriman: But you want to know.

Commissioner Prouty: Yes, sir. I understand that in an imperfect way this was the situation: You had gone in to buy Northern Pacific stock. You had absolutely purchased a majority of that stock, but the stock of the Northern Pacific was made up of two kinds, common stock and preferred stock. You had more preferred stock, but less common stock, than Mr. Hill and his company. The preferred stock of the Northern Pacific could, under certain circumstances, be retired. I have been informed that Mr. Hill and his coadjutors threatened to retire that preferred stock, and therefore

retire you out of control of the Northern Pacific, and it was in consequence of that the arrangement was finally made.

Mr. Harriman: I think if we go into an argument on that subject I will not catch my train.

Commissioner Prouty: You said you wanted to tell.

Mr. Harriman: That is a question, I understand, that has never been brought to issue; but I think Mr. Hill—I listened to his interesting and very clear statements yesterday—stated to you
253 something about the agreement after meetings in my office and Mr. Morgan's office, to the effect that Mr. Morgan was to select the next board of directors of the Northern Pacific. In other words, there was a panic prevailing in the financial markets all over the world for some reason that they did not understand, and apparently for no reason at all, and when the matter was brought to our attention we disclaimed any intention of eliminating the former management of the Northern Pacific therefrom, and as evidence of that intention we agreed that Mr. Morgan should vote our stock at the next meeting.

Commissioner Prouty: Before you came to that conclusion had this question of the right of the Northern Pacific common stock to retire the Northern Pacific preferred stock been raised?

Mr. Harriman: Not to our minds.

Commissioner Prouty: Had it to your knowledge?

Mr. Harriman: Only in a general way, as it has with you.

Commissioner Prouty: Had your attorneys expressed an opinion on that subject?

Mr. Harriman: I do not remember that he had. I think there were various talks on that subject. But we were satisfied that the interest we had acquired in the Northern Pacific would accomplish all we desired in having secured to us and to the territory of the Northern Pacific and to our territory a free movement of the traffic on the lines it would naturally go.

Commissioner Prouty: And having secured that stock for that purpose and having got enough of it, you proceeded to perpetuate that influence by selling every share of stock you had.

Mr. Harriman: No, sir; there were various conferences, and we had offers for our interests in the Northern Pacific which we thought it was to the interest of our shareholders to dispose of. What you want to know is whether there was any understanding or agreement whereby we were to be secured in any general way by an alliance with the Northern Pacific?

Commissioner Prouty: That is one thing.

Mr. Harriman: Well, there was not any.

Commissioner Prouty: Then, I would like to ask you what you gained by your purchase and sale of the Northern Pacific stock? What did the Union Pacific gain?

Mr. Harriman: Well, I do not know. As to that, we developed the fact in our talks and conferences with these various people and

with our own officers—the fact that we were strong enough to maintain our position against any other organization.

Commissioner Prouty: Where did you develop that—in the stock market?

254 Mr. Harriman: No, sir; in our talks and conferences with our own people and the people affiliated with the Northern Pacific.

Commissioner Prouty: In other words, you came to a better understanding of the traffic situation?

Mr. Harriman: There was no understanding.

Commissioner Prouty: You came to a better knowledge?

Mr. Harriman: Yes, sir, we all had by conferences.

Commissioner Prouty: To come back to my original question, When you sold that stock—you need not answer the question if you do not want to—when you sold that stock did you make or lose money as a Union Pacific Company?

Mr. Harriman: As an Oregon Short Line Company.

Commissioner Prouty: It is all one as a Union Pacific proposition.

Mr. Harriman: I can answer that we did not lose any. We believe we did not lose any.

Commissioner Fifer: Did the Hill-Morgan influence control the board of directors of the Northern Pacific at the time of these negotiations?

Mr. Harriman: I do not know that Mr. Hill ever had any influence in the Northern Pacific. There had been a voting trust, as I understand, on the Northern Pacific, and I think that was controlled by the Morgan interests.

Commissioner Fifer: Did you believe at that time that the Morgan interests did control the directors of the Northern Pacific?

Mr. Harriman: It had all along.

Commissioner Fifer: Did that give them the right, or did you believe it would give them the right, to retire this preferred stock of the Northern Pacific and retire you from the control of the Northern Pacific?

Mr. Harriman: Will you repeat that?

Commissioner Fifer: Did you understand at the time of the negotiations, and was that an inducement to you to sell the interest of the Oregon Short Line, or the Union Pacific, the interest it held in the Northern Pacific——

Mr. Harriman: You mean did the fact that they might retire the preferred Northern Pacific stock influence us in disposing of it?

Commissioner Fifer: Yes, sir.

Mr. Harriman: No, sir.

Commissioner Fifer: They controlled the board of directors, however, or at least claimed to?

255 Mr. Harriman: Well, they had not had an election, you know. They controlled—I suppose they did—I presume they controlled the board of directors that was then in office.

Commissioner Fifer: Was anything said in those negotiations that if they did attempt to retire this preferred stock, you would appeal to the courts and enjoin them?

Mr. Harriman: In our conferences with them?

Commissioner Fifer: Yes, sir.

Mr. Harriman: No, sir. I do not think that question between the purchasers and ourselves came up. I do not remember that it did. Of course, you understand, I do not mean to say that that never came up between ourselves.

Commissioner Prouty: When this stock was sold, were the obligations which the Union Pacific and the Oregon Short Line had assumed to purchase it paid off?

Mr. Harriman: Some portion of it.

Commissioner Prouty: Some portion of it still remains?

Mr. Harriman: Well, the obligations—there are some that can not be paid off until maturity.

Commissioner Prouty: What was the form of certificate which the Oregon Short Line issued to raise money with which to purchase this Northern Pacific stock? What were the terms of it? It was the obligation of the Oregon Short Line, I suppose.

Mr. Harriman: An agreement to pay.

Commissioner Prouty: When was the certificate due?

Mr. Harriman: I do not remember. I think in ten or fifteen years, the larger part. Some part there was money borrowed for a short time on collateral, and since has been mostly paid off.

Commissioner Prouty: But the certificates themselves have not yet been paid and cannot be?

Mr. Harriman: I do not think they can be paid unless by agreement with the holders thereof.

Commissioner Clements: With what house or person were your negotiations made for the sale of this Northern Pacific stock?

Mr. Harriman: Mostly with J. P. Morgan & Co.

Commissioner Clements: And it was delivered to that house?

Mr. Harriman: I think it was. I do not have the supervision of that.

Mr. Day: Who negotiated the sale of your stock, this stock directly owned by the Short Line?

Mr. Harriman: The Northern Pacific, you have reference to?

Mr. Day: Yes, sir.

256 Mr. Harriman: I did.

Mr. Day: With whom did you make the negotiations?

Mr. Harriman: I think I said that.

Mr. Day: You said with some persons connected——

Mr. Harriman: The negotiations were conducted with members of the firm of Morgan & Co.

Mr. Day: What particular members did you carry on your negotiations with in which the terms were discussed?

Mr. Harriman: Well, there are four or five there—nearly all the members of the firm—Mr. Steele, Mr. Perkins, Mr. Bacon, and, I

think, at one time Mr. Morgan himself, and there may have been one other member of the firm. At various times they took it up, one by one and together.

Mr. Day: Who was the attorney who acted at that time for the Union Pacific and Short Line in respect to this stock, the holdings of Northern Pacific?

Mr. Harriman: I do not quite understand that question.

Mr. Day: You had some negotiations regarding the contest that was on?

Mr. Harriman: We never went into any contest.

Mr. Day: I used the word "contest" with respect to your effort to acquire what you say you started out to do, to get control——

Mr. Harriman: I think I tried to explain that we purchased the shares of the Northern Pacific prior to May 8 or 9, when there was a sudden rise. I do not consider that a contest. It never came to any contest for control of the Northern Pacific. There never was any contest.

Mr. Day: Were not you seeking to control the Northern Pacific railroad?

Mr. Harriman: To the elimination of the people already in there?

Mr. Day: No; to get—you sought to get a controlling interest in the Northern Pacific railroad, did you not? Did you not say you accomplished that?

Mr. Harriman: We purchased a majority of the capital stock of the Northern Pacific railroad; seventy-eight millions, I think it was, out of one hundred and fifty-five.

Mr. Day: And you stated that the Union Pacific accomplished its object in that respect. What was its object?

Mr. Harriman: To preserve to the Union Pacific system the avenues that were already open to it for exchange of traffic with the Northern Pacific system.

Mr. Day: You told Commissioner Prouty, in reply to a question propounded by Commissioner Prouty respecting your reasons
257 for the sale of this seventy-eight millions of stock so shortly after you purchased it, that the Union Pacific had accomplished its object in the purchase. What was that object or how did you accomplish that object? What assurances have you that you have accomplished it, if that was the only object? What assurances were given you by anyone respecting the future conduct of the Northern Pacific or those avenues of communication between it and the Oregon Short Line or the Union Pacific?

Mr. Harriman: I do not presume that it would be possible for any individual or any combination to give any promise that would be a security to anybody else in the affairs of the operation of any railroad, the Northern Pacific or any other. For instance, these people who purchased the Northern Pacific might sell the stock to-morrow or before the next election and still whatever assurances there were would be of no avail.

Mr. Day: Were there any assurances?
Mr. Harriman: No, sir.
Mr. Day: None at all?
Mr. Harriman: No, sir.
Mr. Day: Directly or indirectly, controlling the operation of the Northern Pacific?
Mr. Harriman: That covers a great deal of ground. We had many conferences as to what the movement by various lines would be, and, considering the whole question, the Union Pacific management determined that it was no longer necessary, as it was believed that it would — to the interest of the Northern Pacific to use the avenues open over the Northern Pacific as it had before, notwithstanding it had purchased the Burlington.
Mr. Day: Were any assurances given you regarding the future relations of the Burlington road with the Union Pacific?
Mr. Harriman: No, sir.
Mr. Day: Nothing said in respect to that, as to how it should be conducted and used?
Mr. Harriman: The Burlington touches the Union Pacific lines at a great many points?
Mr. Harriman: I should think it did.
Mr. Day: You asked no assurances regarding that and received none?
Mr. Harriman: No, sir.
Mr. Day: Was any inducement held out to you to enter the Northern Securities Company or take any interest in that?
Mr. Harriman: No, sir.
Mr. Day: By any of these gentlemen?
258 Mr. Harriman: No, sir.
Mr. Day: You are a shareholder in that?
Mr. Harriman: I am individually; yes, sir; but it has been purchased since—within the last month, I expect; a small interest—not in relation to this.
Mr. Day: Are you a member of the board of directors?
Mr. Harriman: Yes, sir.
Mr. Day: Have you ever sat with the board?
Mr. Harriman: I think I have.
Mr. Day: When?
Mr. Harriman: Once or twice. I think about a month ago.
Mr. Day: That company has only been organized about two months, has it not?
Mr. Harriman: I do not remember. I have not had anything to do with the organization of the Northern Securities Company.
Mr. Day: You are also a member of the executive committee of the Northern Securities Company, are you not?
Mr. Harriman: I think I am.
Mr. Day: Has that committee had a meeting?
Mr. Harriman: I think it has.
Mr. Day: Did you attend it?

Mr. Harriman: Well, I do not remember. I believe I attended one meeting of the executive committee of the Northern Securities Company—I think I did—either the board of directors or the executive committee.

Mr. Day: You wish to be understood as stating that no one representing the other half, or the minority holding of the preferred stock of the Northern Pacific, made any pledges or promises to you or to your colle-gues in Union Pacific respecting the future operation of the Great Northern, Northern Pacific, or the Burlington in the dealings of all or either with the Union Pacific system?

Mr. Harriman: I think that is a question in another form—I thought I answered that.

Mr. Day: I thought I would make it broad.

Mr. Harriman: There is a common interest among us all and we believe that common interest would be served, irrespective of any holding that we or anybody else might have. The common interest of the producer and the carrier, or the various carriers, would be finally adjusted on its own natural basis, irrespective of what anybody could promise or any agreement that might be made, and it would be impossible, in view of the power of the large systems that
259 now exist, for anyone to injure the other without injuring himself. Our interests are so common that we cannot help but consider each other.

Mr. Day: At any of these meetings or conferences were the terms of an adjustment of the questions outstanding between the majority and minority holders of the stock of the Northern Pacific Railroad Company reduced to writing?

Mr. Harriman: There was nothing, except the one just after the financial panic, in which it was suggested that we settle that once for all so as to reëstablish confidence, and that was the one. I think there is a memorandum. I am not sure. I think there is a memorandum in which we agreed that we would permit Mr. Morgan to vote our stock.

Mr. Day: Was anything else stated?

Mr. Harriman: It was merely a wish on our part to indicate to everybody that we had confidence in the then existing management of the Northern Pacific.

Mr. Day: Did you have any conference with the same gentlemen subsequent to that respecting the holding of the Northern Pacific railroad?

Mr. Harriman: That conference—of course we had conferences and negotiations, because there was a desire to purchase our interests. Of course, we could not sell it without negotiations being conducted by somebody.

Mr. Day: Did you attach to your negotiations for the sale of Northern Pacific stock any other conditions than the one of the money price?

Mr. Harriman: No, sir.

Mr. Day: No other conditions?

Mr. Harriman: No other conditions that I remember.

Mr. Day: No other consideration except the one of the money price?

Mr. Harriman: I do not remember any condition of the Union Pacific or Oregon Short Line in any way.

Mr. Day: Or the gentlemen who held the stock, yourself or your cotrustee, or your attorneys—Mr. Schiff or any member of the firm of Kuhn, Loeb & Co.?

Mr. Harriman: None other than I have stated.

Mr. Day: Of the various interests?

Mr. Harriman: No, sir.

Mr. Day: Who has that memorandum?

Mr. Harriman: I do not know. Of course, when the election took place the whole thing fell, and that memorandum may be in existence and may not, I am not sure. I think that mem-
260 orandum was conveyed in a published statement—published in a New York paper—to the effect that we had agreed that Mr. Morgan should vote our stock.

Mr. Day: When you sold your seventy-eight millions of stock did you receive cash for it?

Mr. Harriman: Cash and securities.

Mr. Day: What part cash?

Mr. Harriman: I do not remember; quite a large amount cash.

Mr. Day: What proportion securities?

Mr. Harriman: The same thing. Of course it covered a very large amount of money. We secured some securities and some cash.

Mr. Day: What was the character of the securities you received?

Mr. Harriman: Some of the securities of the Northern Securities stock.

Mr. Day: And the cash was for your preferred stock?

Mr. Harriman: We made no difference. We sold what we had.

Mr. Day: Had the Northern Securities Company then been organized or was it an agreement that you would take its stock when it was organized?

Mr. Harriman: I do not remember that.

Mr. Day: When was the sale made?

Mr. Harriman: In September or October.

Mr. Day: The Northern Securities Company was not incorporated until November 12. You could not have had its securities then.

Mr. Harriman: Well, we had then the agreement to deliver us the securities of a company.

Mr. Day: Is that agreement in writing?

Mr. Harriman: Or cash. I think that is the way it was.

Mr. Day: Is that agreement in writing?

Mr. Harriman: I think we made a memorandum.

Mr. Day: Whom do you mean by "we"?

Mr. Harriman: J. P. Morgan & Co., or in the office of J. P. Morgan & Co., and myself.

Mr. Day: You have a copy of the memorandum?

Mr. Harriman: The transaction was completed.

Mr. Day: When did you get the securities for the balance?

Mr. Harriman: I think we got them in December before the year was out; I do not know. We may have secured some other securities. I do not know.

261 Mr. Day: Were you aware at the time you made the agreement, which you say was in writing, to dispose your seventy-eight millions of Northern Pacific stock——

Mr. Harriman: Whether there was to be a securities company formed?

Mr. Day: Yes, sir.

Mr. Harriman: I think there was some talk of that.

Mr. Day: Did you then know at that time that it was proposed that the Northern Pacific Company should issue this new bond it did, this new bond and mortgage to raise the money, this convertible bond to retire the preferred stock?

Mr. Harriman: I know nothing about what they were to do or how they were to do it.

Mr. Day: There was nothing said to you about the seventy-five millions of convertible bonds?

Mr. Harriman: I cannot remember that there was. It had nothing to do with our transaction. We made no difference between common and preferred stock.

Mr. Day: I want the extent of your information at that time respecting the future policy, the plan by which the preferred stock was to be retired and bonds to the amount of seventy-five millions, convertible bonds, convertible into common stock, was to be issued in payment of the preferred stock to be retired—were you aware of that?

Mr. Harriman: I think not.

Mr. Day: You were given no option to take that for your stock?

Mr. Harriman: We had nothing to do with the securities issued.

Mr. Day: Will you file with the commission a copy of that memorandum?

Mr. Harriman: I will try to if I can get it. I will be very glad to furnish them with any information.

Mr. Day: Was it before or after you had taken the stock in the Northern Securities Company—I mean that you had affected the sale, completed the sale of the seventy-eight millions to Pierpont Morgan & Co. of the Union Pacific interest in the Northern Pacific road—that you were elected a member of the board of directors of the Northern Securities Company? Was it prior or subsequent to the sale of the seventy-eight millions of stock that you were elected a member of the board of directors of the Northern Securities Company?

Mr. Harriman: As you say, we sold our seventy-eight millions of stock.

262 Mr. Day: I mean when you completed the transaction when you actually delivered the stock and took Northern Securities stock in part payment.

Mr. Harriman: I do not think we got Northern Securities Company stock in part payment in the first instance. Our sale was made and completed, I think, before the Northern Securities Company was formed. I think there was only an agreement as to that.

Mr. Day: When were you elected a member of the board of directors of the Northern Securities Company?

Mr. Harriman: I do not remember. I guess in November or December. I know I did not attend the first meetings of that company.

Mr. Day: Who holds that stock in the Northern Securities Company?

Mr. Harriman: I presume the Oregon Short Line.

Mr. Day: What was the amount of that?

Mr. Harriman: I do not remember.

Mr. Day: Roughly speaking.

Mr. Harriman: Oh, it was fifty or sixty millions.

Mr. Day: You think it is in the name of the Oregon Short Line?

Mr. Harriman: No; I think not.

Mr. Day: Was it prior to the issue of that fifty or sixty million of stock, in which an equity belongs to the Oregon Short Line, that you were elected a member of the board of directors?

Mr. Harriman: That I do not remember. These things had no bearing on each other.

Mr. Day: They had not?

Mr. Harriman: No, sir.

Mr. Day: They were entirely independent transactions. Your election as a member of the board of directors of the Northern Securities Company had no bearing whatever, no relation to the ownership of the $78,000,000 of the Northern Pacific road?

Mr. Harriman: My election to the Northern Pacific board?

Mr. Day: To the Northern Securities board?

Mr. Harriman: No, sir.

Mr. Day: I forgot what your answer was to my inquiry as to what your official relation was to the Chicago and Alton Railway Company?

Mr. Harriman: I am a director; a member of the executive committee, and, I think, chairman.

Mr. Day: Are you also a member of the old company, the Chicago and Alton Railroad Company?

263 Mr. Harriman: I think I am.

Mr. Day: What is the capital stock of the Chicago and Alton Railroad Company?

Mr. Harriman: I can not remember those figures.

Mr. Day: Well, about?

Mr. Harriman: I do not remember, really. I think, whatever it was, I think we had to pay about $40,000,000.

Mr. Day: What is the capital stock of the Chicago and Alton Railway Company?

Mr. Harriman: I think that is $40,000,000. I may be mistaken about that. It is common and preferred stock—that can be obtained.

Mr. Day: Both companies are subsisting corporations—the railroad company and railway company?

Mr. Harriman: Yes, sir.

Mr. Day: By what sort of title does the Chicago and Alton Railway Company hold the property of the Chicago and Alton Railroad Company, formerly owned and controlled by the Chicago and Alton railroad; lease or how?

Mr. Harriman: I think it is by lease and ownership both. That is my recollection.

Mr. Day: The lease was for a term of years?

Mr. Harriman: I think it was.

Mr. Day: Is there any contract—any contractual relation—between the old company and the new company except as set out in the lease?

Mr. Harriman: I believe not.

Mr. Day: How much of the stock of the Chicago and Alton Railroad Company (meaning the old company) is owned by the new company?

Mr. Harriman: All but a few millions; I think there is a million or two millions—practically all.

Mr. Day: All but a few millions is an asset of the new company?

Mr. Harriman: Yes, sir.

Mr. Day: Of the stock of the old company all but a few millions is an asset of the new company?

Mr. Harriman: Yes, sir.

Mr. Day: Do you know whether the railway company guarantees any dividends on the stock of the new company?

Mr. Harriman: I do not remember.

Mr. Day: If it does, is that set out in the lease?

Mr. Harriman: I think it is all set out.

264 Mr. Day: Will you furnish a copy of that?

Mr. Harriman: Yes, sir; I will furnish a copy. I think the lease provides for the net earnings of the company. I am not sure.

Mr. Day: If the capital stock of the new company is forty millions as you suppose or approximate——

Mr. Harriman: It is what the property cost. I do not know what it is. Whatever the stock cost, I think that is the capital of the railway company.

Mr. Day: The capital stock of the new company was all paid up in cash?

Mr. Harriman: Yes, sir.

Mr. Day: Par?

Mr. Harriman: Yes, sir; cash or its equivalent. It was issued

for cash or for Chicago and Alton Railroad stock or some other property.

Mr. Day: How was the money raised—by collateral mortgage or trust, or how did the new company raise the money—by bonds?

Mr. Harriman: Some bonds and some stock.

Mr. Day: The stock was paid for in cash?

Mr. Harriman: Or its equivalent—exchanged for securities purchased.

Mr. Day: What is the amount of bonds the new company issued?

Mr. Harriman: That I do not know. I could not say. I think $15,000,000.

Mr. Day: What was the stated price of the stock of the old company that the new company paid?

Mr. Harriman: I do not remember now, but some time ago I think it was about 200.

Mr. Day: The par value of the old stock was 100, and it paid 200?

Mr. Harriman: Two hundred per cent.

Mr. Day: Is the Union Pacific system or any of its subsidiary lines or companies interested as a share owner?

Mr. Harriman: In the Chicago and Alton?

Mr. Day: In the Chicago and Alton—any relationship between the two companies?

Mr. Harriman: No, sir.

Mr. Day: They are quite independent?

Mr. Harriman: Absolutely independent.

Mr. Day: No pecuniary interest in the Alton?

265 Mr. Harriman: No affiliation whatever.

Mr. Day: In either way?

Mr. Harriman: In either way.

Mr. Day: Pending the negotiations for the sale of the seventy-eight millions of Northern Pacific stock, which has been referred to, and the questions which arose respecting it from time to time among your associates, who acted as your legal counsel?

Mr. Harriman: Mr. Pierce.

Mr. Day: On what basis was such portion of the seventy-eight millions as was taken in exchange or exchanged for Northern Securities stock based or taken? What was the basis of the exchange?

Mr. Harriman: We made no exchange.

Mr. Day: I thought you said——

Mr. Harriman: No; we had no transaction whatever. I think you have got a wrong impression. We had no transaction whatever with the Northern Securities Company.

Mr. Day: You took some stock of the Northern Securities Company in part payment?

Mr. Harriman: What you want to know is what price we took Northern Securities Company stock or agreed to take it at in case it was delivered to us, or any other security.

Mr. Day: Yes, sir.

Mr. Harriman: At par.

Commissioner Prouty: You do not mean to say that you sold Northern Pacific stock at par?

Mr. Harriman: No; that question was not asked. I thought the question was whether what we took was on the basis of cash or Northern Securities at par.

Mr. Day: I understood you to say that you took some Northern Securities in part payment.

Mr. Harriman: Yes, sir; in lieu of cash. We did not make any exchange.

Mr. Day: You did not subscribe?

Mr. Harriman: No, sir; we had no transactions with them.

Mr. Day: When you sold this seventy-eight millions of stock, were you advised or informed by any of the people you negotiated with, directly or indirectly, that that stock was to be turned over to the Northern Securities Company when organized?

Mr. Harriman: I do not remember that we were specially advised. That was generally talked, that there was to be a securities company.

266 Mr. Day: You relied on it that that would be done, did you not?

Mr. Harriman: That did not influence——

Mr. Day: I am not asking that. You did rely on that, did you not?

Mr. Harriman: No; we did not rely on it.

Commissioner Prouty: You mean that you agreed to pay par for the stock of a company that you did not know anything about?

Mr. Harriman: I thought the question was not on that basis. The question was, I think, what influence the sale of this Northern Pacific stock—that there was to be a securities company formed——

Mr. Day: I will ask the stenographer to read the question.

The stenographer read the question, as follows: "When you sold this seventy-eight millions of stock, were you advised or informed by any of the people you negotiated with, directly or indirectly, that that stock was to be turned over to the Northern Securities Company when organized?"

Mr. Harriman: That is not as I understood the question. We knew in a general way, the formation of a securities company was talked about, and we agreed to take in lieu of cash a certain amount of that stock, in lieu of cash, at par.

Mr. Day: Then I asked if you did rely on the statement that a Securities Company was to be formed?

Mr. Harriman: In making the sale?

Mr. Day: Yes, sir.

Mr. Harriman: No.

Mr. Day: I do not mean that that was the moving consideration. Would you feel that you had a cause of complaint against the gentlemen you were negotiating with if that stock had not been put into the Northern Securities Company?

Mr. Harriman: I do not think we would. I do not know any reason why we should.

Commissioner Prouty: Of course, before you agreed to take fifty millions of that stock you knew something about what it was going to be worth. You did not expect that they had a right to put Great Northern stock in at $300 a share. You must have known in some way on what basis that company would be operated.

Mr. Harriman: Yes, sir; in the general talk at that time—the general talk that there was to be — securities company formed.

Commissioner Prouty: Do you engage in transactions of fifty or sixty millions on general talk?

267 Mr. Harriman: Yes, sir; very often.

Commissioner Prouty: Perhaps you had better define what you mean by "general talk."

Mr. Harriman: You mean if there was any specific information given or agreement that there should be a certain amount of Northern Pacific or Great Northern stock put in?

Commissioner Prouty: I think what Mr. Day wants and what the commission would like to know, if it is material at all, is what agreement was made, what understanding was had, as to the organization of the Securities Company, of which you agreed to take the stock at par.

Mr. Harriman: We agreed to take the stock at par if the Securities Company was formed, and the Northern Securities Company stock issued in payment for Northern Pacific stock not to exceed 115, and if the Great Northern were put in that that should not exceed 180. That is the plan.

Mr. Day: You understood that Northern Pacific stock was to be taken at 115 of the other, and you took it at par?

Mr. Harriman: No, sir; I did not say that.

Mr. Day: I mean the Northern Securities; you took that at par?

Mr. Harriman: Yes, sir.

Mr. Day: Oh, yes; I see I was in error.

The Chairman: As I understand Mr. Harriman, he said he negotiated the sale of this Northern Pacific stock when his company decided that it was best to sell it. He reported the terms to his company and they ratified the arrangement.

Mr. Harriman: Yes, sir.

The Chairman: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the securities of the Northern Securities Company, if organized on a certain basis?

Mr. Harriman: Yes, sir.

The Chairman: Subsequently it was organized on that basis.

Mr. Harriman: And the stock was delivered and received.

The Chairman: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

Mr. Harriman: Yes, sir.

Commissioner Clements: When in the course of these negotiations did it become certain that the Northern Securities Company would be a practical organization—would be effected?

268 Mr. Harriman: In the first place, the talk of forming a securities company—I do not know whether it was the purpose of forming it under the name of the Northern Securities Company or under any other name, but I was generally cognizant of the fact that there had been a plan of forming a securities company for the holders of the Great Northern stock, and I think some time before we had any interest in the Northern Pacific. I think in some of my conversations with Mr. Hill that he had stated to me that he and his associates had a plan in view for forming a securities company, in which they were to put their holdings of Great Northern stock, a long time before we had any interest in the Northern Pacific.

Commissioner Clements: When did you first seriously consider taking any stock in that company yourself or for the corporations you represent?

Mr. Harriman: Only when we sold the Northern Pacific stock.

Commissioner Clements: That was in September?

Mr. Harriman: Whatever the date was that was the time.

Commissioner Clements: When did you procure that stock for the Oregon Short Line or Union Pacific, the seventy-eight millions?

Mr. Harriman: For the Oregon Short Line?

Commissioner Clements: When did you obtain that?

Mr. Harriman: I think the 7th and 8th of May.

Commissioner Clements: You obtained it in the spring?

Mr. Harriman: Yes, sir.

Commissioner Clements: And determined in the fall, about September or whenever it was, to take fifty or sixty millions of the proceeds of that and put it in the Northern Securities stock, not in exchange, but you would sell one and buy the other?

Mr. Harriman: We agreed to take securities and stock with the understanding that it was to be a securities company, if formed.

Commissioner Clements: At the time you purchased that Northern Pacific stock you apparently must have had some substantial reason for apprehending danger to the properties you represented, as you have already stated, as I understand that you deemed it necessary for the full and proper protection of your interests to have a dominating influence in the Northern Pacific Company. Is that a correct statement?

Mr. Harriman: Yes, sir; that is what I said.

Commissioner Clements: Now, apparently in the fall you turned that loose so as to lose that dominating influence, so far as

269 you had obtained it by the purchase of that stock, and there must have been some substantial impression——

Mr. Harriman: May I explain that?

Commissioner Clements: Certainly.

Mr. Harriman: I think the subsequent action of the Oregon Short

Line or the people representing it in what they thought, and I think what was the prevailing influence with them was that the purchase of the Burlington Company by the Great Northern and perhaps the control of the Northern Pacific by one party might injure the Union Pacific or the territory—it might prevent the Union Pacific from properly serving, I might say, the territory through which it runs, and subsequent to the purchase of that stock, I think that our action in agreeing to give our proxy to Mr. Morgan is evidence enough that we were satisfied that there were more interests than the Great Northern or the people affiliated with the Great Northern in the Northern Pacific, and the subsequent management of the Northern Pacific is a further indication that we were right.

Commissioner Clements: When did you give Mr. Morgan that proxy?

Mr. Harriman: The agreement that he should name the board of directors was given in May, about the time that there was this prevailing financial distrust, in which we had no hand, nor any interest, nor any purpose to serve, except, as I have stated before that we should evidence to the whole financial world that there was no intention of creating a contest as against the then managers of the Northern Pacific.

Commissioner Clements: Now, has not the formation of the Northern Securities Company, with an important holding in it by the Oregon Short Line, one of the corporations you represent—the interests under you—a holding in that company of fifty or sixty millions, and the identification of Mr. Hill and his associates, including the Great Northern and Northern Pacific and Burlington, with this same company—all of you associated together—also gone a long way to assure you that there would be no unfriendly action on the part of the Northern Pacific in respect to the traffic?

Mr. Harriman: No more than there has been in existence since the two corporations were organized.

Commissioner Clements: Which two corporations?

Mr. Harriman: I thought you referred to the Union Pacific or the Oregon Short Line and the Northern Pacific.

Commissioner Clements: Well, what I mean is that since
270 you and the interests you represent and the interests represented by Mr. Hill and Mr. Morgan, which include the Union Pacific, the Southern Pacific, and the Oregon Short Line, and now the Great Northern, the Northern Pacific, and the Burlington, are all holding stock in the way that was described yesterday, more or less, in the Northern Securities Company, and Mr. Hill being president of it and you being a member of the board of directors, is there not much less likely to be any friction or contest in the matter of traffic between the Northern Pacific and the Union Pacific and its affiliated lines?

Mr. Harriman: I think it may in this respect, that it may enable us where we are frequently brought together, or when we are brought together, whether frequently or infrequently, it has been very infre-

quently so far, it may enable us to so get together, that we may be able to eliminate the prevailing distrust as to the various lines maintaining their tariff rates. In other words, I do not know that you have ever had before you a complaint of too high a rate, but it is a complaint as to discrimination, and that is all we are trying to eliminate from the situation to-day. I believe this, that in our association, if we will be able to influence the situation to such an extent that we will prevent, or largely prevent discriminations as against the general shipper, and the concessions which are made or said to be made in favor of one shipper as against another—am I not right, Mr. Chairman, that the complaints mostly that come before your body are to the effect that there are discriminations, and not that rates are generally higher than they ought to be?

The Chairman: I must reserve my answer to that question to another time and place.

Commissioner Clements: Will not the same power of co-operation and unity of action and financial association enable you also to prevent the reduction of the published rate?

Mr. Harriman: I do not know that we have power to do that, even if we wanted to.

Commissioner Clements: Well, the carriers are given power to publish the rates, and they publish what they choose to as the rates at which they will carry. They are also authorized to reduce them from time to time or increase them from time to time. Of course there is a general declaration of the law that they shall be reasonable and just, and free from undue discrimination, but now you say that your principal object is to prevent the unjust discrimination.

Mr. Harriman: I did not say we had an object. I said
271 that I believed being brought together would enable us to consider these questions and prevent by our own officials and the officials of other lines their participating in discriminations and illegal—if you are a mind to—illegal practices.

Commissioner Clements: Particularly deviation from the published rate?

Mr. Harriman: Deviation from the published rates.

Commissioner Clements: Now, what I want to know is this: Inasmuch as under the law you make your own rates and change them from time to time, and you have now co-operation—community of interest—financial and organized co-operation in one concern, directing more or less all these roads, by the election of officers, will it not carry with it not only the power to prevent deviations from the published rate, but also the power to hold up the published rate and prevent its reduction by the separate action of competing roads?

Mr. Harriman: I do not quite understand what you mean by "community of interest." I think we all have a common interest, a common interest to increase the volume of business generally. There can not be one railroad, or one community exist at the expense of the other, and it seems to me that whether we meet or happen to meet by an agreement in Chicago or in New York or in San

Francisco, or whether we are brought together in a board of directors of a securities company or a bank or trust company, it makes no difference. If we wanted to practice something that was against the law it would not be necessary for us to form an organization and become directors thereof and advertise it to the world. We could meet anyhow. We have a common interest to preserve—which I think Mr. Hill explained to you yesterday—the avenues of traffic which are natural and over which traffic can be conducted and the products of the producing sections can reach the markets in some other part of the country. I understand your question to be whether it would not give us an opportunity to do something we have no right to do.

Commissioner Clements: In restraint of competition; reducing rates.

Mr. Harriman: May I ask a question, whether it would be any different whether we met at a specific place you may name, whether as a board of directors of a security company or as a board of directors of some corporation, or whether it was by arrangement at some other place other than where the board of directors meet? It would not give us any more opportunity than we would otherwise have were we not members of one board.

272 Commissioner Clements: Well, the ownership of the stock in the one company would be something more potential than a mere coming together as independent representatives of independent roads. There have been many conferences between traffic managers and presidents in regard to these matters, but this is something substantially different, is it not? Here is a corporation the stock of which——

Mr. Harriman: You are talking about the Northern Securities Company?

Commissioner Clements: Yes, sir; the stock of which is held by these various interests.

Mr. Harriman: Yes, sir; but it might be changed at any time. It might be all combined in one holding.

Commissioner Clements: That might be. So might any pooling contract between an association of roads. It might exist to-day and not to-morrow. So long as it does exist, does it not afford a power of concentration and unity of action?

Mr. Harriman: You mean by holding the stock?

Commissioner Clements: The holding of the stock, the joint interest in the matter, and the co-operation that comes from that.

Mr. Harriman: I think there are other and larger considerations which move the management of these properties other than the holding in any security company. As I have tried to explain, the matters practically control themselves in the end. There are commodities to be moved. There is productive territory. The products of one territory have to be shipped to consuming points, which may be thousands of miles away. We could not control it any more by meeting in that board of directors and having an interest—whether

it was a large or small interest—in that stock any more than we could if we did not.

Commissioner Clements: In times past, when these roads have been separate in ownership and operation, they have reduced rates in order to get business, one road away from the other. That has been the operation of competition in the past. Does not this directly tend to restrain that by the co-operation brought about?

Mr. Harriman: You mean reducing the published rates?

Commissioner Clements: Yes, sir.

Mr. Harriman: I do not think it will, nor do I know in any case where it has.

Commissioner Clements: Do you mean to say that there will be the same freedom and activity and competition, in your judgment—is that what you state now—that there would be if these roads were entirely separate and independent of each other?

273 Mr. Harriman: They are entirely separate and independent of each other.

Commissioner Clements: They are in a technical sense, and at the same time you are president of the Southern Pacific and also chairman of the board of the Union Pacific, as I understood your testimony.

Mr. Harriman: Yes, sir.

Commissioner Clements: And president of the Oregon Short Line?

Mr. Harriman: President of the Oregon Short Line. They are all connecting lines and feed to each other.

Commissioner Clements: Yes, sir; and they have been competing lines, have they not?

Mr. Harriman: Not to my knowledge any more than now, and more than the situation of the lines makes it necessary.

Commissioner Clements: You do not mean to have us understand that Mr. Stubbs, as traffic director of these lines, would make one compete against another in the reduction of rates?

Mr. Harriman: I do not know of any territory that one or the other serves that would make that necessary.

Commissioner Clements: Well, the traffic from the eastern coast to the western coast could go by the Southern Pacific or the Union Pacific, or by the Oregon Short Line in connection with other roads?

Mr. Harriman: On a published tariff?

Commissioner Clements: Yes, sir.

Mr. Harriman: I do not know an instance where a shipment was changed in that way. I think we would hear from the shipper if it was so. Because of the interest that the Union Pacific acquired in the Southern Pacific I believe it is going to enable the Union Pacific or the combined interests to give very much better service, and enable them to improve the lines of the Southern Pacific to such an extent that it can be operated to better advantage and possibly more economically. If these matters are not brought about

that way I do not see how the railroads will exist, and they will not be able to take care of an increased volume of business any cheaper or as cheap as they are to-day. You may separate all these lines that now make up these different systems. Formerly there may have been ten times more than to-day. If you want to separate them and put them into small lines I do not think the business of the country could be conducted. We are natural connections of the Southern at one point and do not interfere with it in any
274 way at any other point. We may develop in connection with the Southern Pacific new avenues, which will reach also the Northern Pacific territory. That is a thing I had in mind. We are now extending a line of the Oregon Short Line from a point in Nevada to southern California.

It will open up an entirely new avenue of traffic between the Northwest and southern California, New Mexico, and those southern points and the territory served by that portion of the Southern Pacific, and enable us to interchange commoditjes with points which are on the Oregon Short Line, owned by the Union Pacific, points on the Northern Pacific over the Short Line, and also new avenues of traffic and new markets for commodities in all the territories served by all those companies. How could we do that if we did not have a close affiliation? Would it be possible to put a middle company in between the existing Short Line and the Southern Pacific in southern California?

Commissioner Clements: Those matters are all interesting and instructive, and no doubt——

Mr. Harriman: You are trying to find, apparently, something that was in our minds in making these affiliations.

Commissioner Clements: The change in the conditions and the opportunities that it afforded—not whether you heard particular complaints or whether or not you have raised the rate here and there, but what I am trying to get at is your judgment as to whether or not this community of interest, as it may be termed, by the holding of stock——

Mr. Harriman: May I not change that into a common interest? I think we have a common interest; not only the railroads, but the producers.

Commissioner Clements: Put it that way. I mean the common interest as it is concentrated now in the Northern Securities Company. I am talking now of the interests of carriers separate from producers and shippers. Has it not placed it in such way that it will be feasible and practicable in a much greater degree than before for carriers to prevent deviations from the published rate and also to prevent reductions in the published rate by the separate action of each of them?

Mr. Harriman: I think not.

Commissioner Clements: You do not think there is any greater opportunity for that than before?

Mr. Harriman: I think not.

Commissioner Prouty: Mr. Harriman, you say it is for the interest of railroads that traffic should move by its natural chan-
275 nels. For instance, take cotton raised in Texas and the Southern States. Is the natural channel by which that cotton is moved from this country to Japan by the Southern Pacific or by the Great Northern?

Mr. Harriman: I think that would be controlled largely by the prevailing conditions at the time that commodity was to move.

Commissioner Prouty: Both of those roads could take it?

Mr. Harriman: Yes, sir.

Commissioner Prouty: And both would probably be competitive for it. Don't you think that out of that competition the cotton grower would be likely to get a better rate to Japan than if you owned both roads, or Mr. Hill owned both roads?

Mr. Harriman: I think if Mr. Hill, myself, or any other man owned all of the railroads that they would get a very much better rate than they would if they were separate.

Commissioner Prouty: Why?

Mr. Harriman: For the reason that the conditions prevailing on each line could be taken advantage of in favor of a particular shipment. We have often had conditions where we could induce the shipment of cotton or any other commodity where we have a prevailing movement of empty cars one way or the other; and with a freer hand I believe the railroads could increase the movement of commodities from one part of the country to the other, to Japan, or any other foreign country, if we had less restriction and could have more elasticity than is now given them in the matter of giving rates at any particular time.

Commissioner Prouty: Just assume, for instance——

Mr. Harriman: One moment, please. I think Mr. Hill explained that yesterday; that commodities of the Northwest have to be moved to points on the Chicago, Burlington and Quincy railroad; they have to be moved to points on the Union Pacific railroad, and the prevailing movement of empty cars the other way would influence the rate at any particular time, which could be given to cotton or to anything else.

Commissioner Prouty; Take cotton. Suppose you owned all of the transcontinental roads, so that a man could not get his cotton across the country unless it went by your road; why would you reduce his rate?

Mr. Harriman: Because it would be to our interest to make such a rate as would induce the movement of that commodity.

Commissioner Prouty: If by reducing the rate you could increase the movement or volume, it would be to your interest to reduce the rate and you would reduce it?

276 Mr. Harriman: Yes, sir.

Commissioner Prouty: Unless you could increase the volume of traffic, you would not reduce the rate?

Mr. Harriman: It would not move. The same principle that

would induce the rate that was made on the first bale of cotton would influence the rate which was made on a million bales of cotton. You would have to make a rate in the first instance that would enable the producer to ship his commodity.

Commissioner Prouty: So you do not think, Mr. Harriman, that competition between different lines would reduce the rate on cotton—competition itself?

Mr. Harriman: I think it is only temporary.

Commissioner Prouty: I will take another illustration that you may know something about; I guess you do. Take the movement of grain from the Mississippi river to the Atlantic seaboard. Some years ago this commission made an order—before I came on it—that corn should be transported from the Mississippi river to New York for 17 cents per hundred pounds, and the railroads of this country said it was confiscatory. Four years ago, in the winter time, when there was no competition by water, there was a published rate in effect from the Mississippi river to New York of 13½ cents per hundred pounds, and we had an investigation to determine why that rate was 13½ cents, and every railroad man that testified on that occasion testified that there were no market conditions abroad that required it—that it was entirely competition between rail lines.

Mr. Harriman: Who benefited by it?

Commissioner Prouty: I am not asking who benefited by it.

Mr. Harriman: I cannot account for the inequalities or stupidity in railroad management.

Commissioner Prouty: I am not asking about stupidity. I am talking about the rate. What was it that reduced that rate to 13½ cents if it was not railroad competition.

Mr. Harriman: May I ask you another question? Did the rate stay at that point?

Commissioner Prouty: The rate stayed a great deal lower than it had been before

Mr. Harriman: I confess that there are matters in railroad management which I cannot understand. I do not pretend to be an expert traffic man; but I know what the shipper wants and the railroad wants is stability, and that there are special instances, such as you cite now, where there are reductions in rates because of the then specially existing condition. Now, if we could, as I
277 said before, have a little elasticity—there may have been in that instance, I do not know, a movement of empty cars east bound which enabled them to take the commodity at that rate you named. I do not know what the conditions were at that time, but that might have been the influence of one railroad.

Commissioner Prouty: Those conditions prevailed for two or three winters.

Commissioner Clements: Every year when the lake is frozen up the rates go up on the railroad, I understand, and when the lake is open the rates go down. That must be the influence of competition.

Mr. Harriman: Is it not a fact that there is a larger volume moving in any event during the time of navigation than there is after navigation is closed? That enables them to make a more attractive rate.

Commissioner Prouty: You have said, and repeatedly, that the railroad was interested and the public was interested in having these systems developed and put into first-rate shape. That is undoubtedly true. That is because the public is interested in the rate at which merchandise finally moves, is it not?

Mr. Harriman: No; not only in the rate, but in the facilities furnished and the regularity of movement as much as in the rate. There is no advantage to a shipper if he is shipping his goods at a favorable rate if he is not well assured that that particular commodity will reach its destination within a reasonable time.

Commissioner Prouty: If your rate from here to Denver was 5 cents higher than rates by other lines, how much stuff do you think you would ship?

Mr. Harriman: I think that 5 cents is a little out of proportion. We might get a little more if we had better facilities, but 5 cents is out of proportion.

Commissioner Prouty: You know, Mr. Harriman, that competing rates have to be practically the same between the same points. You do not rely on facilities to enable you to secure a better freight rate, do you ordinarily?

Mr. Harriman: No; but what I have been trying to illustrate is that by having better facilities and more economical methods for transporting our business that we would be enabled to make better rates; but if we have destructive competition and irregular rates we will not be able—as it has been in the past—we will not be able to give the facilities to continue the increase in the volume of business all over the country.

278 Commissioner Prouty: Is not the thing — which the public is ultimately interested the rate?

Mr. Harriman: No, sir; not absolutely.

Commissioner Prouty: Well, pretty near.

Mr. Harriman: Not pretty near.

Commissioner Prouty: Do you think you can charge a higher rate than your competitor, no matter what facilities are?

Mr. Harriman: I think there are certain conditions. One manufacturer can give better goods and get a higher price.

Commissioner Prouty: If the public is interested along with you in rates and facilities, why should not the public have some voice in determining and supervising the rates?

Mr. Harriman: They have. They practically make it.

Commissioner Prouty: What do you mean?

Mr. Harriman: Apparently a shipper in the past has been able to make the rate.

Commissioner Prouty: Name some rate.

Mr. Harriman: I do not know. I am not a traffic man.

Commissioner Prouty: Mr. Stubbs is.

Mr. Harriman: Don't I understand, as it exists to-day, that if any unequal condition that exists any shipper can make a complaint and have his case brought before a court to adjudicate the same at the expense of the railroad against whom the complaint is made. Am I not right?

Commissioner Prouty: I won't undertake to answer that question. But I would like to have you do this: I would like to have you consult your attorneys and file as a part of your examination here a reference to some case in which a court has rendered a final judgment correcting a rate, a discriminating rate. I do not speak of those States in which there is a commission which has power to fix rates, but I speak of interstate rates of vital importance to the public, and rates in those States where there is no commission with power to fix rates. I would like to have you file a reference to some one case of that sort.

Mr. Harriman: I do not know of any that has been brought. I am asking you. I am not as familiar with that as you are.

Commissioner Prouty: I think as you do with reference to a part of this question, that unless these consolidations and unifications result in the overcapitalization of our railroads they are good for the country and a good thing for the carriers. I think that they may result in imposing on the public, and have resulted in some cases in imposing upon the public, an unjust rate.

Mr. Harriman: May I ask you——

279 Commissioner Prouty: Just a minute. I think the public ought to have some means by which a shipper can complain and by which, if his complaint is found to be reasonable, he could get relief. I do not think he has any such relief now.

Mr. Harriman: Do you know of any special case where you fear that there may be some discrimination or some hardship?

Commissioner Prouty: I do not think that the discrimination between shippers is so likely to take place after consolidation as before. I think the hardship is likely to come from the charging of too high a rate.

Mr. Harriman: It has not in the past.

Commissioner Prouty: I am not quite certain about that.

Mr. Harriman: Can you give me an instance?

Commissioner Prouty: I will give you an instance without saying whether it is in point or not. The actual rates from Buffalo to New York for three or four years had been on corn 2¾ cents a bushel, something higher on wheat. Two years ago you organized up there, or the railroads organized up there, what is called the Buffalo Grain Pool, and the sworn testimony before this commission is that the pool absolutely eliminates competition on ex-lake grain from Buffalo to New York, and that its effect has been to raise rates from one-half to 1 cent a bushel, which amounts on all grain moving through Buffalo in a year to a million and a half dollars. The rate is that

much higher without competition than it was with competition. I do not say it is unreasonable.

Mr. Harriman: You do not say it is unreasonable?

Commissioner Prouty: I do not express any opinion about it.

Mr. Harriman: You do not ask me to?

Commissioner Prouty: No; I do not ask you to.

The Chairman: Is there anything further you desire to ask, Mr. Day?

Mr. Day: Yes, sir; you said when my examination was broken that you got part cash and part stock for the sale of the $78,000,000 of Northern Pacific stock?

Mr. Harriman: Part cash and part securities.

Mr. Day: What became of the cash?

Mr. Harriman: It was used to pay the obligations of the Oregon Short Line—money which they had borrowed to pay for the Northern Pacific.

Mr. Day: And none of it went back into the treasury?

Mr. Harriman: The treasury of the Oregon Short Line and was used—

280 Mr. Day: Used to pay any of the $61,000,000 or the securities, certificates, or obligations of the Short Line that had been put out to raise these $78,000,000?

Mr. Harriman: Had that been reduced? I think not.

Mr. Day: You said that the subsequent management of the Northern Pacific showed that subsequent to the election of the new board of directors that you were right—that the Union Pacific interests were right—in turning the property over to the stockholder, Mr. Morgan. What did you mean by the subsequent management of the Northern Pacific that justified your action?

Mr. Harriman: Perhaps the subsequent management might have been the continuation of the same management.

Mr. Day: Is that what you meant?

Mr. Harriman: That is what it was.

Mr. Day: Has any agreement been made, or any understanding been entered into, regarding a division of trans-Pacific traffic between the Southern Pacific and the Union Pacific?

Mr. Harriman: No, sir.

Mr. Day: Or between the Southern Pacific and the Union Pacific and the Atchison?

Mr. Harriman: No, sir.

Mr. Day: Or with the Northern Pacific or Great Northern or the Canadian Pacific?

Mr. Harriman: Not that I know of.

Mr. Day: You are not a party to it and have no knowledge of it?

Mr. Harriman: I have no cognizance of it.

Mr. Day: Has there been any change in the routing of traffic or regarding rates, division of traffic, or pooling of traffic, since you assumed the management of the Union Pacific system?

Mr. Harriman: Not to my knowledge.

Mr. Day: The Union Pacific is just as independent and is operated just as independently of the Southern Pacific as before the union of interests?

Mr. Harriman: I do not know of any instance where there has been any change.

Mr. Day: And the same is true of the Union Pacific and competing lines to the northward? They are just as independent of each other as they were prior to this union of interests?

Mr. Harriman: There has not been any union of interests.

Mr. Day: Whatever results from the interlacing of stock.

Mr. Harriman: So far as I know, the relations of the companies are on the same basis as before.

281 Mr. Day: Does the Union Pacific stand in a better position to get traffic that formerly went by the Southern Pacific? Does it now?

Mr. Harriman: I do not think so.

Mr. Day: The Southern Pacific is not used to—or the traffic is not diverted from the Southern Pacific to the Union Pacific proper?

Mr. Harriman: No, sir.

Mr. Day: Nor *vice versa?*

Mr. Harriman: No, sir.

Mr. Day: That is all I wish to ask.

The Chairman: Mr. Harriman, about when did your connection with the Union Pacific system begin?

Mr. Harriman: Just after the reorganization, I think, in 1898.

The Chairman: You at that time acquired a large interest and became the chief executive officer?

Mr. Harriman: No; I became a member of the board of directors and a member of the executive committee. I was made chairman of the executive committee and preside at meetings of the committee.

The Chairman: And that is the relation which you have since sustained to that system?

Mr. Harriman: Yes, sir.

The Chairman: And that relation has been practically the same from the time of the reorganization down to the present?

Mr. Harriman: Down to the present time.

The Chairman: And that was of course, before the acquisition of any of the Southern Pacific stock by the Union Pacific?

Mr. Harriman: Yes, sir.

The Chairman: At the time the Union Pacific began to acquire stock of the Southern Pacific had you individually any interest in the Southern Pacific?

Mr. Harriman: No, sir.

The Chairman: You had not been connected as a stockholder or otherwise with the Southern Pacific system?

Mr. Harriman: Not as an officer in any way. I might have had an interest in Southern Pacific stock at some time, but I do not

remember that I had. If so, it was so small as not to have had any influence at all.

The Chairman: You have had to do with deciding upon the policy of the Southern Pacific after acquiring that large interest in the Southern Pacific which was acquired?

Mr. Harriman: Yes, sir.

282 The Chairman: Your testimony may have covered the point I have in mind in a general way, but I desire to ask you what was the direct purpose in acquiring that interest in Southern Pacific stock?

Mr. Harriman: To prevent its control by some other line that might have diverted the business into other channels against the Union Pacific system.

The Chairman: Had you reason to apprehend that the Southern Pacific might fall into such unfriendly hands?

Mr. Harriman: It might have. We had no reason to suppose that any other company were acquiring it, but it was not advisable for us to wait until somebody else moved.

The Chairman: You were not moved by immediate apprehension or by knowledge of efforts being made on the part of others?

Mr. Harriman: As you remember, the principal holder of Southern Pacific stock had recently died, and there was a chance always of that stock being disposed of to some interest that might have been adverse to and prevented the free interchange which had formerly existed between the two companies.

The Chairman: It was on general grounds and for the future prosperity of the Union Pacific road?

Mr. Harriman: Yes, sir; and we believed for the future prosperity of the Southern Pacific.

The Chairman: And that was the sole inducement on the part of the Union Pacific to acquire this large interest in the Southern Pacific?

Mr. Harriman: Yes, sir; to preserve the then existing conditions.

The Chairman: The Southern Pacific at that time owned the line from San Francisco to Ogden?

Mr. Harriman: Yes, sir.

The Chairman: The Union Pacific and its connections could not reach the Pacific coast over its own rails except at Portland?

Mr. Harriman: Well, it does not now. It could by building a railroad.

The Chairman: Except as it controls the Southern Pacific.

Mr. Harriman: That is all.

The Chairman: Before you acquired control in the management of the Southern Pacific you could not reach by your own rails the Pacific coast at any point south of Portland?

Mr. Harriman: No more than we do now.

The Chairman: So that all transcontinental traffic which
283 reached the Pacific coast at points south of Portland, passing over the Union Pacific, had to go from Ogden on the Southern Pacific rails?

Mr. Harriman: There was no other way provided for it then; naturally it must, no matter who owned it.

The Chairman: Did that give the Southern Pacific the position which enabled it to control transcontinental rates upon the Union Pacific route?

Mr. Harriman: I think not.

The Chairman: Then, is the present control of the Union Pacific system over transcontinental rates by the Union Pacific route no greater than it was before the Union Pacific acquired this interest in the Southern Pacific?

Mr. Harriman: I think not. Understand me; I have already explained that in these matters the traffic officers and executive officers of the various companies have to be communicated with and——

The Chairman: I understand that.

Mr. Harriman: All has to be done by conference with the managers of those various lines, the same as it had to be before, to arrange the divisions.

The Chairman: In point of fact, Mr. Harriman, has there been any change in transcontinental rates since this acquisition by the Union Pacific of Southern Pacific stock?

Mr. Harriman: I understand that Mr. Stubbs was on the stand yesterday. I did not hear his testimony and I have not had any conference with him, and he would be the proper one to answer that.

The Chairman: You do not know?

Mr. Harriman: No, sir.

The Chairman: You do not know of any change?

Mr. Harriman: No, sir; I do not.

The Chairman: Either by increase or reduction?

Mr. Harriman: In any way whatsoever.

The Chairman: Is it your understanding that your rates and basis of rates to-day are the same as they were before the Union Pacific acquired the interest in Southern Pacific stock?

Mr. Harriman: I do not know of any change whatever.

Commissioner Prouty: How about the maintenance of rates? Are rates better maintained or not so well maintained as they were?

Mr. Harriman: As between the transcontinental routes, do you mean?

284 Commissioner Prouty: Transcontinental rates.

Mr. Harriman: I do not know of any change whatever.

Commissioner Prouty: I did not understand exactly what Mr. Stubbs's duties were. He is the traffic director of these two companies. Has he power to do anything except to tell somebody what he thinks had better be done?

Mr. Harriman: He has the power, as far as possible, to unify the management of the different officers by conference with the officers of these various companies.

Commissioner Prouty: Suppose Mr. Stubbs thinks some rate ought to be changed on the Southern Pacific system, has he any power to change it?

Mr. Harriman: I think Mr. Stubbs's influence on the Southern Pacific could enable him to change it. He has no power, as I understand it, to issue a tariff. There is a traffic manager of the Southern Pacific.

Commissioner Prouty: You think, then, if Mr. Stubbs's reasons were sufficiently cogent, he could influence the traffic manager to change the rate?

Mr. Harriman: Yes, sir.

Commissioner Prouty: On the Union Pacific is that the same?

Mr. Harriman: Yes, sir.

Commissioner Prouty: Practically Mr. Stubbs can make the rates on the Southern Pacific and the Union Pacific?

Mr. Harriman: I should think he could.

Commissioner Clements: Mr. Stubbs told us yesterday that these roads, and probably all the transcontinental roads, had a joint agency at San Francisco, or that there was an understanding in practice whereby no one would reduce a rate except through this joint agency after notice to competing lines. Don't you think that tends to hold up rates?

Mr. Harriman: To keep rates stable.

Commissioner Clements: Don't it tend to prevent reduction of the published rate?

Mr. Harriman: I do not think it does. I do not know what Mr. Stubbs testified to, but whatever his testimony was, I think he ought to be questioned on it. I am not familiar with those details of traffic matters, but Mr. Stubbs's general powers are that he shall have the general supervision, in co-operation with the managers, of the various lines.

Commissioner Clements: You have asked us some questions, one of which was whether we believe there were any unreasonable rates and also in respect to the effect of association in regard to the
285 raising of rates and keeping rates up. Now, it is a pretty well-known fact, I suppose, in New York and throughout the country, that about two years ago, when the volume of traffic began to grow immensely, after the depression, that the carriers, particularly in trunk-line territory, got together and through their classification committee raised hundreds of articles from one class to another. They took articles of great importance out of the commodity list and put them at a higher rate in the class list. It effected something like eight or ten hundred changes by one paper that was issued, ninety per cent. of which, or more perhaps, were increases, and some of which were increases in the rates over what they had been for fifteen years previous to that—an average in-

crease on the whole of the articles changed was about 33 per cent. That was done by a representative committee of some sixty-odd roads which adopted the classification. I call that to your attention as an illustration of what can be done by co-operation, community of interest, or joint interest, or common interest of the carriers, when they get together to prevent competition and get a better rate.

Now, laying aside for the time being the question of whether the rate was too low before or not, the shipper under the law is declared to have the right to a reasonable rate. Must he look always to the judgment or discretion or generosity or conscience of the railroad manager in order to get his just rate? If in the present state of the law competition is to be eliminated in this way, will he not be left entirely to that tribunal to get his rate?

Mr. Harriman: I do not understand that he is at present left to that tribunal, if there is such a tribunal. But it seems to me that if that rearrangement of the various commodities was made and there has been no evidence of any dissatisfaction, that in itself is evidence that it was reasonable.

Commissioner Clements: There was a multitude of complaints brought before the commission, five or six hundred, by wire and letter and by all known means of communication, and several formal complaints have grown out of it since.

Mr. Harriman: Are they still in process of being adjudicated?

Commissioner Clements: They are in process of adjudication.

Mr. Harriman: Are they going to be adjudicated?

Commissioner Clements: The commission will report upon them when they are finally argued. These cases are tedious, and voluminous testimony has been taken and at various times. All of this suggests that if there is to be any remedy for the public against the exaction of unreasonably high rates the shipper must
286 have the rate before he ships, because the merchant and business man—I think you will agree with me—cannot very well conduct his business on rates which he must pay and then take his chances of getting a part of it back by some process in court, which would require perhaps a suit on each transaction, and the amount involved would not pay for the suit; it is cheaper for him to lose it than to try to get it back.

Mr. Harriman: As I understand, the railroad in that case has to bear the expense of the suit.

Commissioner Clements: If he gets judgment, the company would.

Mr. Harriman: I understand, whether or no, the expense of that suit has to be provided by the railroad complained against.

Commissioner Clements: That is not the law, that I know of.

Commissioner Prouty: Where will that suit be brought?

Mr. Harriman: Now you are getting me into a tangle of things that I do not know about. I am attending to the everyday matters of these corporations that come before me.

Commissioner Prouty: You are looking after the railroad interest and letting somebody else look after the public interest?

Mr. Harriman: No; I am looking after the public interest too, because they are both common.

Commissioner Clements: There is a difference between the rate that traffic will bear and the rate that is reasonable. In answer to a question this morning you said it would not do to make a rate too high; that the traffic would not move; that you would not get the business. It will move at a high rate sometimes, perhaps, because it is of no value unless it does move, provided there is something left the shipper after he pays the rate; but that would not be the measure of the reasonableness of the rate. It was said by Mr. Hill at some time—I do not know whether in this investigation or not—that the increase of 1 mill per ton per mile—it seems very little—would aggregate to the roads of the country $165,000,000 and take from the public $165,000,000, at a mill a ton.

Mr. Day: Per mile?

Commissioner Clements: Per mile.

Mr. Harriman: Or 1 cent for moving 1 ton 10 miles. It is a little plainer to understand.

Commissioner Clements: $165,000,000 is a great deal of money, and yet that would not seem like a very great increase in the rate per ton per mile. It illustrates the extent to which a little stiffening up of the rates by diminution of competition may bring about a very great result in dollars and cents.

287 Mr. Harriman: Would not the reverse of that be a fact if the rate were reduced a mill or 1 cent for moving a ton 10 miles?

Commissioner Clements: Undoubtedly.

Mr. Harriman: It only shows, it seems to me, how the management of these railroads has become refined down to such a fine point, and that they have got to a point where they have got to have some method of preserving their existence. In other words, the manufacturer to-day is dependent upon the railroads as his principal customer. I undertake to say that the increase in volume of business this year is largely because of the improvement and additions to the railroad properties as they exist to-day, and the rates that are made are made sometimes as against themselves.

The Chairman: Have you any further questions, Mr. Day?

Mr. Day: I have nothing more.

The Chairman: Mr. Harriman, do you wish to make any further statement?

Mr. Harriman: No, sir; except to thank the commission for excusing me in time to catch my train.

Witness excused.

Testimony of Edward H. Harriman, taken by and before a special master, in the suit of The State of Minnesota *vs.* Northern Securities Company and others, in the circuit court of the United States for the district of Minnesota, and introduced in evidence by the defendants in the suit of the United States against Northern Securities Company and others, in the same court.

Room 70, Federal Building, City of New York.

DECEMBER 1, 1902—11 o'clock a. m.

The hearing was resumed at this time pursuant to adjournment, all parties being represented.

The defendants offered as evidence in this case the testimony given by E. H. Harriman, in the city of New York, in the case of The State of Minnesota *vs.* Northern Securities Company. Said testimony was received without objection, and is as follows:

"E. H. HARRIMAN, being duly sworn as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. MUNN:

288 Q. Mr. Harriman, you are a member of the board of directors of the Union Pacific and chairman of its executive committee, I believe?

A. Yes, sir.

Q. You are also officially connected with the board of directors and the executive committee of the allied interests of the Union Pacific?

A. Nearly all of them.

Q. And you held such position during the year 1901?

A. Yes, sir.

Q. On or prior to May 9, 1901, had you, acting for the companies or railway interests that you represented, acquired certain stock in the Northern Pacific Railway Company, amounting in round numbers to about 78 million dollars, par value?

A. Yes, sir.

Q. And that stock stood in your name and that of Mr. Pierce, holding it for the interests that you represented?

A. Yes, sir.

Q. Did J. P. Morgan & Company, or any member of that firm, open negotiations with you looking to the purchase or acquisition of such holdings during the fall of 1901?

A. Does it make any difference whether I opened the negotiations with them or they with me? I don't remember. It was either one or the other. The negotiations were opened. Or they may have

been opened by some intermediate party. I don't remember just how it was.

Q. At what time were those negotiations opened?

A. It would be difficult for me to state within a month. It was September or October, I should think.

Q. It was either during the month of September or October, 1901?

A. I should think so.

Q. How long did those negotiations continue before they were finally consummated?

A. I should think about a month or six weeks, possibly two months.

Q. With whom did you have your first dealings in those negotiations, if you remember?

A. I couldn't remember.

Q. Was it with Mr. Bacon, of J. P. Morgan & Company?

A. I had many talks with Mr. Bacon. I had talks with nearly every member of the firm.

Q. In these negotiations were they acting for themselves or acting with the understanding that these securities or this stock was to be turned over to some holding company when organized?

289 A. They never disclosed to me whether they were acting for themselves or somebody else.

Q. Before the negotiations were finally closed was it understood that you were to take some stock in a company to which this stock was to be transferred?

A. That is my recollection.

Q. And was that the Northern Securities Company?

A. It was never designated by any name.

Q. You didn't learn what company was to take it until you received the stock of that company in exchange?

A. Practically at that time.

Q. Did you understand from the beginning of these negotiations, that this stock was ultimately to be turned over to some holding company which was to be organized?

A. No, I can't say that there was any understanding at the beginning of the negotiations for a settlement of whatever differences we might have in regard to that stock, whether it was to be taken by them or by a holding company, or how it was to be paid for. It was only towards the end, when the thing crystallized, that the suggestion was made that payment should be made partly in cash and partly in a holding company stock. I think it was just towards the end of the negotiations when we were considering whether we would break away or get together on it.

Q. Well, did you understand at any time that they were acting for themselves in the matter and expected to take the stock themselves?

A. I had no understanding upon that subject.

Q. They were simply trying to secure this stock on some basis, then?

A. That is the substance of it.

Q. And it was not until toward the end of the negotiations that you learned they were acting for some holding company?

A. I didn't say I understood they were acting for a holding company. They didn't disclose to me that they were acting for anybody else at all during the negotiations.

Q. Well, you finally learned that the stock was in fact to be turned over to a holding company?

A. There never was anything on their part, it seems to me, that would lead me to infer that they were to turn that stock over to a holding company. Towards the end, when the matter crystallized, and when we were very nearly at the end of our tether, they offered to pay for these shares in the stock of a holding company so much, and so much in cash. Now, there was nothing said as to whether they would turn this stock over to a holding company or whether they would hold it themselves; but they would give us that holding company's stock in part payment.

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Q. When did you learn that? How long before you actually delivered the stock?

A. Before we delivered our shares?

Q. Yes.

A. It was several days. I don't remember just when. Perhaps two or three days. It may have been within three or four days, or perhaps two days. I have a great deal to do, Mr. Munn, and since our talk the other day I have been trying to refresh my memory on this very thing; but I was pretty busy in other matters at that time, and have been since.

Q. When you found that you were to take the stock of some other company in part payment for this stock, of course you knew then that they were acting for a holding company, did you not?

A. I don't see how I could know.

Q. Well, did you, Mr. Harriman?

A. No, I don't see how I could.

Q. When did you first learn that this stock was to be delivered to the Northern Securities Company?

A. When it was delivered.

Q. That was the first you knew about that?

A. That is my recollection. The first I knew was when it was delivered to that company.

Q. When did they first make a proposition to you to make payment for this, or part payment for it, in the stock of some other company?

A. I think that was towards the end of our various conferences and negotiations, as I said; within a few days, perhaps, of the time the thing was absolutely closed.

Q. Now, during these various conferences you had when these negotiations were pending what was the talk about payment for

your stock? Was it to be paid for in cash, or how were they to pay for it?

A. I don't recollect that there was anything said as to just how it was to be paid for until towards the end.

Q. What did these negotiations relate to then? Whether you would surrender your stock or give it up?

A. Whether we would do anything with our stock except to stand where we were on the basis of holding preferred and common stock.

291 Q. I suppose when you acquired the stock you supposed you had acquired a controlling interest in the Northern Pacific?

A. Practically that is what we thought.

Q. And did they contend that they had the right to retire this preferred stock which you held without your consent?

A. Yes, sir.

Q. That contention was made during these negotiations?

A. I think steps were taken to retire it before the negotiations were ended.

Q. You mean that official action had been taken, or that they told you they were going to retire it?

A. I think action had been taken.

Q. The record shows that the action taken to retire the preferred stock was on November 13, 1901.

A. It was about that time, then.

Mr. YOUNG: And the record shows that your sale was closed after the 15th.

WITNESS: Then I say it was practically about that time.

Q. When in these negotiations did you first learn that they intended to retire the preferred stock?

A. I think when the action was taken.

Q. Up to that time, then, you supposed you had a controlling interest in the Northern Pacific by your holdings?

A. Yes, sir.

Q. And why were these negotiations pending, then, looking toward a settlement of your disputes, if you had started in to buy a controlling interest in the Northern Pacific and supposed you had it, and no questions were raised about that retirement?

A. Well, of course it was stated to us that this preferred stock could be retired.

Q. Who made those statements?

A. Everybody. It was published in the papers. Statements were made by the directors and by people connected with the company, and published in the papers. I think you will find public statements were made at that time, that that was the intention. But of course the actual steps taken for that purpose were not taken until about that time we made our trade. And if they hadn't been

taken and it hadn't been retired, we probably would have been in control.

Q. You understood, then, during these negotiations and prior to the time you closed the transaction——

292 A. That there was a probability——

Q. —that there would be an effort made to retire that stock without your consent?

A. A probability of it, yes.

Q. Did Mr. Morgan, or any of the representatives of J. P. Morgan & Company, with whom you negotiated, state to you that they intended to do that?

A. I imagine they did. I don't remember just what——

Q. Well, that was one of the principal inducements that led you to finally surrender your holdings, was it not?

A. Practically.

Q. When did this discussion regarding the retirement of the preferred stock first come up, as you remember it?

A. I think in the summer of 1901.

Q. So you had that in mind, when negotiations were first opened between yourself and the firm of J. P. Morgan & Company, of course?

A. I presume that that was one of the influences. I don't know whether I had it in mind or not. I didn't know just what we would do.

Q. At the time you finally consented to accept in part payment for your holdings stock in a holding company, did you insist upon any basis on which any other stock of the Northern Pacific Railway Company should be acquired by that holding company?

A. No, sir.

Q. You finally agreed to turn in your holdings and receive from the Northern Securities Company upwards of 82 millions in stock of this company?

A. Yes, sir.

Q. Did you know at that time on what basis this holding company was to take in any other Northern Pacific or Great Northern stock?

A. Yes, sir.

Q. On what basis?

A. $115.

Q. For the Northern Pacific?

A. Yes.

Q. And what for the Great Northern?

A. $180.

Q. Did you make any request or demand that they should not take any of the stock of either one of these companies at a higher rate than that?

A. No, sir.

293 Q. Did you understand that they would not?

A. I did not.

Q. Were you willing to surrender your holdings to a company and allow it to determine whether they would exchange their stock with some other holder for twice the amount that you were getting?

A. Not if I supposed they would do it. But there was no stipulation.

Q. Well, you understood they would not?

A. I don't think the thought crossed my mind.

Q. Did they represent to you that that was the basis on which they were going to take in the stock?

A. The statement was made to me that they would put this Northern Pacific stock into a holding company and give us—not this Northern Pacific stock—but that they would give us in part payment a holding company's stock on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a holding company, or had formed a holding company, and would pay us in this stock, and that those were the terms on which it was to be bought.

Q. Did they state to you that if they took in any other stock than what you would surrender to the holding company they would take it on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

A. I don't think that statement was ever made. It was a simple statement that they were going to change these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.

Q. That is what I want to get at. They told you, then, that certain holders of the stock of the Great Northern and the Northern Pacific were going to exchange their stock for the stock of the Northern Securities Company, on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

A. They didn't say certain ones were, but they were going to form this holding company, and that they would pay me in the holding company's stock, which stock should be issued on that basis. They didn't say that they had agreed to exchange certain stock.

294 Q. No, but what I want to get at is this. Didn't you understand from their statements that the basis of exchange, if any was made, was 115 and 180?

A. Yes.

Q. That is, 115 for Northern Pacific and 180 for Great Northern?

A. Yes.

Q. Were you consulted at all regarding the formation of this holding company?

A. No, sir.

Q. You didn't know where it was going to be organized?

A. No, sir.

Q. And had nothing to do with it?

A. No, sir.

Q. You were not consulted about the retirement of the preferred stock, either, were you?

A. No, sir.

Q. Did you make any inquiries regarding who were to be the officers of the holding company, or where it was to be incorporated, or the amount of its capital stock, or anything of that kind, before you agreed to accept its shares in part payment for your holdings?

A. I don't know that I made any inquiries. I presume there was considerable talk about it, but I don't remember that I made any inquiry from anybody.

Q. Do you remember any statements made by persons with whom you negotiated or by Mr. Hill or his associates, who ultimately formed this company, as to where it was to be incorporated, or the amount of capital stock, or its officers?

A. All I remember is just as I have stated: a statement made to me that if this trade went through they would pay us in the shares of a holding company which would issue its stock in exchange for Northern Pacific at 115 and Great Northern at 180. And I agreed to take so much of that stock in exchange for the shares of the Northern Pacific we held—all the Northern Pacific we held.

Q. But you made no inquiries as to where the corporation was to be formed or the amount of its capital stock?

A. I knew, of course, the amount of the capital stock; but I didn't go into the particulars of the formation of the company at all. That may seem strange. But in the enormous transactions we have down here we simply have faith that the man who is doing the thing is doing it properly, or else we don't negotiate or trade with him.

295 Q. Did you finally consent to surrender your holdings on the basis on which you did because you had made up your mind they would carry out the determination you had heard expressed, to retire the preferred stock, and thus take away from you the controlling interest in the stock of the Northern Pacific?

A. I think I recollect pretty clearly that from our standpoint we thought it was better for us to accept that price for our stock than to go into a legal contest.

Q. And you understood that if you did not do that you would have a legal contest on that question?

A. Well, we took it for granted, naturally, action having been taken determining to retire the preferred stock.

Q. Well, action was not taken to retire the preferred stock until your negotiations had nearly reached a conclusion?

A. Yes, but they had not reached a conclusion.

Q. That is, you waited until the very last moment to see if they would do what you understood they would do?

A. Well, we were very patient.

Q. Then if such action had not been taken you would not have surrendered your stock?

A. I don't know. That is a condition we did not have to meet. I don't think I could answer that question fairly, nor do I think it is exactly a fair question; because the board of directors might have determined (if they had not done it) to have sold our shares for less.

Q. Well, you were acting on behalf of your company largely by yourself at that time, I suppose?

A. Largely.

Q. And your actions were guided by what you have stated?

A. By what I found the surroundings, yes.

Q. When you began buying this stock for your company or companies you did it with the expectation of acquiring control in the Northern Pacific, of course?

A. Or an influential voice in the management.

Q. And you knew that you did in fact have a majority of the combined stock of the Northern Pacific after you got through with your purchases?

A. Certainly.

Q. And would continue to control that company unless they retired your preferred stock?

A. Or unless we sold it.

Q. Of course you knew, during these negotiations, that Mr. Morgan and Mr. Hill and the stockholders of the common stock
296 of the Northern Pacific who were co-operating with them, or allied with them, claimed to control the Northern Pacific by virtue of a majority of the common stock?

A. Naturally.

Q. Did they claim to you during these negotiations that they had such majority of the common stock?

A. I don't remember that they did. That was the general talk. I don't think it was necessary for them to make even the statement.

Q. You knew that, of course?

A. Naturally. It was known by everybody. I think it was not necessary for them to make that statement to me, because among the other statements, as I say, about the retiring of the preferred stock, was a statement made and published in the papers.

Q. And they never disclosed to you for whom they were acting until the transaction was ready to be closed?

A. Do you mean Morgan?

Q. Yes.

A. Do you mean the exact company?

Q. Yes.

A. My recollection is that he did not. In fact, I don't think this transaction was closed until practically the very minute the payment was made. I think there was considerable discussion and dispute as to the final payment, and about—I don't remember now whether it was the amount to be paid or whether it was the amount of stock to be delivered; I think it was the amount of stock to be

delivered. They supposed we had somewhat more stock than we really had.

Q. When did you have your stock transferred on the books of the Northern Pacific Railway Company in the name of yourself and Mr. Pierce?

A. I don't remember. It must have been sometime before that.

Q. It was prior to the annual meeting in October, wasn't it?

A. I think so, yes.

Q. And you had all your holdings transferred at that time?

A. Practically all. I don't think it was all; I think nearly all was, though. There may have been some of the stock held out; I don't remember.

Q. During these negotiations did the representatives of J. P. Morgan & Company, with whom you dealt, tell you that unless they organized a holding company and this stock was turned
297 over to such holding company, that the transaction would not go through?

A. No, I don't think any such statement was necessary.

Q. Well, was any such statement made?

A. I don't remember that the question ever came up. This was a running negotiation, and it was difficult to tell what either side would do. I think until practically the last minute I didn't know what I would do.

No cross-examination.

(Signed) E. H. HARRIMAN.

Deposition of W. P. Clough.

Testimony of W. P. Clough, taken by and before a special master, in the suit of The State of Minnesota *vs.* Northern Securities Company and others, in the circuit court of the United States for the district of Minnesota, and introduced in evidence by defendants in the suit of The United States *vs.* Northern Securities Company and other-, in the same court.

The defendants offer as evidence in this case the testimony of W. P. Clough, taken in the city of New York in the case of The State of Minnesota *vs.* The Northern Securities Company. Said testimony is received without objection, and is as follows:

"W. P. CLOUGH, being first duly sworn as a witness in behalf of the complainant, testified as follows in answer to interrogatories propounded by Mr. Munn:

Q. The records show that you were present at a meeting of the directors of the Northern Securities Company on the 15th of November, 1901, to which I have already called Mr. Nichols' attention (being the resolution above set forth), where the statement was made

by the president of the Northern Securities Company as to his ability or the possibility of acquiring $37,023,000 of the common stock of the Northern Pacific, and $41,085,000 of the preferred stock. You were present at that meeting?

A. I was, yes, sir.

Q. Was there any discussion at that meeting as to the advisability of this purchase and the terms upon which it was to be made?

A. There was no extended discussion.

Q. Well, will you state what discussion took place?

A. If you will be kind enough to let me take those minutes I will explain just what did occur. (Referring to pamphlet containing minutes of the meeting.) This meeting was an adjourned meeting, held at half-past 2 o'clock on the afternoon of the 15th, which, as I remember, was Friday. A little before the hour for the meeting had arrived (perhaps half an hour or so), one of the partners of J. P. Morgan & Company (my recollection is that it was Mr. Steele) came to the Northern Securities office and said that a negotiation which was pending at that time between J. P. Morgan & Company and Messrs. Harriman and Pierce, for the purchase of their holdings in Northern Pacific preferred and common, he thought would very shortly come to a conclusion as to terms; that is, the precise terms upon which Harriman and Pierce would sell would be arrived at very shortly. And he said, at the same time, that probably before closing the contract, if one were entered into, Harriman and Pierce might, if the stock were turned over to the Northern Securities Company, desire to see some action of the board, and suggested that some kind of action should be taken, and inquired about the meeting. I told him that there was to be a meeting that afternoon, but that likely there could not be another meeting on Saturday (which would be the following day) on account of the fact that a number of our directors did not come to their business on Saturday and that a meeting could not be had until the fore part of the week after that day. Then it was suggested that as that was the case and his bargain might come to an early termination and it might be desired to close it up soon, some sort of action be taken at the meeting to be held that afternoon. And then a sketch was made of a minute entry for the meeting, beginning with the words 'The president stated' and ending with the resolution which closes the first paragraph of the 18th page of this printed volume of the minutes. But as the bargain had not yet been concluded, the figures showing either the amount of the stock or the price to be paid could not then be stated, but he thought they would be ascertained before the close of the meeting. So this preamble, commencing with the words, 'The president stated,' and the resolutions following were prepared just as they are now, with the sums left blank, and the meeting assembled, and, after waiting a little while, no figures were present, and some of the directors being anxious to get away I produced this preamble and resolution and I read the resolution and explained it in a general way to the meeting. And after

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quite a general expression of opinion among the directors who were present, that a purchase of this stock was very desirable the resolutions with the blanks and the preamble were adopted. Then we passed to other business. Just as the meeting was
299 breaking up (the other business being finished) I think Mr. Perkins came in (who was a director). I think Mr. Perkins appeared for the first time near the close of this meeting, after most of the business had been done, and brought in figures showing the amount of preferred and common stock, respectively, that Harriman and Pierce had, and the price to be paid; showing the money and the amount of stock of the Northern Securities Company that was to be paid for it. I looked at it, and it was shown to Mr. Hill, and then it was perceived that the amount of Northern Pacific stock contained in that statement was appreciably less than the amount of stock which we had all the time supposed they owned. And we declined to close the trade; that is, the Securities Company declined to take the stock from Morgan & Company on that basis. The meeting then adjourned, with the whole matter left open. And, as I understood, negotiations were then resumed between Morgan & Company and Harriman and Pierce, and were concluded some time between Friday afternoon and the following Monday morning (which was the 18th). Then a basis was reached, which is expressed by the figures which now appear in this resolution. The preferred and common stock of the Northern Pacific were brought in and paid for, and the minutes were written up with these numbers inserted as they now appear here. The meeting for the purpose of acting upon this project again had been adjourned until the following Tuesday. It was found that the following Tuesday was the first day we could reasonably expect to get a quorum. So the following Tuesday the minutes of the meeting of the previous Friday with the blanks filled as they now stand, were read and approved by the board of directors. That is the history of the resolution.

Q. Now, Col., that is the only official action taken by the Northern Securities Company for the acquisition of this stock?

A. Yes, sir. That is it, precisely.

Q. And no other authorization or ratification was given or made?

A. No, sir, none at all. When the minutes were read at the meeting of the 19th, and approved, with the resolution as it now appears of record, with the numbers filled in, the transaction had been closed; the Harriman and Pierce stocks had been delivered and paid for by the Northern Securities Company the previous day.

Q. There had been no meeting of the directors or executive committee taking any further action regarding this particular
300 transaction, between the meeting of November 15th and the one of November 17th that you refer to?

A. None whatever.

Q. November 18th, I guess it is.

A. 19th.

Q. November 19th?

A. Yes, sir. The board adjourned from Friday afternoon until the following Tuesday afternoon."

Proceedings in the Court of Chancery of the State of New Jersey in the Suit of The Continental Securities Company *vs.* Northern Securities Company.

In the Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

vs.

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of Edward T. Nichols.

(Filed May 20, 1904.)

STATE OF NEW YORK, City and County of New York, } ss:

Edward T. Nichols, of full age, came before me this day, and having been first duly sworn, did depose and say,

I am secretary of the defendant, The Northern Securities Company. Annexed hereto are true copies of the bill of complaint, with affidavit and exhibits thereto attached, order to show cause, and opinion of the vice-chancellor, upon the hearing of said order to show cause, in the suit of The Continental Securities Company, complainant, *vs.* The Northern Securities Company, defendant, in the court of chancery, of the State of New Jersey, as appears upon said copies.

EDW. T. NICHOLS.

301 Subscribed and sworn to before me on this 2nd day of May, 1904.

FRANCIS M. KELLER,
[L. S.] Notary Public, N. Y. C.

In Chancery of New Jersey.

Between—

CONTINENTAL SECURITIES COMPANY, Complainant, and NORTHERN SECURITIES COMPANY, Defendant. } On Bill, &c. Order to Show Cause.

Upon reading and filing the bill, affidavit and exhibits herein, and on motion of Bedle, Edwards & Thompson, in behalf of the complainant.

It is on this sixth day of April, nineteen hundred and four, ordered that the defendant The Northern Securities Company show cause before the chancellor at the chancery chambers in Jersey City, on Monday the eighteenth day of April instant, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard therein, why an injunction should not issue pursuant to the prayer of the bill.

And it is further ordered that a copy of this order and the bill and exhibits herein, be served upon the defendant The Northern Securities Company, within three days from the date of this order.

Respectfully advised,

(Signed) W. J. MAGIE, C.

J. J. BERGEN, V. C.

(Copy.)

In Chancery of New Jersey.

To the Honorable William J. Magie, chancellor of the State of New Jersey:

Humbly complaining showeth unto your honor your orator, The Continental Securities Company, a corporation of the State of New Jersey, duly organized under "An act concerning corporations" (revision of 1896) for the purpose of buying and selling, owning
302 and holding, stocks and securities of various other corporations, and while the owner of such stocks and bonds, of exercising all the rights and privileges of ownership thereof:

First. That it is the holder and owner of five hundred shares of the capital stock of the Northern Securities Company, a corporation of the State of New Jersey; that it files this bill in behalf of itself and all other stockholders similarly situated.

Second. That the Northern Securities Company is a corporation of the State of New Jersey, duly organized under the laws of this State on the thirteenth day of November, nineteen hundred and one, with a capital stock of four hundred million dollars, of which it has issued and there is outstanding $395,400,000, consisting of three million nine hundred and fifty-four thousand shares of said stock, of the par value of one hundred dollars each; that the said stock was largely issued to secure ownership of the controlling interest of the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, the owners of certain lines of railway which extend from the cities of Duluth, Saint Paul and Minneapolis in the State of Minnesota, thence across the continent to Puget sound; that the said Northern Securities Company now holds, one million five hundred and thirty-seven thousand five hundred and ninety-four shares of the capital stock of the Northern Pacific Company, and one million one hundred and eighty-one thousand two hundred and forty-two shares of the capital stock of the Great North-

ern Railway Company, which holdings are about ninety-nine per cent. of all the stock of the Northern Pacific Railway Company, and about ninety-four and one-half per cent. of all the stock of the Great Northern Railway Company.

Third. That on March 10th, 1902, a suit was brought in the United States circuit court for the district of Minnesota, third division, by the United States against the Northern Securities Com-any and others for the purpose of determining whether or not the holding and owning of the said stock of the Northern Pacific Railway Company and the Great Northern Company, by the Northern Securities Company, was not a violation of the act of Congress, known as the anti-trust act of 1890, which declared illegal every contract, combination or conspiracy in restraint of trade or commerce among the several States, or with foreign nations; that such proceedings were taken in said United States circuit court for the district of Minnesota, that answers were filed by all of the defendants, and upon proofs the issue was tried, and exhaustively argued, and thereafter a
303 decree was entered therein in favor of the United States, adjudging that the stock of the Northern Pacific Railway Company and the Great Northern Railway Company, now held by the Northern Securities Company was acquired in pursuance and execution of a plan, combination and conspiracy, in restraint of trade and commerce amongst the several States, such as the anti-trust act denounces as illegal and enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies and also enjoining it from voting said stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision or influence over the stock of said company or either of them, by virtue of its holding said stock, and enjoining the Northern Pacific and Great Northern Companies respectively, their officers, directors, and agents from permitting said stocks to be voted by the Northern Securities Company or any of its agents or attorneys in its behalf, at any election for officers of either of said company, and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said companies; but permitting the Securities Company to return and transfer to the *stockholders* of the Union Pacific and Great Northern Companies any and all shares of stock of those companies, which it may have received from such stockholders in exchange for its own stock, and to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies; and that a copy of said decree or the decretal part thereof, is hereto annexed and marked Exhibit "A."

Your orator further shows that an appeal was taken from the said decree of the said circuit court, to the United States Supreme Court, and that said Supreme Court rendered its decision on the fourteenth

day of March, nineteen hundred and four, affirming the decision of the circuit court, and in the decision then announced affirming said decree, it was directed that the judgment of the Supreme Court of the United States should be "that the decree below be and hereby is affirmed, with liberty to the circuit court to proceed in the execution of its decree as the circumstances may require." That the mandate upon such decision of the Supreme Court has not yet been issued, and under the rules of that court will not issue until the expiration of thirty days from the date of the decision, unless by special order.

304 Fourth. And your orator shows that upon the rendition of the decision by the Supreme Court of the United States affirming the decree of this court, the defendants in that cause, and the Northern Securities Company, determined without waiting for the issue of the mandate of the Supreme Court and without any order of the United States circuit court, for the district of Minnesota, in the execution of its decree, to distribute and divide the stock of the Northern Pacific and Great Northern Railway Companies held by the Northern Securities Company *pro rata* among the stockholders of the Northern Securities Company, according to their holdings of its stock; and not to return and transfer to the original exchanging stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of these railway companies, which the Northern Securities Companies originally received from such stockholders in exchange for its own stock, nor to transfer and assign the stock in either of the railway companies to any such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for such stock of said railway companies respectively.

Fifth. That upon the twenty-second day of March, nineteen hundred and four, James J. Hill, the president, and Edward T. Nichols, of the Northern Securities Company issued a circular to the stockholders of the Northern Securities Company, setting forth the fact of the decision in the United States Supreme Court, and that the directors of the Northern Securities Company had decided, in order to fully and promptly comply with the decree in said suit, to reduce the capital stock of the Northern Securities Company and to distribute to its shareholders the shares of stock of the said railway companies now held by it, and that they had adopted certain resolutions recommending that ninety-nine per cent. of the present outstanding shares of the Northern Securities Company be called in for surrender and cancellation. That the capital stock of the company be reduced from three million nine hundred and fifty-four thousand shares to thirty-nine thousand, five hundred and forty shares and that as against each share of the stock of the Northern Securities Company so to be surrendered there should be delivered thirty-nine dollars and twenty-seven cents of the stock of the Northern Pacific Rail way Company and thirty dollars and seventeen cents of the stock

of the Great Northern Railway Company, and proportionate amounts thereof for fractional shares of the stock of this company so surrendered; that a meeting of the stockholders of the company had
305 been called to be held on Thursday the twenty-first day of April, nineteen hundred and four, at eleven o'clock in the forenoon, at the office of the company No. 51 Newark street, Hoboken, N. J., to vote upon said resolutions, and upon such other business as may be brought before said meeting. The circular further sets forth that the laws of *the* New Jersey require a two-thirds vote of the shareholders to permit the company to reduce its capital stock.

That the circular above referred to also sets forth among other things that the assets of the Northern Securities Company remaining in the treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit above set forth, valued at an amount in excess of three million nine hundred and fifty-four thousand ($3,954,000.) dollars to which it was proposed to reduce the stock of said company, but that no disclosures whatever were made of the character, nature or kinds of stocks so held, or the extent thereof, or the real value thereof, so that your orator or any other stockholder can in any way determine what was the actual amount or value thereof.

Your orator charges that the plan of distribution of the assets of the company and the reduction of stock does not permit your orator to exercise any judgment as to whether or not it is desirable for it to remain a stockholder of the Northern Securities Company or to hold stock in a corporation owing said stocks, the nature of which is not disclosed; and your orator further charges that it is not within the power of the board of directors or of the stockholders of the corporation, to compel your orator or any one to continue as a stockholder of the Northern Securities Company to any extent whatever, when the said Northern Securities Company no longer owns the stock or controls the corporations for which it was originally incorporated to control.

And your orator says that a distribution upon the basis set forth in the plan proposed by the directors of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company would not redeem and retire the entire amount of the Northern Securities Company stock which was issued in exchange for the stock of the two railway corporations, and that any method which does not retire all of the stock issued in exchange for the stock of said railway company is contrary to the meaning and effect of the decree of the United States court.

Sixth. Your orator shows that it is informed and believes
306 that the resolutions adopted at the said meeting of the directors, were as follows:

Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern

Pacific Railway Company; and 1,181,243 shares in the capital stock of the Great Northern Railway Company; and

Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying in this company any dividends upon any of the shares of such railway company, held by this company; and

Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

Whereas, this company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present capital stock as will enable it without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the board of directors of this company hereby declares it advisable that article fourth (4th) of this company's certificate of incorporation be amended, so as to read as follows:

Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000) divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars each ($100). Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum (99) of the shares held by him.

Upon the surrender to this company by any shareholder, of the entire number of shares, and parts of shares of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

307 The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them respectively, shall be determined from the stock transfer books of the company, which for such determination, shall be closed at a day and hour to be determined by resolution of the board.

Resolved, That a meeting of the stockholders of this company, for

the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be and is hereby called, to be held, at the general offices of this company in the city of Hoboken, county of Hudson, State of New Jersey, at eleven o'clock a. m., on April 21st, A. D. 1904.

Seventh. Your orator charges that the plan of distribution set forth in said resolutions is contrary to the spirit of the decree of the said United States circuit court which, as your orator is advised, directs, or at most only authorizes the Northern Securities Company to return and transfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company respectively, any and all shares of stock in either of said railway companies, which the said Northern Securities Company had heretofore received from such stockholders in exchange for its own stock; that the purpose of said decree was that the stock of the Northern Pacific Railway Company should be returned to such stockholders as had surrendered and exchanged stock of the Northern Pacific Railway Company, and that the stock of the Great Northern Railway Company should be surrendered to such stockholders as had surrendered and exchanged stock of the Great Northern Railway Company.

Eighth. Your orator shows that at the time of the acquirement by the Northern Securities Company of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company, the stock of the Northern Securities Company was issued at par, to the stockholders of the Northern Pacific Railway Company at the rate of $115 per share, and that the stock issued in exchange for the stock of the Great Northern Railway Company was issued at par for said Great Northern stock at the rate of $180 per
308 share, and that it is not within the power of the directors of the Northern Securities Company to determine arbitrarily that the distribution of the assets of the Northern Securities Company among its stockholders may be made by giving to each stockholder a proportional distribution of the stock of the two companies held by it.

Ninth. Your orator charges that the said decisions of the said United States courts, and the decree thereunder, setting forth that the defendant corporation comes within the terms of the act to protect trade and commerce against unlawful restraints and monopolies, and was illegal, and that the stock of the said Northern Pacific Railway Company, and the stock of the Great Northern Railway Company was acquired, and is held by virtue of said combination or conspiracy in restraint of trade and commerce among the several States, and that the companies should be enjoined from either attempting to acquire further stock, or to vote the stock which is now held, or to exercise any control over the railway companies, or either of them, and restraining the said railway companies from permitting the stock to be voted by the said defendant, The Northern Securities

Company, and restraining the Northern Securities Company from paying any dividends on account of the stock of either of said railway companies, or permitting the officers of the Northern Securities Company to exercise any control whatever over the corporate acts of the said railway companies, is a determination that the object, intent, purpose and result of the incorporation and organization of the said Northern Securities Company, and its acquisition of the stock of said Northern Pacific Railway Company, and the Great Northern Railway Company, as above stated and set forth, were illegal, *ab initio*, and that the issue of its stock in exchange for the acquirement of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company was illegal and improper, and that therefore the stock of the said defendant, The Northern Securities Company, should be called in and retired, and the stock of the said two railway companies returned to the several persons who assigned the said stocks to the said Northern Securities Company, and received the stock of the Northern Securities Company in exchange thereof, or to the transferees of the stock of the Northern Securities Company so issued and exchanged, since the acquirement of the said stock of the said railway companies by the Northern Securities Company, and that said contracts for exchange being illegal could only be corrected by the return to the several holders of the
309 stock of the Northern Securities Company, the stock of the Northern Pacific Railway Company and the Great Northern Railway Company respectively, for which the said shares of the Northern Securities Company were originally issued.

Tenth. Your orator further charges that while, under the act concerning corporations of the State of New Jersey the power is given to reduce the capital stock of a corporation by the surrender by every shareholder of his shares, and to issue to him in lieu thereof of a decreased number of shares; the said act does not provide for the distribution of the assets of a corporation upon such reduction, nor does it provide for the distribution of a portion of the assets of a corporation and the retention of the balance of the assets, as the property of the corporation, and which assets its stock after being reduced should represent; that the only way in which the decree of the United States court can be effectually carried out is by the return in specie to each stockholder originally holding stock in said railway companies or to any transferee of said stockholder, of the exact number of shares surrendered and for which the stock of the Northern Securities Company was issued; and that such method is the only equitable means of distributing to those, who under the original plan of incorporation, or to their transferees became stockholders of the Northern Securities Company, of all the property contributed by them to form the assets of said corporation.

And your orator further charges that the directors are not authorized to distribute the property of the Northern Securities Company in the arbitrary manner which they have determined upon, but they become trustees to return to the several holders of stock of

the Northern Securities Company, the stock for which stock so surrendered, was originally exchanged. That there is no right or power in said directors to compel any present stockholder of the Northern Securities Company, who originally held stock in the Northern Pacific Railway Company, to accept in exchange for the shares of the Northern Securities Company a smaller number of shares of Northern Pacific Railway Company than originally contributed by him, and also stock of the Great Northern Railway Company, of which he was not an owner, nor *vice versa* is there any power to compel one originally an owner of stock of the Great Northern Railway Company to now accept some shares of stock of the Northern Pacific Railway Company.

310 Your orator further charges that the method of distribution outlined in the said resolutions is only another means, by a *pro rata* distribution among the stockholders of the Northern Securities Company of the shares of the Northern Pacific and the Great Northern Railway Company, of maintaining the illegal position attacked in the said case *of* United States court and to remedy which the said decree was made.

Your orator charges that the distribution as planned and adopted by the board of directors, if consummated, would vest the majority of the stock of both the Great Northern and Northern Pacific Railway Companies, in the same individual stockholders of the said companies, who originally co-operated in the organization of the Northern Securities Company, and who are still co-operating and acting in concert and combination, and who continue the common management and direction of the said two competing railway companies in a manner which would render the decree of the United States court ineffectual, and defeat or evade its true intent and purpose.

Therefore, inasmuch as your orator is without other relief in the premises, your orator prays that the said Northern Securities Company be required to make a full and true answer in the premises, not under oath, (which is hereby expressly waived) and that it may be ordered, adjudged and decreed that the Northern Securities Company return and transfer to its original stockholders, or their transferees, all the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company respectively, upon the same terms under which said stock of the said two companies was acquired by it.

And your orator further prays that in the meantime the said Northern Securities Company, its officers, servants, directors and agents be enjoined and restrained from accepting any stock of the Northern Securities Company and issuing in lieu thereof any stock of the Northern Pacific Railway Company or the Great Northern Railway Company until it shall be determined by this court upon what equitable plan the stock of the Northern Pacific Railway Company and the Great Northern Railway Company should be distributed among its stockholders, and that the said company should be

enjoined from holding the said stockholders' meeting called for the twenty-first of April, until it shall be determined whether or not the plan of distribution set forth in the said resolutions is a correct and true manner of distribution, and that if said plan should not be approved by this court, that then another plan should be made setting forth upon what basis a distribution of said stock should
311 be made, and that your orator may have such other and further relief in the premises as is agreeable to equity and good conscience.

May it please your honor, the premises considered to grant unto your orator not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said Northern Securities Company, restraining them from holding the stockholders' meeting of the Northern Securities Company, on the twenty-first day of April, nineteen hundred and four, to vote upon the resolutions adopted by the board of directors on the twenty-second day of March, nineteen hundred and four, and set forth in said bill or from accepting the surrender of the stock of the Northern Securities Company, and issuing in lieu thereof any stock of the Northern Pacific Railway Company and the Great Northern Railway Company under the plan therein proposed or from taking action in regard to the reduction of the capital stock of the Northern Securities Company, until the further order of this court, but also the State's writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said The Northern Securities Company, commanding it by a certain day and under a certain penalty therein to be expressed, to be and appear before your honor at this honorable court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orator as in duty bound, will ever pray, &c.

(Signed) BEDLE, EDWARDS & THOMPSON,
Sol. and of Counsel with Compl'ts.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

Clarence H. Venner, being duly sworn according to law on his oath says that he is the president of The Continental Securities Company, the complainant in this cause; that he has read the foregoing bill and the facts therein set forth so far as they relate to the acts of said corporation, are true, and so far as they relate to the acts of others, he believes them to be true.

That the said Continental Securities Company is the holder and owner of five hundred shares of the capital stock of the Northern Securities Company; that he is informed and believes that the statements as to the incorporation of the Northern Securities Company and

of the issue of its stock in exchange for the stock of the Northern
312 *Northern* Pacific Railway Company and the Great Northern Railway Company is correctly set forth in the said bill, and that the said Northern Securities Company now holds one million, five hundred and thirty-seven thousand, five hundred and ninety-four (1,537,594) shares of the capital stock of the Northern Pacific Railway Company, and one million, one hundred and eighty-one thousand, two hundred and forty-two (1,181,242) shares of the stock of the Great Northern Railway Company, which holdings are about ninety-nine (99) per cent. of the issued stock of the Northern Pacific Railway Company, and about ninety-four and one-half (94½) per cent. of all the issued stock of the Great Northern Railway Company.

That deponent has examined the pleadings, opinion and decree of the United States circuit court for the district of Minnesota, in the cause wherein The United States is complainant and The Northern Securities Company and others were defendants, and that the said proceedings are correctly set forth in the said bill.

That deponent is informed and believes that an appeal was taken to the United States Supreme Court, and that a decision was rendered therein on the fourteenth day of March, nineteen hundred and four, affirming the decree below, as in said bill set forth.

Deponent further says that he has in his possession a copy of a circular issued on the twenty-second day of March, nineteen hundred and four, to the stockholders of the Northern Securities Company, signed by James J. Hill, as president, and Edward T. Nichols, as secretary, and setting forth the determination of the directors of the Northern Securities Company to reduce the capital stock of the said company, and to distribute to its shareholders the shares of the stock of the said railway companies now held by it in the rates and at the terms in the bill set forth; that he also received a proxy and power of attorney with a notice of a stockholders' meeting to be held at the company's principal office in Hoboken, New Jersey, which proxy and power of attorney contained a copy of the resolutions of the board of directors of the Northern Securities Company, and which is copied at length in said bill.

That deponent believes that unless restrained by this honorable court the directors will endeavor to secure the adoption of said resolutions by the stockholders at the said stockholders' meeting, and that the distribution of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company, among the stockholders of the Northern Securities Company, is inequi-
313 table and unjust and that the only equitable and fair way of making the distribution of said assets is to return to each contributing stockholder or transferee of contributing stockholder the exact number of shares of stock in the Northern Pacific Railway Company and Great Northern Railway Company, surrendered by them in exchange for the stock of the Northern Securities Company.

Deponent further says that he has no information as to the nature

or character of the balance of the assets of the Northern Securities Company which remain in its treasury after the said distribution is made, and cannot form any estimate as to whether the same is worth the said sum of three million, nine hundred and fifty-four thousand — ($3,954,000), or whether it is worth anything at all.

That deponent believes that his company, as a stockholder of the said Northern Securities Company, is entitled to have returned to it the number of shares of railroad stocks which were transferred to the said Northern Securities Company in exchange for the five hundred shares of stock now held by this company.

Deponent says that he believes that it is inequitable that his company should be required to remain a stockholder of the Northern Securities Company, holding five shares of its capital stock, after the proposed reduction should have been made.

(Signed) C. H. VENNER.

Sworn and subscribed to this 5th day of April, A. D. 1904, before me,

(Signed) RAYMOND DAWSON,
Notary Public of New Jersey.

EXHIBIT A.

United States Circuit Court for the District of Minnesota, Third Division.

UNITED STATES
vs.
NORTHERN SECURITIES COMPANY ET AL. } Decree on Bill, &c.

It was ordered, adjudged and decreed as follows, towit

That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, 26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200)
314 entitled "An act to protect trade and commerce against unlawful restraints and monopolies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all of the stock of the Great Northern railway now claimed to be held and owned by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants and employés be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stock-

holders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be, and they are hereby, respectively and collectively, enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern
315 Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed, to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the clerk of this court and have execution therefor.

(Signed) HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

Opinion.

In Chancery of New Jersey.

Between—

THE CONTINENTAL SECURITIES COMPANY, Complainant, and THE NORTHERN SECURITIES COMPANY, Defendant. } On Bill for Injunction, 354, and Relief.

Charles E. Thomson, Esq., for the complainant. John W. Griggs, Robert H. McCarter, Charles L. Corbin, and Thomas Thatcher, for the defendant.

On Rule to Show Cause Why an Injunction Should Not Issue.

BERGEN, *V. C.*:

Stated as concisely as the matters under consideration will permit, it appears from the bill of complaint, affidavits and exhibits offered and used, by consent, on the hearing, that the defendant was lawfully incorporated under the laws of this State; that the objects for which it was formed, as set forth in its certificate of incorporation, was the purchase, holding and selling of the bonds, evidences of indebtedness or capital stock of other corporations, whether incorporated in this State or elsewhere, and as owner thereof, to exercise all the rights, powers and privileges of ownership, in-
316 cluding the right to vote on any such stock; that shares of the capital stock of the defendant corporation of the par value of one hundred dollars each, to the extent of 3,954,000 shares were issued and disposed of; that of the stock so issued, a large proportion was used in purchasing a majority of the capital stock of the Northern Pacific Railway Company, and also of the Great Northern Railway Company, by virtue of which the defendant company assumed the management and control of the railway companies; that the defendant company purchased 1,537,594 shares of the common stock, and 410,850 shares of the preferred stock of the Northern Pacific Company, paying therefor in cash $43,625,036.50, and 1,768,229 shares of its own stock; that it purchased of the capital stock of the Great Northern Railway Company 1,181,242 shares, paying therefor $1,707,200 in cash and 2,110,576 shares of its own stock; that the defendant issued and sold of its own stock 75,220 shares to the public for cash; that in January, 1902, the preferred stock of the Northern Pacific Railway Company, held by the defendant, was called for payment, by that company, and paid in cash, for which the defendant received $41,035,000 of which it invested $34,709,062.50 in the convertible bonds of the Northern Pacific Com-

pany, afterward availing itself of the convertible rights vested in the owner of any such bond, the defendant surrendered said bonds to the Northern Pacific Company, and received from it the equivalent in shares of the common stock of said company issued to redeem the bonds. It is thus disclosed that the capital stock of the defendant company was issued in part for the common stock of the two railway companies, which we may assume, for the purposes of this motion was an exchange of stocks with differences paid in cash; that stock of the defendant company worth at par $7,522,000 was sold in the public market for cash; that a large amount of common stock of the Northern Pacific Company now owned by the defendant, was issued by the Northern Pacific Company directly to it, for the surrender of convertible bonds belonging to the defendant company.

It further appeared that a suit brought by the United States against the defendant company, based upon an alleged violation of the act of Congress, commonly known as the "anti trust" act had resulted in a decree, afterward affirmed by the Supreme Court of the United States, adjudging that the defendant had entered into a combination in restraint of trade and commerce among the several States, which the act of Congress denounced as illegal; that
317 all of the stock of the Northern Pacific Railway Company, and all the stock of the Great Northern Railway Company, claimed to be held and owned by the defendant, was acquired and held by virtue of such illegal combination, and upon such adjudication enjoined the Northern Securities Company, or its representatives, from acquiring or attempting to acquire any further stock in either of said railway companies, and prohibiting the defendant from voting, or attempting to vote said stock at any meeting of the stockholders of either of said railway companies, and from exercising, or attempting to exercise any control, direction, supervision or influence whatsoever, over the acts and doings of said railway companies, or either of them, by virtue of its holding any stock therein, or from voting at any corporate election for directors or officers of either of said companies; and said decree further enjoined the said railway companies from paying any dividends to this defendant, on account of any stock which it claimed to hold or own of either of said companies, and prohibiting the said railway companies, from permitting the defendant to exercise any control over their corporate acts. The said decree adjudges that not-ing in it contained, should be construed as prohibiting this defendant from returning and transferring to the stockholders of either of said railway companies, any and all shares of stock in either of said companies, which the Northern Securities Company might have theretofore received from said stockholders, in exchange for its stock, or as prohibiting the defendant from making transfer of the stock to such persons as might then be the holder- of its own stock, originally issued in exchange or payment for stock acquired by it in the aforesaid railway companies.

It further appeared that the continued ownership of said railway

stocks by the defendant company, would not only be useless, but a great disadvantage to the stockholders of the company, and that the directors of the company had decided to reduce its capital stock, and divide the surplus that would arise upon such reduction, between the stockholders, and in order to carry out said determination, on the 22nd day of March, 1904, adopted certain resolutions for that purpose, those pertinent to this issue, being as follows:

"Resolved, In consideration of the premises, it is declared neces-
"sary and desirable for this company so to reduce its present capi-
"tal stock as will enable it without delay, in connection with such
"reduction, to distribute among its shareholders, the shares of capi-
" tal stock of said railroad companies held by it.

318 " *Resolved*, That the board of directors of this company
" hereby declare it advisable that article fourth (4th) of this
"company's certificate of incorporation be amended so as to read
'as follows:

"Fourth. The capital stock of this company is hereby reduced to
"three million nine hundred fifty-four thousand dollars ($3,954,000)
"divided into thirty-nine thousand five hundred and forty (39,540)
"shares of one hundred dollars each ($100). Such reduction of cap-
"ital stock shall be accomplished by each holder of outstanding
"shares of this company's stock, surrendering to the company, for
"retirement, ninety-nine percentum (99) of the shares held by him."

"Upon the surrender to this company by any shareholder of the
"entire number of shares, and parts of shares of this company's
"stock, which he is hereby required to surrender, this company will
"assign to him, for each share so surrendered, thirty-nine dollars
"and twenty-seven cents ($39.27) of the stock of the Northern Pacific
"Railway Company, and thirty dollars and seventeen cents ($30.17)
"of the preferred stock of the Great Northern Railway Company,
"and proportional amounts thereof for fractional shares of the stock
"of this company."

And on the same day the said directors called a special meeting of the shareholders of the defendant company, to vote upon said resolutions, and upon such other business as might be brought before said meeting. That the requirements of the statute, regarding the holding of the special meeting, have been complied with, is not disputed, but the lawful right of the stockholders to approve, and of the directors to carry out the distribution of surplus as proposed, is questioned, and the court is asked to enjoin the stockholders from meeting, and passing upon the resolutions proposed by the directors as aforesaid, and the directors from carrying it out if approved.

The corporation act of this State very clearly and distinctly defines the method to be pursued by a corporation desiring to reduce its capital stock; it is not disputed but that the proceedings taken in the present instance, have followed the statutory directions, so that the asking of the court to enjoin the meeting of the stockholders, is a mere incident to the real question, which is the prohibiting of the directors of this company, from dividing the surplus

in the manner proposed, for if the action of the stockholders
319 at the special meeting, should be the approval of the proposed reduction of capital stock, the result would be, if carried out, the creation of a large surplus of assets. Before the court will allow an injunction order to restrain a corporation from distributing surplus assets, on the prayer of a complaining stockholder, it should be satisfied that the complainant is entitled to the relief he asks on the case presented.

The able and ingenious argument of the complainant's counsel, rested largely upon tho contention that the decree of the Supreme Court of the United States, above recited, not only prevents the distribution of the surplus assets, in the manner proposed, but goes further, and requires that the defendant company shall transfer to the original stockholder, or his transferee, the same stock which was delivered in exchange for the defendant's stock. I am very clear that the decree of the Supreme Court will not bear any such construction; it controls the action of these defendants, only so far as the holding of the stock, and the exercise of such powers as the ownership of stock in a corporation usually confers, may be in violation of the act of Congress with regard to interstate commerce, and that the statement or proviso in the decree that nothing in it contained should interfere with the transfer of the stock to the stockholders of either of the railway companies, any stock which the defendant might have received from stockholders in exchange for its stock, is not a direction that it shall transfer it in any particular method or form, but is added to the decree to avoid the possible construction that the stock could not be returned to the original holders if it was wise or possible to do so. There is no doubt about the character of the original transaction; it was intended to be, and was, a sale of stock to the defendant company, with every *indicia* of ownership and title; the purchaser was not bound to retain one share of the stock, it had the right to sell any or all of it, and invest the proceeds in other securities, and did so in the case of the preferred stock of the Northern Pacific Company; upon such sale and delivery, the stock of the two railway companies became the assets of the defendant company, upon which the value of its stock depended. Large quantities of the capital stock of the defendant have been sold in the open market to purchasers who had a right to rely upon the well known character of the assets of this company, as a protection to their investment, and it would not make the slightest difference, whether the stock in one instance was originally issued for cash, and in another, in exchange for the stock of the two railway companies, the cash and the stock are the common assets of the com-
320 pany, and each stockholder is entitled to the benefit of all of the assets of the corporation, whose stock they hold, and if a division of the surplus is to be made, from securities held as assets, every stockholder is entitled to have his proportionate share of each class, where there is a possible or probable difference in market value.

The complainant also contends that as the purpose for which the stock was acquired, has been adjudged to be unlawful, the transfer and sale of the stock was void *ab initio*, that no title passed, and upon surrender of the stock of the defendant company, the original holder, or his transferee, is entitled to demand and have the identical stock he sold or transferred to the company returned to him. If this insistment of the complainant is sound, he does not show what property he is entitled to have returned, for all that appears to the court at present, his stock may belong to the class that was sold for cash, in which case he would have no ground to complain, for he is getting his equitable portion of the assets of the company, be they worth more or less, but in my judgment, he would not be entitled to the relief he seeks, if he had been able to show that his stock was originally issued to one who had turned over to the defendant company, stock in either of the two railway companies, for if the original stock was issued for an unlawful purpose, the person who paid the consideration, and who accepted the stock, was one of the conspirators, and can hardly ask the aid of a court of equity, to restore to him, property which he contributed to an illegal enterprise—he must abide the consequences of his own act. To permit the originators of an unlawful scheme, or their successors in title, to withdraw from the property of the company, a special class of assets, and leave as security for the unoffending stockholder, such assets as might remain, as a security for his investment, is inequitable. This corporation is not to be dissolved, it holds many valuable securities, other than the stocks of these two railway companies, and expects to continue business, and might, so far as I can see, sell all of these stocks, the holding of which had become unprofitable, and divide the cash among the stockholders, or invest it in other proper securities. It seems to me, that the only question on this branch of the case is, what is the character of the title by which the defendant corporation holds these stocks. I am satisfied from the evidence before me, that the stocks were sold and conveyed without reservation, to the defendant, and that its directors might sell all of one class of stock, and hold the other, and that each stockholder would then have a
321 joint interest in the stock retained, as well as in the cash. If one class of assets had depreciated in value, and the other had increased in worth, during such ownership, would it be seriously contended that a favored class of stockholders could take the valuable assets, and leave the depreciated to satisfy the other stockholders? I think not. Stockholders are, in a sense, partners, and the property of the firm belongs jointly to all. No trust was created when the stocks were transferred, at least, none was announced to the public when the stock was offered for sale, or shown on this hearing, and a secret trust, if now disclosed, would not be sustained, at least, against such stockholders as are not subject to it- protection.

The complainant further argues, that the law under which the defendant was organized, while permitting a reduction of stock does not provide for a distribution of a portion, and the retention o

the balance of the assets as the property of the corporation. The suggestion that a corporation cannot retain a portion of its assets, to represent the capital stock after reduction, is without merit, otherwise every reduction of capital would require a distribution of all the property of the company, and thereby in effect, work a dissolution of the corporation.

By the reduction of the capital stock of a corporation, not impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction, and unless the rights of creditors will be affected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying on of the business for the best interest of the stockholders, may not require. Strong *vs.* Brooklyn R. R. Co., 93 N. Y. 426. Williams *vs.* Western Union Tel. Co. 93 N. Y. 163. Morawetz on Corporations, 443. The proposed distribution is not a dividend in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case, the character of the assets make an equitable division easy to accomplish, each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value, if there is a difference in value between the two classes, or the value of one is subject to
322 greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean, and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders, require that a division of the stock of the two railway companies be made between them, unless prevented by some imperative legal rule; no such rule exists, on the contrary, the power of directors of a corporation to divide property other than money, among the shareholders, is sustained by abundant authority. 9 Amer. & Eng. Enc. of Law. 2 ed. 695; Ehle *vs.* Chittenango Bank, 21 N. Y. 548; Leland *vs.* Hayden, 102 Mass. 542.

Having determined that the stock of the two railway companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a vested interest to the extent of his holdings of the defendant company's stock; that when the capital stock of a corporation is reduced and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company, among the stockholders; that a division of property as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property, so held for distribution, and that the proposed method of division is equitable, it is clear that the complainant has

shown no equity upon which to base its claim for the restraining order of a court of equity. Whether this complainant would be entitled to equitable relief in any phase of the case, is extremely doubtful; I must take the bill of complaint as stating complainant's position correctly, and it is there alleged that notice of the action of the directors on this subject, together with the call for a special meeting for its approval was issued on the 22nd., day of March 1904, and that after that, and on the 28th., day of March following, the complainant went into the market and bought five hundred shares of defendant's capital stock; manifestly he bought such stock with knowledge of the proposed action of the directors and stockholders and thereupon immediately filed his bill of complaint in this cause. But one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company, and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company, made necessary by the
323 restrictive order and decree of the United States court, and to delay the stockholders of the defendant company, (many of whom had nothing to do with the origin of the scheme, afterwards declared unlawful) in the receipt of dividends or income from their investment.

The rule to show cause will be discharged.

(Endorsed:) In chancery of New Jersey, Between The Continental Securities Company, complainant, and The Northern Securities Co. def't. Opinion. Vice Chanceller Bergen, On bill for injunction and relief.

Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY and THE NORTHERN PACIFIC RAILWAY COMPANY, Defendants.

Affidavit of E. T. Nichols.

(Filed May 20, 1904.)

CITY AND COUNTY OF NEW YORK, } *ss:*
State of New York, }

I, Frances M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 2nd day of May, A. D., 1904, at said State and county, Edward T. Nichols came

before me in person, and having been by me first duly sworn did depose and say:

I am a resident of Morristown, in the State of New Jersey. Since November fourteenth, 1901, I have continuously been secretary and treasurer of The Northern Securities Company, defendant, and in those capacities have continuously had charge and supervision of its records and accounts.

324 I am acquainted with the evidence taken in the suit of The United States *versus* The Northern Securities Company, Great Northern Railway Company, Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, and know all the individual defendants in said suit, and all the persons referred to in said case as those consulted about the formation of the Northern Securities Company; they do not exceed ten or twelve persons altogether.

The individual defendants in said suit and all the other holders of stock of the Great Northern Railway Company, or of the Northern Pacific Railway Company, referred to in said evidence as having been consulted about the formation of the Northern Securities Company, now hold altogether nine hundred and ninety-six thousand and sixteen (996,016) shares of the stock of the Northern Securities Company. The ratable distribution proposed by the board of directors of the Northern Securities Company would vest in the said person three hundred eighty-seven thousand two hundred twenty-four (387,224) shares or twenty-four and nine-tenths (24.9) per cent. of the capital stock of the Northern Pacific Railway Company, and two hundred ninety-seven thousand four hundred ninety-three (297,493) shares or twenty-three and eight-tenths (23.8) per cent. of the capital stock of the Great Northern Railway Company, being about one-fourth of the stock of each company. The result of such distribution would vest in the Oregon Short Line Railroad Company, three hundred twenty thousand seven hundred and six (320,706) shares, or twenty and sixty-nine one-hundredths (20.69) per cent. of the capital stock of the Northern Pacific Railway Company and two hundred forty-six thousand three hundred eighty-nine (246,389) shares or nineteen and seventy-one one-hundredths (19.71) per cent. of the capital stock of the Great Northern Railway Company, being about one-fifth of the stock of each company, and would vest in about three thousand persons scattered over the world without any relation to each other, one million two hundred and twenty-nine thousand two hundred ninety-four (1,229,294) shares or seventy-nine and thirty-one one-hundredths (79.31) per cent. of the capital stock of the Northern Pacific Railway Company and nine hundred ninety-four thousand seven hundred three (994,703) shares or seventy-nine and six-tenths (79.6) per cent. of the capital stock of the Great Northern Railway Company, being more than a majority of both companies.

325 First.

The stock of the Northern Securities Company has been issued for the following-named purposes and considerations:

1. For cash at par to the incorporators.
2. In payment for Northern Pacific original common stock.
3. In payment for Northern Pacific preferred stock.
4. In payment for Northern Pacific new common stock.
5. For cash in the open market, the proceeds being used in the purchase for cash of Great Northern stock and other stocks held by the Northern Securities Company.

The Northern Securities Company acquired on the eighteenth day of November, 1901, certificates in the name of E. H. Harriman and Winslow S. Pierce, for thirty-seven million twenty-three thousand dollars ($37,023,000.00) par value common stock and forty-one million eighty-five thousand dollars ($41,085,000.00) par value preferred stock of the Northern Pacific Railway Company, for which it issued to complainants, Harriman and Pierce, certificates for eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) par value of its own stock, and paid eight million nine hundred fifteen thousand six hundred twenty-nine dollars ($8,915,629.00) in cash. The certificates for common stock so received by the Northern Securities Company were by it delivered and surrendered to the Northern Pacific Railway Company, which, in exchange therefor, issued and delivered to the Northern Securities Company certificates in the name of the Northern Securities Company for the same number of shares of Northern Pacific Railway Company's common stock, all of which stock ever since has been and now is held by the Northern Securities Company. On the twenty-seventh day of December, 1901, the Northern Pacific Railway Company having called in all of its preferred stock for redemption and cancellation, the Northern Securities Company presented for redemption thirty-four million seven hundred nine thousand dollars ($34,709,000) par value of the preferred stock so acquired and received therefor thirty-four million seven hundred nine thousand dollars ($34,709,000.00) in cash. Subsequently, the Northern Securities Company subscribed and paid cash at par for thirty-four million seven hundred nine thousand sixty-two and fifty one-hundredths dollars ($34,709,062.50) convertible bonds of the Northern Pacific Railway Company, and thereafter exchanged such bonds for
326 an equal amount in par value of the common stock of said railway company. On January second, 1902, the Northern Securities Company surrendered to the Northern Pacific Railway Company six million three hundred seventy-six thousand dollars ($6,376,000.00) par value of said preferred stock and received payment therefor in cash. On the second day of January, 1902, the outstanding capital stock of the Northern Securities Company was two hundred ninety-seven million four hundred sixty-four thou-

sand nine hundred fifty-one and ninety-four one hundredths dollars ($297,464,951.94) par value. From time to time between the eighteenth day of November, 1901, to shortly before the entry of the decree in said suit the Northern Securities Company acquired from a large number of the owners of stock of the Great Northern Railway Company, acting separately, a large majority of its stock, and prior to the eighth day of March, 1903, the Northern Securities Company acquired from a very large number of separate individual owners thereof eighty-two million twenty-seven thousand three hundred sixty-two and fifty one-hundredths dollars ($82,027,362.50) par value of the common stock and new stock of the Northern Pacific Railway Company.

Second.

From the day on which the Northern Securities Company was organized until the close of business on the 18th of April, 1904, the Northern Securities Company issued the following certificates for its capital stock:

Nos. A 1 to A 881 inclusive, in various denominations exceeding 100 shares each.

Nos. B 1 to B 6673 inclusive, in various denominations from 1 share to 99 shares each.

Nos. C 1 to C 41085 inclusive, all of the denomination of 10 shares each.

Nos. 1 to 38306 inclusive, all of the denomination of 100 shares each.

In the aggregate, 86,945 certificates of said stock have been issued, a very large majority of which are now outstanding. During the same period approximately 16,000 transfers of said stock have been registered upon the books of the company. The Northern Securities Company has made purchases, as one transaction, from the same persons, of both Northern Pacific and Great Northern stocks in varying amounts and has issued and delivered in payment therefor certificates of its own stock aggregating such purchase price but
327 in no way specifically related to the purchase price of either one or the other of said railway stocks. Such certificates have been split up into smaller denominations, transferred to other holders and again repeatedly transferred and retransferred on the books of the company. Many of the transfers made on the books of the company are complicated, some showing the splitting up of large certificates and the transfer of parts or all thereof to several new separate holders; others showing the transfer from several separate owners to one new holder and the consolidation of the amount of stock represented by such transfers into one or more certificates of larger denomination.

There are many transfers that are collective, as where one person brings in a number of certificates standing in different names to be transferred to one holder. In conformity with the custom and practice of stock transfer offices in such cases, the certificates to be trans-

ferred were delivered to the transfer agent and the same have been entered on th- debit side of the transfer books and the new certificates issued against the whole amount of stock so cancelled have been entered on the credit side in one group. The order in which the entry is made on the debit side is determined by the clerk who makes the entry. The determination of such order is purely accidental; it is therefore manifest that no single certificate of the group of certificates collectively issued on such a transfer can be positively asserted to have been issued against any specific one of the certificates cancelled in that transfer. Whenever the stock represented by a certificate has passed through collective transfers, it cannot be traced back to any original issue without making arbitrary assumptions.

To illustrate this I took, without previously knowing its history, the last certificate of stock issued, viz: certificate B 6673, issued April 18th, 1904, for 50 shares. The certificate cancelled against the issue of certificate B 6673 was B 6645, issued for 50 shares April 14th, 1904.

The certificate cancelled against the issue of certificate B 6645 was certificate B 6117 issued December 14th, 1903, for 50 shares. Certificate B 6117 was one of four certificates, Nos. B 6116 / B 6119, each for 50 shares, the aggregate issue being 200 shares. These four certificates were collectively issued against the cancellation of certificates 36117 and 36116, each for 100 shares and aggregating 200 shares. Certificate No. B 6117 may have had its origin in either certificate No. 36117 for 100 shares or in certificate No. 36116
328 for 100 shares. Arbitrarily *assuming* that it had its origin in certificate No. 36116, I have traced that certificate back and find that it was issued on December 12th, 1903. On that date certificate- Nos. 36116 and 36117, each for 100 shares and aggregating 200 shares, were issued against the cancellation of certificates 19993 for 100 shares, B 2328 for 5 shares and B 2319 for 95 shares, the three certificates aggregating 200 shares.

Assuming again that certificate 36116 for 100 shares had its origin in certificate 19993 for 100 shares, I have traced the history of certificate No. 19993. Certificate No. 19993 was issued March 6th, 1902, against the cancellation of certificate No. 8519 for 100 shares. Certificate 8519 for 100 shares was issued January 14th, 1902, being one of the following certificates, viz; Nos. 8415 / 8680, both inclusive, for 100 shares each, aggregating 26,600 shares and B 1132 for 56 shares, the whole aggregating 26656 shares. All of these certificates were issued January 14th, 1902, against the cancellation of certificate A 499 for 26656 shares. Certificate A 499 was issued January 9th, 1902, being one of the following group of certificates issued on that date, viz; A 499 for 26656 shares and Nos. 7377 / 7476, inclusive, each for 100 shares, the whole aggregating 36656 shares. These certificates were all issued January 9th, 1902, against the cancellation of certificate A 437 for 36656 shares.

Certificate A 437 was issued December 31st, 1901, in payment for

31,875 shares of Northern Pacific stock at the price of 115 per cent. That purchase cost the Northern Securities Company 36656-25/100 shares of its own stock, a scrip certificate being issued for the 25/100 of a share over and above the even amount of 36656 shares.

I have, in this manner and by this process of arbitrary selection, traced certificate B 6673 for 50 shares to an origin in Northern Pacific stock.

Having in the above process traced certificate B 6673 to an origin in certificate B 6117, and then assumed that certificate B 6117 had its origin in certificate 36116, I now assume, in order to show that it may with equal correctness be traced to a different source, that it had its origin in certificate No. 36117.

I have shown above that certificates 36117 and 36116 were collectively issued against the cancelled certificates 19993 for 100 shares, B 2328 for 5 shares and B 2319 for 95 shares. Certificate No. 19993 having been assumed, as above shown, to be the origin of certificate 36116, certificate No. 19993 is necessarily eliminated from
329 further consideration and I have, therefore, *assumed again* that the origin of certificate 36117 is in certificates B 2328 for 5 shares and B 2319 for 95 shares.

I have traced both these last named certificates. Certificate B 2319 for 95 shares was issued March 10th, 1902, as an original issue in part payment for 53 shares of Great Northern stock.

Certificate B 2328 for 5 shares was issued March 10th, 1902, against the cancellation of certificate B 2292 for 5 shares.

Certificate B 2292 for 5 shares was issued March 4th, 1902, together with other certificates,, against the cancellation of certificate No. B 280 for 50 shares.

Certificate No. B 280 for 50 shares was issued December 11th, 1901, in part payment for a purchase of Northern Pacific stock.

This last process of tracing, leads to the conclusion that certificate B 6673 for 50 shares had its origin, as to 95 per cent. of said 50 shares, in a purchase of Great Northern stock and as to 5 per cent. of said 50 shares in a purchase of Northern Pacific stock.

There have been issued and are now outstanding certificates of stock or of stock scrip convertible into stock, for $395,400,000 of the capital stock of the Northern Securities Company, which certificates (besides $45,332,236.50 in cash) were issued and paid as follows: namely, 1,768,229 shares (and $43,625,036.50 in cash) for 1,537,594 shares (each of the par value of $100) of the common stock, and 410,850 shares of the preferred stock of the Northern Pacific Railway Company; 2,110,576 shares (and $1,707,200 in cash) for 1,181,242 shares (each of the par value of $100) of the capital stock of the Great Northern Railway Company; 75,220 shares to the public for cash which was used by the Northern Securities Company for the purchase of other property, and for corporate purposes.

A very large number of the shareholders of the Northern Securities Company reside abroad, in Great Britain, France and other

parts of Europe. At the closing of the transfer books of the company, on the 18th of April, 1904, there were 3,953,971 shares of stock of the company, of $100 each, outstanding in the hands of 2,531 separate holders. The balance of the $395,400,000 of stock of the company, namely $2,900 was outstanding in stock scrip certificates convertible into stock certificates when presented in sums of $100, or multiples thereof.

Third.

I attended the meeting of the stockholders of the Northern Securities Company held on the 21st of April, 1904, and acted
330 as secretary of said meeting. There were present at said meeting in person or by proxy, one thousand eight hundred twenty-nine (1,829) stockholders of the company, or about seventy-two and seventy-five one-hundredths (72.75) per cent. of the total number of stockholders of the company, and holding two million nine hundred forty-four thousand seven hundred forty (2,944,740) shares of the stock of the company, being about seventy-four and one-half (74½) per cent. of its total outstanding stock. Excluding the eight hundred twenty-four thousand nine hundred eighteen (824,918) shares of the stock of the company held by the complainants Harriman and Pierce (which is about twenty and eighty-nine one-hundredths (20.89) per cent. of the total stock of the company), there were absent from said meeting holders of something less than five (5) per cent. of the total stock of the company. All of the two million nine hundred forty-four thousand seven hundred forty (2,944,740) shares present at the meeting voted in favor of the distribution of the railway stocks owned by the company, in accordance with the plan proposed in the circular issued by the company to its stockholders March twenty-second, 1904.

I have received since said meeting of the stockholders, but too late to be used, proxies, intended to be voted at that meeting in favor of the distribution aforesaid, covering more than seventeen thousand (17,000) additional shares of stock of the Northern Securities Company.

Fourth.

The transfer books and stock ledger used by the Northern Securities Company are of approved and modern form and contain all customary provisions for recording the details of stock transfers. These books have been carefully and accurately kept.

I have read the affidavit of Alexander Millar attached to the bill of complaint in this action. What is said in the second section of that affidavit as to the stock books, stock ledgers, books of account and records customarily kept by large corporations, is true, and it is also true that it is customary, and in accordance with the requirements of the New York stock exchange, for such corporations to appoint registrars of transfers.

The registry of transfers kept by such registrars is not, however, a duplicate record of actual stock transfers. It does not show the issuance of any specific new certificate against any particular certificate cancelled. It does show the number and denomina-
331 tions of every certificate issued, the date of cancellation of certificates and the numbers of certificates outstanding, together with the aggregate amount of stock represented thereby, but its principal purpose is to limit the issuance of stock to the amount thereof authorized and to prevent over-issues.

It is not feasible, as stated in the fourth section of that affidavit, to trace every outstanding certificate of stock back to its original source, but, on the other hand, it is true that very many steps in such tracing wouldbe uncertain; would be determined by accident or arbitrary assumption and would lead to no conclusion that could be positively affirmed to be correct. And this is particularly true where the original issue of stock has been made for two or more different considerations, as has been the case, as heretofore stated, in the issuance of the stock of the Northern Securities Company.

EDW. T. NICHOLS.

Subscribed and sworn to before me, this 2nd day of May, 1904.

[L. S.] FRANCES M. KELLER, Notary.

Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

vs.

NORTHERN SECURITIES COMPANY, Defendants.

Affidavit of James J. Hill.

STATE OF NEW YORK, City and County of New York, } *ss:*

I, Frances M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 28 day of
332 April, A. D. 1904, in said State and county, James J. Hill came before me in person, and having been by me first duly sworn did depose and say:

I am the president of the Northern Securities Company and have been since its organization. That on the eighteenth day of November, 1901, the Northern Securities Company acquired certificates in the name of E. H. Harriman and Winslow S. Pierce for thirty-seven million twenty-three thousand dollars ($37,023,000.00) par value common stock and forty-one million eighty-five thousand dollars

($41,085,000.00) par value preferred stock of the Northern Pacific Railway Company. That the terms under which the Northern Securities Company acquired such certificates are in a resolution adopted by the board of directors of the Northern Securities Company, of which the following is a copy.

"*Resolved*, That the president be, and hereby is 'authorized in behalf of this company, to purchase said stock—namely, $37,023,000.00 'par value of the common stock, and $41,085,000.00 par value of 'the preferred stock of the Northern Pacific Railway Company, at 'an aggregate price of $91,407,500.00, payable as to $82,491,971.00 'thereof in the fully paid-up and non-assessable shares of the 'capital stock of this company at par, and as to $8,915,629.00 in 'cash; and that the officers of this company be, and hereby they 'are, authorized to issue fully paid-up and non-assessable shares of 'stock of this company to the amount of $82,491,871.00, and to pay '$8,915,629.00 in cash, in consideration of such $37,023,000.00 of the 'common stock and $41,085,000.00 of the preferred stock of the 'Northern Pacific Railway Company.

"*Resolved*, That the President be, and hereby he is, 'authorized 'at any time to retire at par, for cash, any and all preferred stock 'of the Northern Pacific Railway Company that may be acquired 'by this company, and in case such retirement shall be effected prior 'to January 1, 1902, to allow interest up to January 1, 1902, at the 'rate of four per cent. per annum on the snm receivable for such 'preferred stock.

'*Resolved*, That the president be, and hereby he is, 'authorized in 'behalf of this company to purchase at their par value an amount 'of the convertible certificates of the Northern Pacific Rail-
333 'way Company to be issued pursuant to the resolutions of the 'board of directors of the Northern Pacific Railway Company 'passed November 13, 1901, equal to seventy-five eightieths of the 'par amount of any and all common stock of the Northern Pacific 'Railway Company that shall have been acquired by this com-'pany.

'*Resolved*, That the president be and hereby he is, authorized, in 'case of the purchase by this company of any of the convertible 'certificates of the Northern Pacific Railway Company, to convert 'the same into common stock of the Northern Pacific Railway Com-'pany whenever such conversion may be effected.

'*Resolved*, That the president be, and hereby he is, authorized to 'borrow, on such terms as he may arrange, any moneys required 'for the purpose of carrying out the foregoing resolutions, and to 'make all financial arrangements, and to do all acts and things, 'which he may deem needful in the premises.'"

No other or different contract, agreement, or understanding, relating to the acquisition of such shares by the Northern Securities Company, than as expressed in such resolution, was ever made or authorized by said company.

JAS. J. HILL.

Subscribed and sworn to before me this 28 day of April, 1904.

FRANCES M. KELLER,
[NOTARIAL SEAL.] Notary, N. Y. County.

334 Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
against
NORTHERN SECURITIES COMPANY and THE NORTHERN Pacific Railway Company, Defendants.
} In Equity.

Affidavit of George C. Clark.

(Filed May 20, 1904.)

STATE OF NEW YORK,
City and County of New York, } ss.:

I, Francis M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 2nd day of May, A. D. 1904, in said State and county, George C. Clark came before me in person and having been my me first duly sworn did depose and say:

I have been engaged in the business of banking and brokerage in the city of New York for forty years, and have been for several years a member of the firm of Clark, Dodge & Company. In November, 1901, the members of the firm held for their own account and for the account of their customers large amounts of the stock of the Great Northern Railway Company and the Northern Pacific Railway Company. Since November, 1901, the firm, acting for its members and for customers and upon their instruction, has made sales to the Northern Securities Company of the stock of the said railway companies on the basis of one hundred and fifteen dollars ($115) for Northern Pacific and one hundred and eighty dollars ($180) for Great Northern, receiving in payment therefor shares of the capital stock of the Northern Securities Company at par. All such sales were made in the usual course of business, in good faith, and in the belief that each share of the capital stock of the Northern Securities Company received in payment represented a ratable interest with all other shares in all the assets of the company.

335 The certificates of capital stock of the Northern Securities Company received by the firm in payment for railway shares sold were alike in form, and in no way indicated for what consideration they were issued. The certificates of the Northern Securities Company were, when received, held by the firm for account of its customers and members of the firm. During the time certificates

of the Northern Securities Company so acquired by purchase and delivery to it of railway shares were so held, the firm executed orders for the purchase and sale of Northern Securities Company stock in the market in the usual course of business.

In accordance with the custom and practice of bankers and brokers, the firm, in making sales of the stock of the Northern Securities Company, delivered stock certificates held by it indiscriminately, taking no account of whether they were acquired by purchase in the market or on account of sale and transfer of railway shares made by the firm for its members or customers. When the firm was called upon by its customers to make delivery to them of Northern Securities stock, such delivery was in every instance made without regard to whether the stock delivered was acquired in the market or in exchange for railway shares in the execution of orders for their sale.

Since November, 1901, large amounts of the stock of the Northern Securities Company have been bought and sold in the public markets in New York and elsewhere, and numerous transfers of ownership of such shares *has* been made by delivery from one holder to another without any record of the sale on the books of the Northern Securities Company. The result of the transactions of the firm in Northern Securities Company's stock is that the firm now has in its possession certificates for such stock to the amount of many thousand shares, and is unable to determine whether said certificates were issued by the Northern Securities Company for railway shares sold to it or for other considerations.

GEORGE C. CLARK.

Subscribed and sworn to before me this 2nd day of May, 1904.

FRANCES M. KELLER,
[L. S.] Notary Public, N. Y. C.

336 Circuit Court of the United States, District of New Jersey

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company, Complainants,

against

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of F. B. Blinn.

(Filed May 20, 1904.)

STATE OF NEW YORK, City and County of New York, } *ss:*

I, Frances M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 2nd day of May,

A. D. 1904, F. B. Blinn came before me in person, and having been by me first duly sworn, did depose and say:

I am a resident of Brooklyn, in the State of New York; I have been engaged in business in the city of New York for five years, and am familiar with the methods used by large corporations in transferring their stocks, and with the most modern and approved forms and books used for such purposes.

Since April 1, 1901, I have been the assistant secretary of the Hudson Trust Company, of Hoboken, New Jersey, and have been in charge of the stock transfer department of that company located at 71 Broadway, New York.

The Hudson Trust Company is the transfer agent for the stocks of the United States Steel Corporation.

I have examined the stock transfer books for the Northern Securities Company, and find that they are modern, adequate and substantially the same in form as those in use by other large corporations, and that entries thereon are made in the same manner.

I have read the affidavit of Edward T. Nichols in this case, and concur in his statement that it would not be feasible to accurately trace back any one of a very large proportion of the certificates of stock of the Northern Securities Company now outstanding,
337 to its original source, and thereby ascertain positively whether the same was issued for cash or for property of one kind or another, for the reason that what may be termed collective transfers, which are customary forms of entry on all stock transfer books, and which frequently appear upon the transfer books of the Northern Securities Company, preclude any but a purely arbitrary connection between any particular certificate cancelled and any particular certificate issued in such a transfer.

No certificate could be traced back through such transfers to a source that could be asserted with any confidence to be the true source of such particular certificate.

F. B. BLINN.

Sworn to before me this 2nd day of May, A. D. 1904.

FRANCES M. KELLER,
[L. S.] Notary Public.

Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
against
NORTHERN SECURITIES COMPANY and NORTHERN Pacific Railway Company, Defendants.
} In Equity.

Affidavit of Grant B. Schley.

(Filed May 20, 1904.)

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Frances M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 2nd day of May, A. D. 1904, in said State and county, Grant B. Schley came before me in person and having been by me first duly sworn did depose and say:

I have been engaged in the business of banking and
338 brokerage in the city of New York for many years, and for several years have been a member of the firm of Moore & Schley.

Since the organization of the Northern Securities Company, the firm, acting for its members and for customers, has made sales to the Northern Securities Company of large amounts of the stocks of the Great Northern and Northern Pacific Railway Companies on the basis of one hundred and fifteen dollars ($115) for Northern Pacific and one hundred and eighty dollars ($180) for Great Northern, receiving in payment therefor shares of the capital stock of the Northern Securities Company at par. All such sales were made in the usual course of business, in good faith, and in the belief that all shares of both railway companies formed common corporate assets, and that each share of the capital stock of the Northern Securities Company received in payment represented a ratable interest, with all other shares, in all the assets of the company.

The certificates of capital stock of the Northern Securities Company received by the firm in payment for railway shares so sold were alike in form, and in no way indicated for what consideration they were issued. Deponent's firm has bought and sold, for itself and for its customers, large amounts of the stock of the Northern Securities Company, represented by certificates in the names of numerous other persons and firms. In accordance with the custom and practice of bankers and brokers, the firm, in making sales of said stock of customers, delivered stock certificates held by it indiscriminately, taking no account of whether they had been acquired

by purchase in the market, or on account of sale and transfer of railway shares made by the firm for its members or customers, or of the names in which they were issued.

Since November, 1901, large amounts of the stock of the Northern Securities Company have been bought and sold in the public markets in New York and elsewhere, and it has been common usage to make transfer of ownership of such shares from seller to buyer by delivery of the stock certificates, without any record of the transfer being made on the books of the Northern Securities Company.

GRANT B. SCHLEY.

Subscribed and sworn to before me this 2nd day of May, 1904.

[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

339 Affidavit of B. G. Mitchell.

(Filed May 20, 1904.)

STATE OF NEW YORK,
City and County of New York, } ss:

I, Frances M. Keller, a notary public in and for the State and county aforesaid, do hereby certify that on the 2nd day of May, A. D. 1904, B. G. Mitchell came before me in person, and having been by me first duly sworn did depose and say:

I am a resident of the city of New York. I have been engaged in business in said city for more than thirty-five years, and I am thoroughly familiar with the most modern and approved practice adopted by large corporations for the transfer of their stocks.

I have been since 1885 an officer of the Central Trust Company of New York, and am at this time the third vice-president of that company, and as such officer I have charge of the department of that company devoted to the transfer or registration of corporation stocks.

The Central Trust Company of New York acts as transfer agent or as registrar of transfers of a large number of different corporations. The duties of a transfer agent and of a registrar are entirely dissimilar, each performing duties that the other does not, and the transfer books and the registry of transfers are dissimilar and serve entirely different purposes.

I am informed and verily believe that the Northern Securities Company has issued a part of its capital stock for cash, part in payment for stocks of the Northern Pacific Railway Company and part in payment for stock of the Great Northern Railway Company, and that said capital stock of the Northern Securities Company so issued for different purposes and for divers considerations is now outstand-

ing in the hands of a large number of different holders and that a very large proportion of said stock has been repeatedly transferred and retransferred upon the books of the company

I have examined the stock transfer books of the Northern Securities Company and have found that they are modern in form and provide all the facilities for accurately recording the details of transfers. I am of the opinion that it would be practically impossible to trace back any one of the large proportion of the certificates of stock of the Northern Securities Company now outstanding and
340 thereby ascertain whether its origin was in a purchase of Northern Pacific stock, in a purchase of Great Northern stock, or whether it was issued for cash or other consideration.

By the nature of many transfers appearing upon said books such process of tracing would necessarily be by arbitrary selection, and would be in many of its steps uncertain and would lead to endless confusion.

B. G. MITCHELL.

Sworn to before me this 2nd day of May, 1904.

[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC Railway Company, Defendants.

Affidavit of Edward T. Nichols and Nicholas Terhune.

(Filed May 20, 1904.)

UNITED STATES OF AMERICA, State, County, and City of New York, } *ss.:*

Edward T. Nichols and Nicholas Terhune being duly sworn depose and say:

Said Nicholas Terhune is one of the transfer agents of the Northern Securities Company.

That they have read the affidavit of Otto C. Kahn submitted on behalf of complainants in this suit.

That so far from collective transfers of Northern Securities Company stock being of such infrequent occurrence as to be a matter of little significance when compared with the great mass of transfers

of stock, it is a fact that they are a very frequent, practically
341 a daily occurrence, and are found on substantially every page of the transfer-books and cover a very large percentage of the aggregate amount of stock transferred.

Mr. James J. Hill's account is not the only instance in which both Great Northern and Northern Pacific stocks have been received from a single vendor as part of one transaction. Several such transactions are recorded on the books of original entry mentioned in Mr. Kahn's affidavit.

Over six hundred eighty-five thousand (685,000) shares of stock of the Northern Securities Company have been issued in payment for such purchases in over twenty (20) different names, and in a large number of different certificates, a large proportion of which have been split up and transferred into other names.

EDWARD T. NICHOLS.
NICHOLAS TERHUNE.

Subscribed and sworn to before me this 19th day of May, 1904.

MARY AGNES CARTWRIGHT,
[L. S.] Notary Public, Kings Co., 135.

Cert. filed in N. Y. Co.

Circuit Court of the United States for the District of New Jersey.
In Equity.

EDWARD H. HARRIMAN and Others, Complainants,
vs.
THE NORTHERN SECURITIES COMPANY and NORTHERN Pacific Railway Company, Defendants. } May, 1904.

Affidavit of Edward T. Nichols.

(Filed May 20, 1904.)

CITY AND COUNTY OF NEW YORK, *ss:*

Edward T. Nichols, being duly sworn, deposes and says as follows, viz:

Up to the 22d day of March, 1904, neither Edward H. Harriman,
342 nor his associate Winslow S. Pierce, nor the Oregon Short Line Rail Road Company, (of which at all times the said Harriman was and now is president,) ever in any way or manner questioned or disaffirmed either the original transaction of November 18, 1901, or any subsequent action of the Northern Securities Company, but acquiesced in the issue of more than 85,000 certificates of stock to more than 3,100 stockholders of said company, residing in and being citizens and subjects of many States

and foreign countries, who in payment for stock of said company delivered to it their property and money to the amount of hundreds of millions of dollars upon their faith in its ownership of the said stock and property to it sold and delivered as aforesaid by Harriman and Pierce; and the said Harriman and Pierce or their *cestui que trust* the Oregon Short Line Rail Road Company, regularly received and have continued to receive, and to appropriate to their use without interruption, upon $82,491,800 Northern Securities stock quarterly dividends to the amount of millions of dollars, derived to a large extent from property and money so sold or delivered to the Northern Securities Company in good faith by such other stockholders. Since the acquisition of said stocks from Harriman and Pierce and others, more than 15,000 transfers of the stock of the Northern Securities Company have taken place on the books of said company, which transfers were made to innocent purchasers in good faith relying upon the validity of the acquisition of said stocks by the Northern Securities Company.

Substantially all of the capital stock of the Oregon Short Line Rail Road Company is owned by the Union Pacific Railway Company, which two companies in turn own substantially all of the stock of the Oregon Rail Road and Navigation Company, of all of which three railroad companies the said Edward H. Harriman is president; and one or another of the railroads of said three companies is strongly competitive with the railroad of the Northern Pacific Railway Company or the railroad of the Chicago, Burlington and Quincy Rail Road Company of whose capital stock, substantially one-half is owned by the Northern Pacific Railway Company; the line of all of said railroads being accurately shown upon the map Exhibit 13 opposite page 662 of volume one of the record in the suit of the United States against Northern Securities Company and others to which map reference hereby is made. The granting of the relief prayed for by the complainants in that suit, as I am advised by counsel and therefore aver would result in vesting in said three competing railroad companies such an amount of the stock of the Northern Pacific Railway Company as necessarily would give to them the control of the competing railroads of the Northern Pacific Railway Company and the Chicago, Burlington & Quincy Rail Road Company, and such common control would be in violation of the constitution and statutes of Nebraska and of other States in which such railroads are situated.

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EDW'D T. NICHOLS.

Subscribed and sworn to before me in the city of New York this third day of May, 1904.

WM. H. BRUDER,
[L. S.] Notary Public, New York County.

345 Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
vs.
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC Railway Company, Defendants.

Verified Minutes Northern Pacific Railway Company, Northern Securities Company.

April, 1904.

John W. Griggs, sol'r of def'ts.

Filed May 20, 1904.
S. D. OLIPHANT, Clerk.

346 Circuit Court of the United States for the District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
vs.
THE NORTHERN SECURITIES COMPANY, Defendant.

STATE OF NEW YORK, }
City and County of New York, } ss:

George H. Earl, being duly sworn, deposes and says:

I am secretary of The Northern Pacific Railway Company, one of the defendants in this suit, and have been secretary of said company continuously from November, 1901. During that time I have regularly attended the meetings of the board of directors, and of the executive committee of said company, and have kept and have entered accurate minutes of the proceedings of all such meetings in books belonging to the company, which during all such period have been and now are in my custody in the office of the company in the city of New York. I have made a true copy of all such minutes from November 13, 1901, as relate to the retirement of the preferred stock and the issue of common stock, and have annexed the same hereto as part of my deposition. All action therein recorded was taken as therein stated, and by the affirmative vote of every director therein recorded as having been present at the meet-

ing at which such action was taken, and in every instance every director so recorded as present at any meeting was so present, and voted in favor of every resolution in said minutes recorded as having been adopted at such meeting.

GEO. H. EARL.

Subscribed and sworn to before me, in the city of New York, this 2d day of May, 1904.

[SEAL.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

347 Northern Pacific Railway Company.

Directors' Eighty-third Meeting.

NOVEMBER 13, 1901.

At a meeting of the board of directors held pursuant to due notice at the office of the company, No. 49 Wall street, New York city, on Wednesday, November 13, 1901, at 2 o'clock p. m., there were present the following newly elected directors (constituting a quorum), viz.:

Messrs. Baker,
Harriman,
Hill,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rea,
Rockefeller,
Steele,
Stillman,
Thomas,
Twombly.

On motion, Mr. Ives was chosen to act as chairman. He thereupon took the chair and announced the meeting ready for organization.

The secretary then submitted the report of the inspectors of election, showing that at the annual meeting of stockholders held on October 1, 1901, the following were elected directors for the ensuing year, to wit:

Robert Bacon,
George F. Baker,
Edward H. Harriman,
James J. Hill,
Brayton Ives,
D. Willis James,

John S. Kennedy,
Daniel S. Lamont,
Charles S. Mellen,
Samuel Rea,
William Rockefeller,
348 Charles Steele,
James Stillman,
Eben B. Thomas,
Hamilton McK. Twombly.

The directors then proceeded to the election of officers.

On motion, it was

Resolved, That the secretary be, and hereby he is, directed to cast a ballot in favor of the election of the following named persons to serve as officers of this company for the ensuing year, to wit:

For president.....Charles S. Mellen,
For vice-president.. .....Daniel S. Lamont,
For comptroller.....Henry A. Gray,
For treasurer.....Charles A. Clark,
For secretary and assistant treasurer .....George H. Earl,
For assistant secretary .....Richard H. Relf,
For general counsel in New York .....Francis Lynde Stetson,
For general counsel in St. Paul ....Charles W. Bunn.

The secretary cast the ballot as directed and the chairman announced that the above named persons were duly elected to the offices set opposite their names respectively.

Mr. Ives then resigned the chair in favor of Mr. Mellen.

The resignation of Mr. Robert Bacon as a director of this company was presented, and, on motion, the same was accepted.

Mr. Samuel Spencer was nominated as a director to fill the vacancy caused by the resignation of Mr. Bacon, and on motion, the secretary was directed to cast a ballot in favor of the election of Mr. Spencer. This was done and the chairman announced that Mr. Samuel Spencer had been duly elected a director of this company to fill the existing vacancy.

On motion of Mr. Steele, it was

Resolved, That the following directors be and hereby they are appointed as the executive committee of this company, viz.: Messrs. Baker, Harriman, Hill, Kennedy, Spencer and the president, or in his absence the vice-president, *ex-officio*.

The following preamble and resolutions, offered by Mr. Kennedy and seconded by Mr. Baker, were unanimously adopted:

Whereas, under and pursuant to an agreement dated July 13, 1896, the Northern Pacific Railway Company did acquire from
Messrs. J. P. Morgan & Co. a copartnership in the city of
349 New York (in said agreement called the reorganization managers), certain stocks, bonds and other property representing the system formerly of the Northern Pacific Railroad Company,

and in consideration of such agreement and transfer did issue and deliver to the reorganization managers certificates for 750,000 shares of its fully-paid and non-assessable preferred stock and 800,000 shares of its fully-paid and non-assessable common stock, of the character described in a certain plan and agreement for the reorganization of the Northern Pacific Railroad system, dated March 16, 1896; and, furthermore, did agree at all times and in all ways and particulars to coöperate with the reorganization managers and to assist them in carrying into effect and in accomplishing the purposes of said plan and agreement of reorganization; and

Whereas, in and by the said plan and agreement of reorganization it was expressly provided that the right would be reserved by the new company (being the Northern Pacific Railway Company) to retire this preferred stock in whole or in part at par from time to time upon any first day of January during the twenty years succeeding the date of said reorganization agreement; it being the purpose and the intent of the said agreement that the ultimate control of the new company should be held and be exercised by the holders of the common stock, and that the preferred stock should, as soon as practicable, be liquidated and be paid off in cash at par; and

Whereas, upon the first day of July, 1896, at a meeting of the stockholders of the Northern Pacific Railway Company, each and every stockholder being present and voting in favor thereof, a resolution was duly adopted providing for the issue of $80,000,000 of common stock and of $75,000,000 of preferred stock of the Northern Pacific Railway Company, and expressly prescribing that such preferred stock should be issued upon the condition that at its option the company might retire the same in whole or in part, at par, from time to time, upon any first day of January prior to 1917; and

Whereas, at a meeting of the directors of the Northern Pacific Railway Company, duly held on the 8th day of July, 1896, a form of certificate for the preferred stock of the company, with the conditions and regulations to be incorporated therein or endorsed thereon, was duly adopted by the unanimous vote of the board of directors of the Northern Pacific Railway Company, including the following provision:

"The company shall have the right, at its option, and in such manner as it shall determine, to retire the preferred stock in whole or in part, at par, from time — time on any first day of January prior to 1917;" and

Whereas, at a meeting of the stockholders of the Northern Pacific Railway Company, duly held upon July 13, 1896, the said resolution of the board of directors adopting the said form of stock certificate to be issued for the preferred stock was duly ratified and ap-roved by the affirmative vote of every stockholder of the company; and

Whereas, each and every certificate for the $75,000,000 of preferred stock of the Northern Pacific Railway Company, containing

the express provision for the retirement thereof, from time to time thereafter, was issued under and pursuant to the provisions of the said resolution of July 1, 1896, and each and every certificate for stock now outstanding contains such express provision for the retirement thereof; and

Whereas, under and pursuant to section 8 of the act, chapter 244 of the Private and Local Laws of Wisconsin, approved April 15, 1895, it was expressly provided that all the affairs of this company should be managed by a board of directors who should be stockholders, and who thereby were invested with all the powers of the corporation save as thereinafter provided; and

Whereas, in and by section 11 and section 12 of the said act, chapter 244 of the Laws of 1895, it was expressly provided that this company might make its preferred stock convertible into common stock upon such terms and conditions as should be fixed by the board of directors, and that it might in its corporate name execute and deliver its notes, bonds, debentures or other evidences of indebtedness in such form as from time to time should be prescribed by the board of directors, and in such amount as should be deemed from time to time by said board expedient, and might make the same convertible into its capital stock of any class upon such terms and conditions as to the board of directors might seem advisable; and

Whereas, the holders of a majority of the common stock of the Northern Pacific Railway Company have requested the board of directors to take all such action as may be requisite to retire the whole of the preferred stock upon the first day of January, 1902, and have given satisfactory assurances that the necessary moneys for that purpose will be furnished, and that all action requisite for that purpose will be taken by the holders of the common stock; and

351 Whereas, in the judgment of the board of directors of the Northern Pacific Railway Company, it is desirable that this company should now exercise the option to retire the preferred stock in whole upon the first day of January, 1902;

Now, therefore, it is hereby unanimously

Resolved, (1) That the Northern Pacific Railway Company, in exercise of its right specifically expressed in each and every certificate of stock of this company, has determined, and hereby does determine, to retire the preferred stock of the Northern Pacific Railway Company, in whole, at par, upon the first day of January, 1902.

(2.) That notice of the retirement of the preferred stock, substantially in the form of that annexed to the minutes of this meeting, be published in the manner prescribed by the by-laws for notice of stockholders' meetings, and that a copy thereof be mailed to every stockholder of this company.

(3.) That for the purpose of raising the funds necessary to retire the preferred stock, this company will make and will issue its negotiable bonds, dated November 15, 1901, for the aggregate principal sum of $75,000,000, payable January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at this

company's office in the city of New York, with interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such bond shall be convertible into shares of the common stock of this company, at the rate of one share of $100 for each $100 of the principal sum of such bond remaining unpaid at the date of such conversion; and upon surrender to it of any such bond this company will issue to the holder of such surrendered bond, shares of this company's common stock at the rate aforesaid. Such conversion may be made by the company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such bond at any time on or after the first day of January, 1902. Such bonds shall be coupon bonds or registered bonds, in denominations each of $1,000 or of some multiple thereof, and shall be in such form as shall be determined by the president or the vice-president of this company. Every such bond shall be subscribed by the president or a vice-president, and by the secretary or an assistant secretary and shall be issued under the corporate seal.

(4.) That the president and the vice president of this com-
352 pany, and each of them, be, and hereby they are, authorized and empowered to contract to sell and to sell all or any of said bonds at a price not less than par and accrued interest; and in such contract to provide for the delivery of all or any part of said bonds upon receiving such payment therefor, on or prior to or after December 31, A. D. 1901; and also to covenant and agree that any and all moneys received for said bonds shall be specifically appropriated and used exclusively for the retirement of the preferred stock at par; and accordingly it is hereby expressly declared that all such proceeds shall be set apart and shall be held as a trust fund for such purpose.

Any such contract for delivery of such bonds prior to January 1, 1902, may provide for the payment of the whole or any part of the purchase price of said bonds with allowance of interest, at a rate not exceeding four per cent. per annum from the time of the receipt of the price of such bonds until January 1, 1902, the date when such bonds begin to bear interest.

Any and every such contract shall contain a provision giving to the holder of every share of this company's common stock now outstanding suitable opportunity on demand to receive through or from the purchaser of said bonds under said contract, at a price not exceeding par and accrued interest, such bonds (or a like amount of common stock received upon conversion of such bonds, if theretofore converted) to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder; and for the purpose of providing for subdivision of interests, suitable certificates representing fractional interest in bonds from time to time may be issued, and may be redeemed in such manner as shall be determined by the president or the vice-president.

(5.) That the proper officers of this company be, and hereby they

are, directed, out of the proceeds of said bonds, and out of any other moneys in the company's treasury available for that purpose, to pay at the company's New York office, to each holder of record of the preferred stock of this company on and after January 1, 1902, upon surrender of the certificates for such stock, $100 for each and every of the shares of preferred stock for which the certificates shall be so surrendered.

(6.) That all of the preferred stock of this company be, and hereby it is, declared to be retired from and after December 31, A. D. 1901; and that from and after that date all of the authorized capital stock of this company, fixed at $155,000,000 by resolution of this company's stockholders at the meeting thereof held on the first
353 day of July, 1896, be of one kind and be without preference in favor of any part thereof, and the total authorized capitalize- stock of this company continue to be $155,000,000 as so fixed at said meeting.

(7.) That the president, the vice-president, the treasurer and secretary of the Northern Pacific Railway Company be, and hereby they are, authorized from time to time to take all proceedings and to do all acts necessary or suitable to carry these resolutions fully into effect.

(8.) That for the purpose of the retirement of the preferred stock, the transfer books of the stock of this company be closed at three o'clock p. m. on Tuesday, December 10, 1901; and that the transfer books of the common stock be reopened upon Thursday, January 2, 1902, at ten o'clock a. m.

* * * * * * *

On motion, the meeting then adjourned.

GEO. H. EARL, Secretary.

Northern Pacific Railway Company.

Retirement of Preferred Stock.

To the holders of preferred stock of the Northern Pacific Railway Company:

Notice hereby is given that in exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every outstanding stock certificate, the company has duly determined to retire the preferred stock, and the same will be retired, in whole, at par, upon the first day of January, 1902. Accordingly each and every holder of preferred stock is notified to present and to surrender his certificate for such preferred stock at the office of the Northern Pacific Railway Company, 49 Wall street, in the city of New York, on and after the first day of January, 1902, and upon such surrender to receive payment in cash of the par amount thereof.

For the purpose of such retirement, the transfer books of the

Northern Pacific Railway Company will close at three o'clock p. m. on Tuesday, December 10, 1901, and the transfer books of the common stock will reopen Thursday, January 2, 1902, at ten o'clock a. m.

By order of the board of directors,

GEO. H. EARL, Secretary.

Dated November 13, 1901.

354 Northern Pacific Railway Company.

Executive Committee.

Eighty-seventh Meeting.

NOVEMBER 15, 1901.

The executive committee of the board of directors of the Northern Pacific Railway Company met, pursuant to due notice, at the office of the company, No. 49 Wall street, New York city, on Friday, November 15, 1901, at 3:30 o'clock p. m.

The following directors (constituting a quorum) were present:

Messrs. George F. Baker,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

The chairman laid before the committee a form of convertible certificate, which had been prepared to meet the requirements of the resolutions of November 13, 1901.

After consideration of such form of proposed convertible certificate, it was, by the affirmative vote of all present,

Resolved, That the form of convertible certificate now submitted by the chairman for the purpose of meeting the requirements of the resolutions of November 13, 1901, be and hereby the same is, approved; and that the president or any vice-president, and the secretary or any assistant secretary, be, and hereby they are, authorized and directed from time to time to make and execute such convertible certificates for the aggregate principal sum of $75,000,000; and that the proper officers of the company be, and hereby they are, authorized from time to time to issue the same for the purposes, and upon the terms specified in the said resolutions of November 13, 1901.

The chairman then laid before the committee a form of agreement or contract with the Standard Trust Company of New York as contractor, for the sale and delivery of such convertible certificates at a price not less than par and accrued interest, as provided for in the fourth of said series of resolutions adopted November 13, 1901.

On motion, and by the affirmative vote of every member present, it was

Resolved, That the president and vice-president of this company, and each of them, be and hereby they are, authorized and empowered to execute and deliver the said contract under the cor-

porate seal of this company, and that the secretary be, and hereby he is, authorized to affix the corporate seal and to attest the same.

355 On motion, the following resolutions were unanimously adopted:

Resolved, That the president or vice-president be, and hereby he is, authorized to sell, at their par value, on or before January 1, 1902, to any holder of common stock of this company, an amount of the convertible certificates of this company authorized by the resolutions of the board of directors, passed November 13, 1901, equal to seventy-five eightieths of the par amount of the common stock held by such stockholder, provided that in case any such sale shall be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the re-opening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock shall release any and all right to purchase any of such bonds from this company.

Resolved, That to the extent of any moneys received by this company from sales of convertible bonds of the issue authorized by the board of directors by the resolutions passed November 13, 1901, the president or vice-president be, and hereby he is, authorized to retire or take up any of the preferred stock of this company and to pay therefor upon surrender of the certificates for such preferred stock, duly endorsed in blank for transfer a sum equal to the par value of such preferred stock; and in case any such preferred stock shall be retired or taken up prior to the closing of the transfer books on December 10, 1901, a sum equal to the dividend of one per cent. thereon declared payable on January 1, 1902, shall be paid to such holder out of the surplus of the company.

Resolved, That to the extent that preferred stock of this company shall have been retired or taken up, the president or vice-president be authorized to cause the convertible certificates of this company that shall have been issued under the resolutions of the directors passed November 13, 1901, to be converted at par into common stock, and to cause the common stock of this company to be issued upon any such conversion.

Resolved, That the officers of this company be authorized and directed, under the direction of the president or vice-president, to do all acts and things required to carry the foregoing resolutions into effect.

On motion, the meeting then adjourned.

GEO. H. EARL, Secretary.

356 No. —. UNITED STATES OF AMERICA. $—.

Northern Pacific Railway Company.

Temporary Four Per Cent. Convertible Certificate.

Northern Pacific Railway Company (hereinafter termed the "railway company"), for value received, promises to pay to bearer, or to the registered holder of this certificate, if the same shall be registered, on the first day of January, 1907, upon presentation and surrender of this certificate for cancellation, at its office in the city of New York, — dollars, in the gold coin of the United States of America of the present standard of weight and fineness, and to pay interest thereon at the rate of four per cent. per annum from January 1, 1902, such interest being payable at said office, in like gold coin semi-annually, on the first day of January and the first day of July in each year, to the bearer or to the registered holder of this certificate, upon presentation of the certificate and endorsement of such payment thereon. Both the principal and interest of this certificate are payable without deduction for any tax or taxes which the railway company may be required to pay or to retain therefrom, under any present or future law of the United Sates, or of any State, county or municipality therein.

Upon demand of the holder of this certificate at any time after January 1, 1902, and upon presentation and surrender of this certificate for cancellation, this certificate shall be convertible into common stock of the railway company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate, and upon such demand and such presentation and surrender of the certificate, the railway company will issue to the holder its common stock at the rate aforesaid. In case the railway company shall fail to make such conversion, then and in every such case, at the option of the holder, the principal of this certificate shall become and be forthwith due and payable, with the interest accrued and unpaid.

At any time after the date hereof, at its election, the railway company may require the holder of this certificate to convert the same into common stock of the railway company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and upon advertisement by the railway company of such election, in either "The New York Times" or "The New York Tribune,"
357 newspapers published in the city of New York, the holder shall, upon presentation and surrender hereof, be entitled to receive common stock of the railway company at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and from and after such advertisement no interest shall accrue or be payable upon or in respect of this certificate from the interest day next preceding the date of such advertisement, and the principal of this certificate shall not be payable in cash, but the

holder shall be entitled only to receive common stock of the railway company in exchange for this certificate as hereinbefore provided.

This temporary certificate is exchangeable for an engraved or lithographed certificate when the same shall be ready for delivery and is one of a series of similar certificates of the railway company, issued and to be issued for the aggregate principal sum of $75,000,000, such issue having been authorized by resolution of the board of directors of the railway company passed November 13, 1901, to which reference hereby is made. All moneys received for the certificates of said issue have been specifically appropriated and will be used exclusively for the retirement at par of the preferred stock of the railway company, and will be set apart as a trust fund for such purpose.

This certificate may be registered in the owner's name on the books of the railway company, at its office or agency in the city of New York, such registry being noted on the certificate by the certificate registrar of the railway company. After such registration, no transfer shall be valid unless made on the railway company's books by the registered owner and similarly noted on the certificate; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored; but this certificate again from time to time may be registered or transferred to bearer as before.

In witness whereof, the Northern Pacific Railway Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or an assistant secretary, this fifteenth day of November, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,

[L. S.] By —— ——, President.

Attest:

—— ——, Secretary.

358 Memorandum of agreement, made this — day of November, A. D. 1901, by and between Northern Pacific Railway Company, a corporation of the State of Wisconsin, of the first part, and the Standard Trust Company of New York, a corporation of the State of New York (hereinafter termed the "trust company"), of the second part,

Witnesseth, that the parties hereto have mutually agreed as follows:

Article I.

On January 1, 1902, Northern Pacific Railway Company agrees to sell and to deliver to the trust company, and the trust company agrees to buy from Northern Pacific Railway Company,

at their face value, all the convertible certificates of indebtedness of the Northern Pacific Railway Company for the aggregate principal sum of seventy-five million dollars ($75,000,000), of the issue authorized by vote of the directors of said company passed November 13, 1901, except such of said certificates as shall be purchased by the holders of the common stock of said corporation, as recited in article III, of this agreement.

Such convertible certificates are to be dated November 15, 1901; and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at company's office in the city of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of one hundred dollars ($100) par value for each one hundred dollars ($100) of the principal of such certificate remaining unpaid at the date of such conversion; and upon surrender to it of any such certificate said railway company will issue to the holder of such surrendered certificate shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company, at its option, at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902. Such certificates shall be in denominations each of one thousand dollars, or some multiple thereof, and shall be substantially of the tenor of the draft thereof, marked "Exhibit A," hereto attached.

359 Until engraved or lithographed certificates can be prepared, temporary certificates, in form satisfactory to the trust company, shall be deliverable hereunder, which temporary certificates shall be exchangeable for engraved or lithographed certificates as soon as the same shall be ready for delivery.

Article II.

Northern Pacific Railway Company covenants and agrees with the trust company that all moneys received for such certificates shall be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and shall be set apart as a trust fund for such purpose.

Article III.

It is understood and agreed that suitable opportunity shall be given to every holder of common stock of the Northern Pacific Railway Company registered at the closing of the transfer books on December 10, 1901, to purchase and to pay for, at the price hereinafter stated, an amount of such certificates (subject to a proper adjustment for fractional amounts of certificates) equal to seventy-five eightieths

of the par amount of such common stock owned of record by such stockholder.

At any time prior to the sale and delivery of such certificates to the trust company, the Northern Pacific Railway Company may sell and deliver, at the price hereinafter stated, to any such holder of common stock, the amount of such certificates which such holder of the common stock is to be given such opportunity to purchase; but in case any such sale be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the reopening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock, prior to such reopening of the transfer books, shall release any and all right to purchase any of such certificates from the Northern Pacific Railway Company. As soon as practicable the Northern Pacific Railway Company, by notice, shall extend to each holder of its common stock registered at the closing of the transfer books on December 10, 1901, suitable opportunity, until January 1, 1902, to purchase, at the price hereinafter stated, an amount of such
360 certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder.

After the sale and delivery to the trust company of such of said certificates as shall not have been purchased by the stockholders of the Northern Pacific Railway Company, the trust company will give to every holder of common stock of said company registered at the closing of the transfer books on December 10, 1901 (other than holders of common stock who previously shall have purchased, or shall have had suitable opportunity to purchase, a ratable share of such certificates, as aforesaid), suitable opportunity, not later than March 1st, 1902, to receive, on demand, through or from the trust company, upon payment to the trust company of the price hereinafter stated, an amount of such certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder (or a like amount of common stock received upon conversion of such certificates if theretofore converted).

The price payable for all such certificates sold under this article on or before January 1, 1902, shall be a sum equal to the principal thereof. The price payable for all such certificates sold and delivered under this article after January 1, 1902, shall be a sum equal to the principal thereof, and the interest accrued thereon. The price payable for any stock received upon conversion of such certificates shall be the same as the price which would have been payable for a corresponding amount of such certificates.

Under the provisions of this article every such holder of common stock shall *only* be given the opportunity to purchase, either from the trust company or from the Northern Pacific Railway Company, such amount of such certificates (or stock) as in the aggregate shall

be equal to seventy-five eightieths of the par amount of the common stock owned of record by such stockholder at the closing of the transfer books on December 10, 1901.

Article IV.

In case the Northern Pacific Railway Company shall fail to sell and to deliver such certificates to the trust company at the times and in the manner herein provided, or shall fail to comply with all its agreements herein contained, or in case the Northern
361 Pacific Railway Company shall fail to issue its common stock in exchange for all certificates delivered hereunder to the trust company when and as demand therefor shall be made by the trust company or other holder, then and in any such case the trust company, at its option, by notice delivered at the office of the Northern Pacific Railway Company in the city of New York, may forthwith rescind this agreement, and thereupon the Northern Pacific Railway Company, upon surrender to it of any such certificates, shall be bound to repay to the trust company or other holder the price paid for such certificates hereunder, with proper allowance of interest.

This agreement shall be deemed strictly *inter partes*, and shall not give any rights to any person or corporation except the trust company and the Northern Pacific Railway Company, except as provided in the certificates themselves.

In witness whereof, the parties hereto have caused these presents to be signed by their officers duly authorized the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,

By ——— ———.

THE STANDARD TRUST COMPANY OF NEW YORK,

By ——— ———.

Northern Pacific Railway Company.

Executive Committee.

Eighty-eighth Meeting.

NOVEMBER 18, 1901.

The executive committee of the board of directors of the Northern Pacific Railway Company met, pursuant to due notice at the office of the company, No. 49 Wall street, New York city, on Monday, November 18, 1901, at 2 o'clock p. m.

The following directors (constituting a quorum) were present:

Messrs. George F. Baker,
Edward H. Harriman,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

* * * * * * *

362 On motion the following resolutions were unanimously adopted:

Resolved, That the president or vice-president cause to be engraved and printed new forms of stock certificates of this company to be issued after January 1, 1902, on which date the retirement of the preferred stock of this company is to take effect, which new forms of stock certificates shall be substantially of the following tenor, to wit:

Capital Stock, $155,000,000.

No. —. — Shares.

Northern Pacific Railway Company.

This is to certify that —— —— is the owner of —— fully-paid and non-assessable shares, of the par value of one hundred dollars each, in the capital stock of the Northern Pacific Railway Company, transferable only in person, or by attorney, upon the books of the company, at the office of its transfer agents in the city of New York, upon surrender of this certificate.

This certificate is not valid unless registered by the registrar of transfers of the company in the city of New York.

Witness the signatures of the president or one of the vice-presidents of said company, and of J. P. Morgan & Co., its transfer agents in the city of New York.

New York, ——.

—— ——,
Vice-President.

—— ——,
Transfer Agents.

Registered:
CENTRAL TRUST COMPANY OF NEW YORK,
By —— ——, Registrar.
—— ——, Secretary.

Resolved, That until January 2, 1902, and until the common stock to be issued in exchange for the convertible certificates of this company, issued and to be issued under the resolutions of the board of directors, passed November 13, 1901, shall have been listed
363 at the New York stock exchange, the president or vice-president, and the secretary, in behalf of the company, shall cause to be executed and delivered temporary certificates for any such common stock to be issued upon the conversion into common stock of any such convertible certificates, which temporary stock certificates shall be signed by the president or vice-president and by the secretary, but shall not require the signature of the transfer agents, and shall not be registered by the registrar of transfers; and such temporary stock certificates shall be substantially of the following tenor, viz.:

No. —. — Shares.

Northern Pacific Railway Company.

Temporary Certificate of Common Stock.

Issued upon conversion of 4% convertible certificates under resolutions of the board of directors passed November 13, 1901.

This is to certify that —— —— is the owner of —— fully paid and non-assessable shares, of the par value of one hundred dollars each, of the common capital stock of the Northern Pacific Railway Company, transferable only in person or by attorney upon the books of the company upon surrender of this certificate.

Witness the signatures of the president, or one of the vice-presidents, of said company, and of the secretary, this — day of —— —.

—— ——, Vice-President.
—— ——, Secretary.

Resolved, That the secretary be, and hereby he is, authorized and directed in behalf of the company, to issue and publish and offer to stockholders of common stock of record on December 10, 1901, substantially as follows:

Northern Pacific Railway.

Offer to Holders of Common Stock.

NEW YORK, November 23, 1901.

To holders of common stock of Northern Pacific Railway Company of record December 19, 1901:

364 Every holder of the common stock of the Northern Pacific Railway Company registered as such at the closing of the transfer books on Tuesday, December 10, 1901, will have, and hereby is offered, the opportunity to purchase at par, to an amount equal to seventy-five eightieths of the par amount of the common stock held by him at the closing of the transfer books on December 10, 1901, convertible certificates of indebtedness of the Northern Pacific Railway Company, part of a total issue for $75,000,000 authorized by vote of the directors of the company passed November 13, 1901.

Such convertible certificates are to be dated November 15, 1901, and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at the company's office, in the city of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1,

1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of one hundred dollars ($100) par value for each one hundred dollars ($100) of the principal of such convertible certificate remaining unpaid at the date of such conversion, and upon surrender to it of any such convertible certificate the railway company will issue to the holder of such surrendered convertible certificate, shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902.

Such convertible certificates shall be in denominations each of one thousand dollars or some multiple thereof, and shall be substantially of the tenor of the draft thereof on file in the New York office of the railway company. For any fractional interest to which any common stockholder may be entitled under this offer, there will be issued scrip representing such fractional interest redeemable in convertible certificates when presented in even equivalents.

All of the moneys received for such convertible certificates will be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and will be set apart as a trust fund for such purpose.

The railway company has contracted to sell and deliver to
365 other parties on the same terms all of said issue of convertible certificates of indebtedness except such as shall be purchased by the holders of the common stock.

Payments for such convertible certificates must be made at the office of the Northern Pacific Railway Company at 49 Wall street, New York, on or before December 31, 1901. Convertible certificates in temporary form will be ready for delivery, and payment therefor may be made, at said office at any time during business hours from and after December 11, 1901.

Stockholders desiring to avail of this opportunity to purchase such convertible certificates must file their application therefor in the form herewith enclosed on or before December 24, 1901.

By order of directors,

GEORGE H. EARL.

Northern Pacific Railway Company.

Directors' Eighty-fifth Meeting.

JANUARY 8, 1902.

At a meeting of the board of directors held, pursuant to due notice, at the office of the company, No. 49 Wall street, New York city, on Wednesday, January 8, 1902, at 2 p. m., there were present the following directors (constituting a quorum) viz.:

Messrs. Baker,
Clough,
Harriman,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rockefeller,
Steele,
Spencer,
Stillman,
Thomas,
Twombly.

The minutes of meeting held December 11, 1901, were read and approved.

The executive committee reported by the reading of the
366 minutes of its meetings held November 15th and 18th, 1901, December 14th, 1901, and January 2, 1902, and on motion the committee's action as reported was approved, ratified and confirmed.

The president submitted the following forms of notices which had been duly published, to wit:

Northern Pacific Railway Co.

Notice that Preferred Stock Has Been Retired.

To the holders of certificate- for preferred stock of the Northern Pacific Railway Company:

Notice is hereby given that in the exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every stock certificate issued and outstanding prior to Nov. 15, 1901, the company has retired the preferred stock and the same was retired in whole upon the 1st day of January, 1902. Each and every holder of a certificate for preferred stock not heretofore surrendered is notified that upon presentation and surrender of his certificate at the office of the Northern Pacific Railway Company, 49 Wall street, in the city of New York he will receive payment in cash of the par amount of such certificate.

No holder of any certificate for preferred stock now has or hereafter will have any right as stockholder nor any claim against the company, except to receive payment for certificates surrendered at the rate above stated.

Dated January 2, 1902.

By order of the directors.

GEORGE H. EARL, Secretary.

Northern Pacific Railway Co.

Notice to Holders of 4 % Convertible Certificates.

JANUARY 2, 1902,

Notice is hereby given to all holders of four per cent. convertible certificates of the Northern Pacific Railway Company, dated November 15, 1901, and issued under and pursuant to the resolutions of the board of directors of this company adopted November 13, 1901, that the railway company has elected to require and hereby does require the holder of every such certificate to convert the same
367 into common stock of the Northern Pacific Railway Company at the rate of one share of $100 for each $100 of the unpaid principal of the certificate and upon presentation and surrender of such certificate at the office of this company, 49 Wall street, in the city of New York, the holder will be entitled to receive therefor common stock of the railway company at the rate aforesaid. No interest will accrue or be payable upon or in respect of any such certificate from and after the first day of January, 1902.

By order of the directors.

NORTHERN PACIFIC RAILWAY COMPANY,
By DANIEL S. LAMONT, Vice-President.

Attest:
GEORGE H. EARL, Secretary.

On motion it was

Resolved, That the issuance and publication of the foregoing notices be and the same hereby is approved and ratified.

The president reported that pursuant to the resolutions and instructions of the directors, $75,000,000 of convertible 4% certificates were sold by the officers of the company at par, and the proceeds deposited with the fiscal agents of the company for the redemption of the whole of the preferred stock cartificates which were duly retired January 1st, of which certificates for 713,140 shares have already been redeemed and canceled; and that the entire issue of $75,000,000 of convertible certificates has been exchanged by its owners for a like amount of the common stock of the company, at par, making the present capital of the company consist of 1,550,000 shares of common stock, at $100 each.

Mr. Clough gave notice that at the next regular meeting of the board he would move for adoption the following resolutions for amendment of the by-laws.

Resolved, That section 3 of article I, concerning notice of meetings of stockholders, be amended by changing the words "four" and "three" to "two" before the word "weeks," and by striking out the words "St. Paul" "London and Berlin," so that the same shall read as follows:

SECTION 3. Notice of meetings.—Written or printed notice of every meeting of stockholders shall be advertised at least once in each week for two weeks immediately preceding such meeting in one or
368 more daily or weekly newspapers published in the cities of Milwaukee and New York, which notice shall, in general terms state the object of the meeting. At least two weeks before such meeting a copy of such notice shall be mailed from one of the offices of the company to each stockholder of record who shall have furnished to the company's stock transfer agents in the city where the certificates of such stockholder shall have been issued, an address to which such notice may be sent; but failure to mail any such notice shall not invalidate any action taken at such meeting or at any adjournment thereof.

Resolved, That section 4 of article I, of the by-laws be amended by striking out and cancelling the last paragraph thereof as follows:

These provisions, however, are subject to the rights of the holders of preferred stock.

Resolved, That section 5, section 6 and section 7 of article II of the by-laws be, and hereby the same are, repealed, and in lieu thereof the following section be, and hereby the same is, adopted:

SECTION 5. Meetings of the board.—Meetings of the board shall be held whenever called, by direction of the president or of the vice-president or of any three of the directors for the time being in office.

The secretary or the assistant-secretary shall give notice of each meeting, by mailing the same at least two days before the meeting, or by telegraphing the same at least one day before the meeting, to each director; but such notice may be waived by any director.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every director shall be present, even though without notice, any business may be transacted.

Resolved, That section 10 of article II. of the by-laws be amended so as to read as follows:

SECTION 8. Executive committee.—The executive committee shall consist of six (6) directors, of whom the president, and in case of his absence from the meeting, the vice-president, shall be one *ex-officio*. It shall possess and exercise all the powers of the board of directors, except when the latter is in session, but it may act only by the concurrent vote of not less than four (4) in number. It shall keep a record of all its proceedings, and the same shall be submitted to the board of directors. The executive committee shall have the power to fill any vacancy in its own number, but the director so chosen
369 shall serve as a member of the committee only until the next meeting of the board of directors, or until a successor shall have been elected by the board. The secretary, or, in his absence from the meeting, an assistant-secretary, or other officer or employee of the company may act as secretary of the committee. A majority of the committee shall be a quorum. Meetings of the executive committee shall be held whenever called by the direction of the

president or of the vice-president or of any two members of the committee.

The secretary or the assistant secretary shall give notice of each meeting by mailing the same, or by telegraphing the same, one day before the meeting, to each member; but such notice may be waived by any member.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every member of the committee shall be present, even though without notice, any business may be transacted.

Resolved, That section 8, section 9, section 10 and section 11, of article II. of the by-laws, be amended so as to be numbered, respectively, section 6, section 7, section 8 and section 9.

Resolved, That section 4 of article III. of the by-laws be, and hereby the same is, amended by striking out the second paragraph thereof.

Resolved, That the first clause of subdivision (*b*) of section 1 of article IV. of the by-laws be, and hereby the same is repealed.

On motion, the secretary was instructed to send to each director at least ten days before the next regular meeting a copy of the proposed amendments.

On motion, the meeting then adjourned.

GEO. H. EARL, Secretary.

370 In the Circuit Court of the United States for the District of New Jersey.

EDWARD HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Plaintiffs,

against

NORTHERN SECURITIES COMPANY, Defendant.

STATE OF NEW YORK, City and County of New York, } ss.:

I, Frances M. Keller, a notary public in and for the city and county aforesaid, do hereby certify that on this 2nd day of May, 1904, Edward T. Nichols came before me, and having been first duly sworn, did depose and say:

I am 51 years of age and live in Morristown, in the State of New Jersey; since November 14, 1901, I have continuously been secretary of the said company, and a director, and as such have attended all meetings of the board of directors of said company, and as secretary have made all entries of the minutes of the proceedings of said board in the records of said company.

During all the period aforesaid Mr. Edward H. Harriman, one of the petitioners aforesaid, has also been a director, and a member of the executive committee of the Northern Securities Company.

During said period meetings of said board were held on the following named dates, to wit: November 14, 1901, November 19, 1901, December 9, 1902, January 22, 1903, April 17, 1903, November 18, 1903, March 22, 1904, at all of which meetings said Harriman attended, and in the proceedings of which he participated, as a director of the Northern Securities Company.

At the said meeting of November 19, 1901, proceedings were had, with the assent and by the affirmative vote of the said Harriman as such director, as set forth in Exhibit No. 1, hereto attached.

The minutes of a previous meeting of said board, held on November 15, 1901, which minutes were approved by the said board, at the meeting of November 19th, 1901, are set forth in Exhibit No. 2, hereto attached.

At the said meeting of January 22, 1903, proceedings were
371 had, with the assent and by the affirmative vote of the said Harriman, as such director, set forth in Exhibit No. 3, hereto attached.

Meetings of the executive committee of the Northern Securities Company, at which the said Harriman was present, and in the proceedings of which he participated, were held on November 27, 1901, December 19, 1901, January 31, 1902, July 24, 1902, October 16, 1902, January 29, 1903, April 15, 1903, January 11, 1904, and February 24, 1904.

Annual meetings of the stockholders of the Northern Securities Company, for the election of directors, and the transaction of other business, were held at the company's offices in Hoboken, New Jersey, on November 10, 1902, and November 9, 1903.

At each of said meetings the said Harriman and Pierce attended, by myself as their proxy, and participated in all the business transacted at said meetings.

True copies of said proxies are hereto attached as Exhibits 4 and 5.

EDWARD T. NICHOLS.

Subscribed and sworn to before me in the city of New York, this 2nd day of May, 1904.

FRANCES M. KELLER,
[L. S.] Notary Public, N. Y. Co.

Northern Securities Company.

Incorporators' First Meeting.

NOVEMBER 13, 1901.

The first meeting of the incorporators of the Northern Securities Company was held at the office of the Hudson Trust Company, at

No. 51 Newark street, in the city of Hoboken, New Jersey, on Wednesday, the 13th day of November, 1901, at 12 o'clock noon.

There were present: George F. Baker, Jr., Abram M. Hyatt and Richard Trimble being all the incorporators and all the subscribers to the capital stock of the company.

The following proceedings were had.

The meeting was called to order by Mr. Baker, and on motion, Mr. Hyatt was elected chairman and Mr. Trimble was elected secretary.

372 Mr. Hyatt took the chair, and Mr. Trimble presented a copy of the certificate of incorporation of the company, which was duly recorded in the office of the clerk of Hudson county, New Jersey, on November 13, 1901, and duly filed in the office of the secretary of state of New Jersey on November 13, 1901. It was ordered that a copy thereof be prefixed to the minutes of this meeting.

Mr. Trimble then presented a waiver of notice of this meeting and it was ordered that the same be filed with the Secretary.

Mr. Trimble thereupon submitted for the consideration of the incorporators a set of by-laws. After some discussion, and on motion and by affirmative vote of all present, it was

Resolved, That the by-laws now submitted to this meeting by Mr. Trimble be and hereby the same are adopted as the by-laws of the corporation, subject to alteration or amendment thereof as therein provided from time to time by the board of directors, and that a copy thereof be affixed to the minutes of this meeting.

Upon motion and by affirmative vote of all present, it was

Resolved, That the incorporators do proceed to the election of the first board of directors of the company, such board to consist of three directors and to be classified, as provided in the by-laws and certificate of incorporation, by electing one director for a term of one year, one for a term of two years and one for a term of three years; and that Mr. August T. Pupke and Mr. James H. P. Reilly, be, and hereby they are, appointed inspectors of election.

The inspectors having duly qualified, the polls were opened, and remained open until all the incorporators and subscribers to the capital stock of the company had voted; the polls thereupon being closed, the vote was canvassed and the inspectors reported that the ballot showed that the following named persons were unanimously elected directors for the terms set opposite their respective names, votes representing three hundred (300) shares having been cast for each of such persons, that is to say:

First class: George F. Baker Jr.—to hold office for one year;

Second class: Abram M. Hyatt—to hold office for two years.

Third class: Richard Trimble—to hold office for three years.

The chairman then presented to the meeting an instrument, signed by all the incorporators and subscribers to the capital stock of the company, waiving assessments and notice of assessments on

their subscriptions, and it was ordered that such instrument be filed with the secretary.

On motion and by affirmative vote of all present, it was

373 *Resolved*, That the directors assess the stock heretofore subscribed for one hundred (100) per cent., in accordance with the terms of the waiver signed by the subscribers.

The following resolutions were adopted by affirmative vote of all present:

Resolved and ordered, That in compliance with the laws of the State of New Jersey (revision of 1896, approved April 21, 1896) this corporation have and continuously maintain a principal office and place of business with the State of New Jersey and have an agent at all times in charge thereof and upon which agent process against this corporation may be served, and therein keep the stock and transfer books for the inspection of all who are entitled to see the same and for the transfer of stock; that the books in which the transfers of stock shall be registered and the books containing the names of the shareholders shall be at all times during the usual hours of business open to the examination of every stockholder at such principal office; and that the name of this corporation be at all times conspicuously displayed at the entrance of its principal office in this State.

Resolved and ordered, That until the location of the principal office of the company shall be changed by the stockholders or by the board of directors, as authorized by law, the principal office and place of business of the company be in and at the office of the Hudson Trust Company, at No. 51 Newark street, Hoboken, New Jersey.

Resolved and ordered, That until otherwise directed by the board of directors, the Hudson Trust Company be, and hereby it is, appointed agent of this corporation, upon whom legal process against this corporation may be served within the State of New Jersey, and also the transfer agent of the stock of this corporation.

On motion, the meeting thereupon adjourned.

—— ——, Secretary.

Northern Securities Company.

Directors' First Meeting.

NOVEMBER 13, 1901.

The first meeting of the board of directors of Northern Securities Company was held at the office of the Hudson Trust Company, No. 51 Newark street, Hoboken, N. J., on November 13th, 1901, at twelve thirty o'clock in the afternoon.

374 Present: George F. Baker, Jr., Abram M. Hyatt, Richard Trimble, being all the directors.

On motion, Mr. Hyatt was elected temporary chairman and Mr. Trimble was elected temporary secretary of the meeting.

Mr. Hyatt took the chair and called the meeting to order.

Mr. Trimble then presented the minutes of the meeting of the incorporators and subscribers to the company's capital stock held this 13th day of November, 1901, and also a waiver of notice of this meeting signed by all the directors.

Upon motion, it was

Resolved, That the board proceed to the election of officers by ballot.

Mr. Hyatt was nominated for president, and, no other nominations being made a ballot was taken, and Mr. Hyatt was unanimously elected president.

Mr. Trimble was nominated for secretary, and, no other nominations being made, a ballot was taken, and Mr. Trimble was unanimously elected secretary.

Mr. Baker was nominated for treasurer, and, no other nominations being made, a ballot was taken, and Mr. Baker was unanimously elected treasurer.

The secretary then took and subscribed his oath as secretary of the corporation, which was duly filed.

Upon motion it was

Resolved, That the treasurer be, and hereby is, authorized to open a bank account in behalf of the corporation with Hudson Trust Company, 51 Newark St., Hoboken, New Jersey.

Upon motion it was unanimously

Resolved, That until otherwise ordered, the president and treasurer be authorized to draw checks of this company for any sums on deposit with any depositary of this company; and that all checks of the company be signed by the president and the treasurer.

Upon motion, by affirmative vote of all present, it was

Resolved, That an office of the company be maintained in the city of New York, and that meetings of the board of directors from time to time may be held either at the principal office of the company in the State of New Jersey or at the office in the city of New York or elsewhere as from time to time shall be ordered by the board of directors.

The treasurer then called attention to the written subscriptions to the capital stock of the company to the amount of three hundred shares of one hundred dollars each, amounting in the aggregate to thirty thousand dollars ($30,000).

375 On motion, by affirmative vote of all present, it was

Resolved, That a call be made for the payment in full of subscriptions to the capital stock of the corporation, such call to be payable upon demand of the treasurer.

On motion, by affirmative vote of all present, it was

Resolved, That until otherwise ordered by the board of directors the common corporate seal is and shall be an impression upon paper or wax of a circular device such as that to be impressed upon the margin hereof, being the words "November, 1901" in a centre, surrounded by the words "Northern Securities Company, New Jersey;" and that the secretary of the company procure, preserve and keep

duplicate stamps for making such impressions of such corporate seal; and, when and as directed by the board of directors or by the president, or any vice-president, the secretary or any assistant secretary may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the company.

The secretary presented to the board a draft of certificates for stock of the company, and

On motion and by affirmative vote of all present, it was

Resolved, That the certificates to be issued by this company for stock be of the tenor of the draft certificate now submitted, but that pending the preparation of engraved certificates of such tenor, temporary certificates in form satisfactory to the president and treasurer may be issued.

On motion and by affirmative vote of all present, it was

Resolved, That the proper officers of the company be, and hereby they are, authorized and directed in behalf of the company and under its corporate seal or otherwise, to make and file any certificate or other instruments required by law to be filed in any State in which the officers of this company shall find it necessary to file the same as a condition of transacting the business of the corporation in that State.

On motion, the meeting thereupon adjourned to meet at the office of the Hudson Trust Company, 51 Newark St., Hoboken, New Jersey, at four o'clock this afternoon.

—— ——, Secretary.

376 Northern Securities Company.

Directors' First Meeting (Adjournment).

NOVEMBER 13, 1901.

Meeting of the board of directors of the Northern Securities Company, held pursuant to adjournment at No. 51 Newark street, in the city of Hoboken, on Wednesday, November 13, 1901, at four o'clock p. m.

Present: George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

The treasurer reported that he had received $30,000 in full payment of the 300 shares of the capital stock of the company, subscribed for by the three subscribers to the certificate of incorporation.

Upon motion, and by the affirmative vote of all the directors, it was

Resolved, That the officers of this company be, and hereby they are, authorized and directed to make and file in the office of the secretary of state a certificate stating that the capital stock with which this company is to begin business—viz., $30,000—has been paid in, in cash.

Upon motion, and by the affirmative vote of all the directors, it was

Resolved, That certificates for the fully-paid up shares of the capital stock of this company subscribed for by the three subscribers to the certificate of incorporation, be issued to such subscribers.

Upon motion, and by the affirmative vote of all the directors, the following resolution was adopted:

Resolved, That the president be, and hereby he is, authorized, for and in behalf of this company, to purchase any shares of the common capital stock of the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, that shall be tendered to this company at a price not exceeding $115 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid-up shares of the capital stock of this company at par, the board of directors having adjudged and determined, and hereby adjudging and determining, that the value of such shares of the capital stock of the Northern Pacific Railway Company is at least $115 per share.

377 *Resolved*, That the proper officers of the company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this company in payment for any stock of the Northern Pacific Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted:

Resolved, That Manhattan Trust Company of New York be, and hereby is appointed registrar of transfers of the stock of this company.

Resolved, That Hudson Trust Company, of Hoboken, New Jersey, be and hereby is appointed transfer agent of the stock of this company.

Resolved, That Hudson Trust Company be and hereby is appointed agent of this corporation upon whom legal process against this corporation may be served within the State of New Jersey.

Upon motion, the meeting adjourned.

—— ——, Secretary.

Northern Securities Company.

Directors' Second Meeting.

NOVEMBER 14, 1901.

Meeting of the board of directors of the Northern Securities Company, duly held pursuant to notice of adjournment at No. 51 Newark street, in the city of Hoboken, on Thursday, November 14, 1901, at ten o'clock a. m.

Present: George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

Upon motion, and by the affirmative vote of all the directors, the following resolution was adopted:

Resolved, That the president be, and hereby he is, authorized, for and in behalf of this company, to purchase any shares of the preferred capital stock of the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, that shall be tendered to this company at a price not exceeding $180 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid-up shares
378 of the capital stock of this company at par, the board of directors having adjudged and determined, and hereby adjudging and determining that the value of such shares of the capital stock of the Great Northern Railway Company is at least $180 per share.

Resolved, That the proper officers of the company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this company, in payment for any stock of the Great Northern Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted:

Resolved, That a meeting of the board of directors be, and hereby the same is, called to be held at 31 Nassau street, in the city of New York, on Thursday, the 14th day of November, 1901, at two o'clock in the afternoon.

The secretary reported that, pursuant to the request of Messrs. George F. Baker, Jr., Abram M. Hyatt, and Richard Trimble, out of the shares of stock held by the said gentlemen in the Northern Securities Company, there have been transferred shares of stock of this corporation to the following-named gentlemen to the amount set opposite their names, respectively, viz.:

To John S. Kennedy	1 share
D. Willis James	1 "
Samuel Thorne	1 "
Jas. J. Hill	1 "
E. T. Nichols	1 "
George F. Baker	1 "
Robert Bacon	1 "
Geo. W. Perkins	1 "
D. S. Lamont	1 "
E. H. Harriman	1 "
Jacob H. Schiff	1 "
James Stillman	1 "
W. P. Clough	1 "
George C. Clark	1 "
N. Terhune	1 "

On motion, duly seconded, and by the affirmative vote of all present, being all of the directors of the company, it was

Resolved, That the by-laws of the company be, and hereby they are, amended in the following manner, to wit:

379 The third paragraph of section 1 of article II. is hereby amended as follows, viz., by striking out the following words:

"The number of the first board of directors shall be three, but the number of directors may be altered from time to time, and so soon as deemed advisable by the first board of directors, shall be increased to fifteen, by the alteration of these by-laws,"

and by inserting in place thereof the following:

"The number of the board of directors shall be fifteen, but the number of directors may be altered from time to time by the alteration of these by-laws."

Upon motion, and by the affirmative vote of every director, it was

Resolved, That the board of directors, as at present composed, under the power given to them by the provisions of the by-laws, do now proceed to the election of twelve additional directors; one-third thereof—to wit, four directors—for the unexpired portion of the term of one year; one-third thereof—to wit, four directors—for the unexpired portion of the term of two years, and one-third thereof—to wit, four directors—for the unexpired portion of the term of three years.

A ballot having been taken, the following persons, all of whom are stockholders of the company, were duly elected directors of the company for the terms hereinafter specified, namely:

First class. To hold office for the unexpired portion of the term of the directors of the first class (being one year): James J. Hill, George F. Baker, George W. Perkins, Daniel S. Lamont.

Second class. To hold office for the unexpired portion of the term of the directors of the second class (being two years): Samuel Thorne, Jacob H. Schiff, James Stillman, W. P. Clough.

Third class. To hold office for the unexpired portion of the term of the directors of the third class (being three years): J. S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon.

Upon motion, the meeting adjourned to reconvene at 31 Nassau street, in the city of New York, at two o'clock this afternoon.

—— ——, Secretary.

380 Northern Securities Company.

Directors' Second Meeting—Adjournment.

NOVEMBER 14, 1901.

A meeting of the board of directors of the Northern Securities Company was held at 31 Nassau street, in the city of New York,

this 14th day of November, 1901, at two o'clock p. m., pursuant to adjournment.

The roll being called the following directors answered to their names: Geo. F. Baker, Jr., Abram M. Hyatt, Richard Trimble, James J. Hill, George F. Baker, George W. Perkins, D. S. Lamont, James Stillman, W. P. Clough, John S. Kennedy and E. T. Nichols.

The president occupied the chair.

The minutes of the first meeting of the board of directors and of the adjournment thereof, held on November 13, 1901, and of the second meeting, held on Novemer 14, 1901, were read and approved.

Mr. George F. Baker, Jr., tendered his resignation as director and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, To proceed to the election of a director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. N. Terhune having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Terhune was duly elected director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. Richard Trimble tendered his resignation as director and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, To proceed to the election of a director of the third class to fill the vacancy caused by the resignation of Mr. Trimble.

Mr. E. H. Harriman having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Harriman was duly elected a director of the third class to fill the vacancy caused by the resignation of Mr. Trimble.

381 Mr. Terhune and Mr. Harriman then appeared and accepted their election as directors, and took their seats in the board.

Mr. George F. Baker, Jr., tendered his resignation as treasurer, and on motion his resignation was accepted.

Mr. E. T. Nichols was thereupon nominated for treasurer, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was elected treasurer of the company.

Mr. Abram M. Hyatt then presented his resignation as president of the company, to take effect upon the election of his successor.

Upon motion, duly seconded, and by the affirmative vote of all present, it was

Resolved, That the resignation of Mr. Hyatt as president of this company be accepted, and that the board proceed to the election of a president to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. James J. Hill was nominated for president, and there being

no other nominations, a ballot was taken, and Mr. Hill was duly elected president of this company, to fill the vacancy caused by the resignation of Mr. Abram M. Hyatt.

Mr. Abram M. Hyatt tendered his resignation as a director, and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, To proceed to the election of a director of the second class, to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. George C. Clark having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Clark was duly elected a director of the second class to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. Clark then appeared, accepted his election as director, and took his seat in the board.

Mr. Richard Trimble thereupon tendered his resignation as secretary of the company to take effect after the close of this meeting, and such resignation was accepted.

Mr. E. T. Nichols was nominated for secretary, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was duly elected secretary of the company, the election to take effect after the close of this meeting. Mr. Nichols thereupon took the oath prescribed by law.

382 Upon motion, duly seconded, and by the affirmative vote of all present, it was resolved that the board proceed to the election of a first, a second, a third and a fourth vice-president of the company for the ensuing year.

Mr. John S. Kennedy was nominated for first vice-president and, there being no other nomination, a ballot was taken and Mr. Kennedy was unanimously elected first vice-president of this company.

Mr. George F. Baker was nominated for second vice-president and, there being no other nomination, a ballot was taken and Mr. Baker was unanimously elected second vice-president of this company.

Mr. D. Willis James was nominated for third vice-president and, there being no other nomination, a ballot was taken and Mr. James was unanimously elected third vice-president of this company.

Mr. William P. Clough was nominated for fourth vice-president and, there being no other nomination, a ballot was taken and Mr. Clough was unanimously elected fourth vice-president of this company.

Mr. W. P. Clough was appointed general counsel of the company.

Upon motion, duly seconded, and upon the affirmative vote of all present, it was

Resolved, That the board do now proceed to the election of the members of the executive committee, to be composed of the presi-

dent, *ex-officio*, and five directors. Directors Kennedy, Baker, James, Harriman, and Clough were nominated as members of said committee. There being no other nominations, a ballot was taken and Directors Kennedy, Baker, James, Harriman, and Clough were unanimously elected members of said committee.

The meeting thereupon adjourned until 2:30 o'clock p. m. of November 15th, A. D. 1901, at the offices on the ninth floor of the building Nos. 27–29 Pine street, in New York city.

—— ——, Secretary.

EXHIBIT No. 2.

The directors of the Northern Securities Company met at No 27 Pine street, New York city, on the 15th of November, 1901, at 2:30 p. m., pursuant to adjournment, of which adjournment written notice had been sent to all directors.

383 Present: Messrs. James J. Hill, George F. Baker, Daniel S. Lamont, N. Terhune, George W. Perkins, W. P. Clough, George C. Clark, John S. Kennedy, D. Willis James and E. T. Nichols.

The president occupied the chair.

The minutes of the adjournment of the directors' second meeting, held at 31 Nassau street, in the city of New York, at 2 o'clock p. m. on November 14th, 1901, were then read and approved.

Upon motion, duly made and seconded, it was unanimously resolved, that in case of absence or disability of the president, his duties and authority shall be exercised by the respective vice-presidents in the order of their numbers, beginning with the first.

The president stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

On motion, and by affirmative vote of all the directors present, it was

Resolved, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

Resolved, That the president be, and hereby he is, authorized at

any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent. per annum, on the sum receivable for such preferred stock.

Resolved, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value
384 an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

Resolved, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

Resolved, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises.

The meeting thereupon, on motion duly made and seconded, adjourned until 2 o'clock p. m. of Tuesday, November 19th, 1901, at the office on the ninth floor of the building No. 27–29 Pine street, New York city.

—— ——, Secretary.

EXHIBIT No. 1.

The directors of the Northern Securities Company met at 27 Pine street, New York, on Tuesday, November 19th, 1901, at two o'clock p. m., pursuant to adjournment, of which adjournment written notice had been sent to all directors.

Present: Messrs. George F. Baker, George C. Clark, W. P. Clough, E. H. Harriman, James J. Hill, D. Willis James, John S. Kennedy, Daniel S. Lamont, E. T. Nichols, George W. Perkins, J. H. Schiff, James Stillman, N. Terhune and Samuel Thorne.

President Hill took the chair.

The minutes of the directors' adjourned meeting held at 27 Pine street, New York, on the 15th November, were read, and on motion, duly seconded, were approved.

A form for the stock certificate of the company was presented, and on motion, duly seconded, was referred to the executive committee, with power.

385 The by-laws of the company were presented and read, and on motion, duly seconded, it was

Resolved, That the by-laws, as the same appear in the minutes, be, and they hereby are, approved and confirmed.

On motion, duly seconded, it was

Resolved, That the by-laws be amended, and are hereby amended and supplemented so as to provide for the appointment by the board, or by the executive committee of two (2) or more additional vice-presidents and two (2) or more additional assistant treasurers, for the sole purpose of signing, on behalf of this company, and if found necessary or desirable, of affixing this company's corporate seal, to this company's stock certificates; said officers to be under the direction, and their term of office to continue, during the pleasure of the president.

Resolved, Further, that the acts of such additional vice-presidents and assistant treasurers, in the signature and sealing of the said stock certificates, shall be deemed the act of this company as fully, and with like effect, as if the same were done by the president and treasurer of this company.

On motion, duly seconded, it was

Resolved, That the Manhattan Trust Company of New York be, and is hereby, appointed registrar of transfers of the stock of this company.

On motion, duly seconded, it was

Resolved, That Mr. Nicholas, Mr. Terhune and Mr. E. A. Bernholz be, and they hereby are, appointed transfer agents of the stock of this company.

On motion, duly seconded, the meeting adjourned, subject to the call of the chair.

————, Secretary.

Minutes of a special meeting of the board of directors of the Northern Securities Company, held at its office, Nos. 27–29 Pine street, New York city, at 11 o'clock a. m., November 29th, 1901. Said meeting was held in pursuance of a call of the president, a written agreement of directors, and a notice to Director Robert Bacon and his acceptance of such notice, copies of which appear below:

"To the directors of the Northern Securities Company:

"A special meeting of the board of directors of said company is hereby called, to meet at its offices, Nos. 27–29 Pine street, New York city, at 11 o'clock a. m., on November 29, 1901, for the pur-
386 pose of considering the approval of the rules of procedure of the executive committee, and such other business as may come before the meeting.

"Dated November 25, 1901.

"JAS. J. HILL, President.

"We, the undersigned, directors of the Northern Securities Company, hereby waive notice of the meeting of the directors, to be held

at Nos. 27–29 Pine street, in the city of New York, at 11 a. m., November 29, 1901, and hereby assent that such meeting may be held at said time and place, without further notice.

"Dated November 25, 1901.

"JAS. J. HILL.
"JACOB H. SCHIFF.
"DANIEL S. LAMONT.
"GEO. W. PERKINS.
"GEO. C. CLARK.
"E. H. HARRIMAN.
"SAM'L. THORNE.
"JAS. STILLMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH.
"EDW'D. T. NICHOLS.
"N. TERHUNE."

To Robert Bacon, director of Northern Securities Company:

A special meeting of the board of directors of said company has been called by the president, to be held at its offices, Nos. 27–29 Pine street, New York city, at 11 o'clock a. m., November 29th, 1901, for the purpose of considering the approval of the rules of procedure of the executive committee, and such other business as may come before the meeting. Please wire accepting notice.

Dated November 25th, 1901.

E. T. NICHOLS, Secretary.

387 Nov. 28, 1901.

To Nicholas Morgan, N. Y.:

Received yesterday and hereby accept notice special meeting your letter dated lurdan.

ROBERT BACON.

Director Robert Bacon having been out of the city when such notice was given, the same was sent to him by the secretary of the company by telegraph, and his acceptance of notice, as appearing above, was sent by him by telegraph.

The following directors were present at the meeting and participated in the proceedings thereof:

Geo. F. Baker.
Geo. C. Clark.
W. P. Clough.
Jas. J. Hill.
D. Willis James.
John S. Kennedy.
Daniel S. Lamont.

Edw'd T. Nichols.
Geo. W. Perkins.
Jacob H. Schiff.
N. Terhune.
Sam'l Thorne.

Upon the request of the president, the secretary read the minutes of all the meetings of the board of directors which had been held previously to this meeting; whereupon it was, by the affirmative votes of all the directors present,

Resolved, That all the acts done and resolutions taken by the board of directors at the several meetings prior to the present be, and the same are, in all things approved, ratified and confirmed.

The secretary then read the minutes of the proceedings of the executive committee held on November 27th, 1901, which minutes were as follows:

Northern Securities Company.

Minutes of the first meeting of the executive committee of the Northern Securities Company, held at its offices in New York city at 1:30 p. m. on November 27th, 1901, in pursuance of an agreement of the members of the committee waiving notice of the meeting of which the following is a copy:

388 "Northern Securities Company.

"The subscribers, members of the executive committee of the said company, hereby agree to hold a meeting of said committee, for organization and for the transaction of such other business as may come before the committee, at the offices of the company, Nos. 27–29 Pine street, New York city, at 1:30 p. m. on November 27, 1901.

"Dated November 25, 1901.

"JAS. J. HILL.
"E. H. HARRIMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH.

All the members of the committee were present and participated. On motion, the following rules regulating the procedure of the committee were unanimously adopted:

Northern Securities Company.

Rules of Procedure of the Executive Committee.

Rule I.

Meetings.

Meetings of the executive committee shall be held whenever called, in writing, by the chairman or by any two other members of the committee, at the offices of the company in the city of New York, or at the offices of the company in the State of New Jersey, the place of meeting to be stated in the call.

The secretary of the committee shall give notice of each meeting to each member of the committee by delivery of such notice to the member personally, or by leaving the same for him at his usual place of business, on a business day previous to that fixed for the meeting; but such notice may be waived by any member of the committee.

At any meeting at which every member of the committee shall be present, even though without any notice, any business may be transacted.

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Rule II.

Officers.

The president of the company, *ex-officio*, and, in his absence, one of the members, in the order in which their names appear upon the list voted for by the directors, at their election, shall act as chairman of the committee.

The secretary of the company, and, in his absence, one of the assistant secretaries, *ex-officio*, shall be secretary of the committee, and, as such, shall keep accurate minutes of the proceedings of the committee.

Rule III.

At all meetings of the board of directors of the company, the secretary of the committee shall lay before the board, for its approval or disapproval, the minutes of meetings of the executive committee held in the previous interval between meetings of the board.

The secretary then exhibited to the committee the form of the company's permanent stock certificate, which was as follows:

Authorized Capital Stock, $400,000,000.

No. —. — Shares.

Northern Securities Company.

Incorporated and Registered under the Laws of the State of New Jersey.

This certifies that —— —— is the registered holder of —— shares of the capital stock of the Northern Securities Company of one hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

390 In testimony whereof, the said company has caused this certificate to be signed by its president and treasurer this — day of ——, A. D. 190–.

—— ——, President.

—— ——, Treasurer.

Countersigned this — day of ——, A. D. 190–.

—— ——,
Transfer Agent.

Countersigned and registered this — day of ——, A. D. 190–.
MANHATTAN TRUST COMPANY,
Registrar of Transfers,
By —— ——, Secretary.

Shares, $100 each.

On motion the said form was unanimously approved.

The secretary of the company reported to the committee that he had obtained bids and models for the stock certificate from the American Bank Note Company and the International Bank Note Company, and had entered into a contract with the International Bank Note Company, their bid being the lowest, to engrave the plates for four denominations of stock certificates for $450, and to furnish stock certificates at the rate of $35 per book of 500 certificates, on the condition that the work shall be approved by this company and be satisfactory to the New York stock exchange. On motion, duly seconded, the action of the secretary in making this contract was approved.

On motion, duly seconded, the meeting adjourned.

—— ——, Secretary.

391 On motion, the acts and resolutions of the executive committee at the said meeting were, by the affirmative vote of all the directors present, approved and confirmed.

On motion, the meeting then adjourned to 3 p. m. on Tuesday, December 3d, at the company's said offices.

——— ———, Secretary.

EXHIBIT No. 3.

Northern Securities Directors, 22d January, 1903.

NEW YORK, January 22, 1903.

A meeting of the board of directors of the Northern Securities Company was held at the office of the company, No. 26 Liberty street, New York, N. Y., at 2.30 p. m., this day, pursuant to call.

Present: Messrs. Bacon, Baker, Clark, Clough, Harriman, Hill, James, Kennedy, Nichols, Perkins, Schiff, Stillman, Terhune and Thorne.

The president took the chair.

The secretary read the minutes of the meeting of the board of directors held December 9, 1902, which on motion duly seconded, were approved.

The secretary reported that no meeting of the executive committee had been held since the last meeting of the board of directors.

The secretary then read and placed before the board, for its information, the balance sheet of the company as at December 31, 1902.

The following correspondence between Mr. James J. Hill and this company was then read:

"Great Northern Railway Company, 32 Nassau street.

NEW YORK, September 10, 1902.

The Northern Securities Company, New York city.

DEAR SIRS: Having discussed with some of your directors the advisability of the issuance of additional stock and the sale
392 thereof, and after that discussion such issuance and sale having been deemed advisable, I hereby agree to lend to you at any time to January 1st, 1903, up to 75,000 shares stock of the Northern Securities Company for the purpose of making deliveries on account of such sales of said stock. Should such issuance and sale not be formally approved by your directors, or executive committee, I agree to accept, in lieu of the return to me of such stock as you may borrow from me in terms of this letter, the proceeds that may be derived by you from the sale thereof, with interest on such proceeds from the date of their receipt by you to the date of their payment to me with interest at five per centum per annum.

It is understood that while any of said stock remains in your hands you will account to me and pay me any dividends that may

be paid thereon and turn over to me any privileges that may accrue thereon.

It is understood and agreed that all the stock you may borrow from me on this agreement shall be returned to me or its proceeds be paid over to me as above provided, on or before February 1st, 1903.

Your acceptance of the terms of this letter will constitute a contract between us.

Yours very truly,

(Signed) JAS. J. HILL."

"Northern Securities Company, 26 Liberty street.

NEW YORK, September 10, 1902.

James J. Hill, Esq., 32 Nassau street, New York, N. Y.

DEAR SIR: We beg to acknowledge the receipt of your letter of September 10, 1902, agreeing to lend to us, on certain terms, up to 75,000 shares of stock of the Northern Securities Company.

We accept all the stipulations of your letter, and in the event of our borrowing from you any part of the 75,000 shares of said stock, we agree that such stock shall be subject to the terms of said letter.

Yours very truly,

(Signed) W. P. CLOUGH,
4th Vice Pres't.

(Signed) EDW. T. NICHOLS,
Secretary."

393 The president then explained that, in accordance with the agreement embodied in this correspondence, the company had borrowed 62,000 shares of the Northern Securities Company stock, and that of said stock the officers of the company had sold 59,346 shares in the open market at prices averaging nearly 112 %, and applied the proceeds to extinguishing the indebtedness of the company.

On motion, duly seconded, it was

Resolved, That the contract, dated Sept. 10, 1902, signed by the officers of this company, on its behalf, with James J. Hill, by which Mr. Hill promised to lend to the company shares of its stock, up to 75,000 in the aggregate, in order to assist the company in procuring funds for repayment of loans, by sale of its shares in the open market, and also the sales of said borrowed stock, in said market, amounting to 59,346 shares, be, and the same are hereby, in all things approved, ratified, and confirmed.

Resolved, further, That the officers of this company be, and they are hereby, empowered and directed to do all acts, and to execute all instruments, for and on behalf of this company, necessary or proper for carrying into effect the provisions of said contract, including the issuance to Mr. Hill of 59,346 shares of the stock of this company to replace the said shares so sold.

EXHIBIT 4.

Know all men by these presents, that Edward H. Harriman and Winslow S. Pierce of —— do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both —— —— to be — substitute and proxy for — and in — name and in — behalf, to vote at the election of directors of Northern Securities Company, or on any other business relating to said company, at the annual meeting to be held in the city of Hoboken, N. J., on the 10th day of November, 1902, or at any postponement or adjournment thereof, as fully as we might or could if personally present, and we hereby revoke any other proxy heretofore given by us.

In witness whereof, we have hereunto set our hands this 2d day of October, 1902.

(Signed) EDWARD H. HARRIMAN.
(Signed) WINSLOW S. PIERCE.

Witness present:
(Signed) ALEX. MILLAR.

394 EXHIBIT 5.

Know all men by these presents, that —— —— of —— do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both, —— —— to be — substitute and proxy for — and in — name and in — behalf, to vote at the election of directors of Northern Securities Company, or on any other businass relating to said company, at the annual meeting to be held in the city of Hoboken, N. J., on the 9th day of November, 1903, or at any postponement or adjournment thereof, as fully as — might or could if personally present, and — hereby revoke any other proxy heretofore given by —.

In witness whereof, we have hereunto set our hands this 13th day of Oct., 1903.

(Signed) E. H. HARRIMAN.
(Signed) WINSLOW S. PIERCE.

Witness- present:
(Signed) ALEX. MILLAR.
(Signed) JOS. H. ALLEN.

395 In the Circuit Court of the United States for the District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
v.
NORTHERN SECURITIES COMPANY and NORTHERN Pacific Railway Company, Defendants.
} In Equity.

Opinion.

(Filed July 15, 1904.)

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company, and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. the present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in United States *v.* Northern Securities Co. *et al.*, 120 Fed. 721, and the affirmatory decree of the Supreme Court of the United States in the same case. 193 U. S. 197. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the anti-trust act. 26 Stat. 209. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of
396 a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the first section. Section 3 declares illegal "every contract, combination in form of

trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the preceding sections. Section 4 provides, among other things, that the several circuit courts of the United States shall have "jurisdiction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several States of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants, Hill, Clough, James and Kennedy, and certain other persons whose names were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants, Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned or controlled a majority of the capital stock of the Northern Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern
397 Pacific system and the Great Northern system, connecting the Great Lakes and the Mississippi river with Puget sound and the Pacific ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest, on and prior to November 13, 1901, entered into an unlawful combination and conspiracy "to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own cap-

ital stock upon a certain basis and at a certain rate was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and the Northern Securities Company substituted, as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for effecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and
398 transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations, formerly carried on by the two railway companies independently

and in free competition one with the other, had been formed and was in operation, and the defendants were thereby attempting to monopolize, and had monopolized, such interstate and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest
399 of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein asked. In that decree it was declared that the defendants, in violation of the anti-trust act, had entered into a combination or conspiracy in restraint of trade and commerce among the several States, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such conbination or conspiracy in restraint of trade and commerce among the several States," and a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies" or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein;" and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents at any corporate election for directors or officers of either of

the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

"But nothing herein contained shall be construed as pro-
400 hibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the United States March 14, 1904, "with liberty to the circuit court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the court below, among other things, said:

"No valid objection can be made to the decree below, in form or in substance. * * * The circuit court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance.

Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions,
401 reciting that the company "has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock

of the Great Northern Railway Company," and "has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company," and that "there are now outstanding 3,951,000 shares of its own capital stock," and that it "desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it "necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred and forty (39540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance, among other things, that the total authorized capital stock of the Northern
402 Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now

outstanding; that the Northern Pacific and Great Northern Railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the Northern Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States and for objects prohibited by the anti-trust act that prior to November 13, 1901, Hill, Morgan, Clough, James Kennedy, Bacon, Baker and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of New Jersey, and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of
403 $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway

companies in exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a majority of the capital stock of each of the railway companies had been or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of
404 the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an interest therein of $82,491,871 par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, owned by the Oregon Short Line Railroad Company, and receiving in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce, was part of the original issue of stock by that company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not

be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with the Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the actual custody of the Equitable Trust Company of New York as pledgee, and are avail-
405 able for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be converted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, converted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway company, namely the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in United States *v.* Northern Securities Company *et al.*, 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held posses-

sion thereof in violation of the anti-trust act; that it acquired no title thereto and cannot transfer any rights in respect thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United
406 States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, *pro rata* among its own stockholders, but not to return and retransfer to the stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent. by a vote of more than seventy-five per cent. in interest of its stockholders, and by a like vote the proposed plan of *pro rata* distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and *ultra vires* the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock

of either railway company originally exchanged by the
407 assignors can be delivered to such assignees in exchange for
their present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies *pro rata*, among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution *pro rata* in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are entitled exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such *pro rata* distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the *pro rata* share of the stock of the two railway companies which they would receive upon such *pro rata* distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such
railway company into which the preferred stock so exchanged
408 was converted, and they offer to bring into court such stock
of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration to the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securi-

ties Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their rights and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to the Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and restrained from parting with, disposing of, transferring, assigning or distributing any part of the stock of the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

409 The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistance urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far-reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact

remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the
410 denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in

the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In Russell *v.* Farley, 105 U. S. 433, 438, the court through Mr. Justice Bradley said:

"It is a settled rule of the court of chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."

In City of Newton *v.* Levis, 79 Fed. 715, the circuit court of appeals for the eighth circuit through Judge Sanborn said:

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only ques-
411 tion presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. * * * The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," &c.

In Glascott *v.* Lang, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find

a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

412 In Hadden *v.* Dooley, 74 Fed. 429, 431, the circuit court of appeals for the second circuit through Judge Shipman said: "When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merit of accuracy."

In Great Western R. Co. *v.* Birmingham &c., 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. * * * It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the cas*t* so made?"

In Shrewsbury & Chester R. Co. *v.* Shrewsbury R. Co., 1 Sim. N. S. *410, *426, *427, *432, the vice-chancellor, Lord Cranworth, said:

"When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the
413 court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. * * * Where it is made out that there is a point to be decided which the plaintiff *if* is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative *i*f interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it

may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. * * * Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. Denver & R. G. R. Co. *v.* United States, 124 Fed. 156. Allison *v.* Corson, 88 Fed. 581. Buskirk *v.* King, 72 Fed. 22. Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693. Southern Pac. Co. *v.* Earl, 82 Fed. 690. New Memphis Gas & Light Co. *v.* Memphis, 72 Fed. 952. Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245. Georgia *v.* Braileford, 2 Dall. 402.

It does not appear, nor has it been claimed or intimated,
414 that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock or either of the railway companies, unless and by virtue of some voluntary and extrajudicial arrangement. But this court has power to require of the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed *pro rata* among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter com-

pany. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of $71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A *pro rata* distribution under the proposed plan of the $39,661,450 par value of stock of the latter company, included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock
415 from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decre- in the present case, should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value was taken by the Northern Securities Company at an agreed real valution of $115 for each $100 at par without distinction between common and preferred stock. The plan of *pro rata* distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern Pacific Railway Company, and in such man-

ner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for each $100 per value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan the holders of the remaining one hundredths of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive
$24,638,919 par value of the preferred stock of the Great
416 Northern Railway Company and $32,070,612 par value of the
common stock of the Northern Pacific Railway Company.
The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the holder of $37,023,000 par value of the common stock became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy-five eightieths of its par value in the new common stock. There is evidence furnished by the affidavits and exhibits that the Northern Securities Company exercised this right and received of such new common stock $34,709,062 at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this balance was sold or disposed of at par—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less—its proceeds, $4,062,000 fairly may be treated as an offset

to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000 amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company leaves a bal-
417 ance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the *pro rata* plan, leaving $8,803,166 in their favor, less the amount of their share of the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629, paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company original-y transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the latter company. The affidavits and exhibits furnish evidence of some weight that the above mentioned par value of $6,375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely, $34,709,062 par value was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new company stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and
418 Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance

in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

"1901, Nov'b'r 18th.

Investment Account No. 1—To Capital Stock a/c.

For 410,850 shs. N. P. pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day.....	8,915,629
Balance paid in stock.....,	$32,169,371

Say 321,693 shs. & $71 scrip issued as fully paid up stock at par."

Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy-five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new, common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value its pre-
419 ferred stock on the seventy-five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062, for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part, directly or indirectly, to convert such balance of preferred stock into the new com-

mon stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits and exhibits fail to disclose, and counsel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,192,371 par value or a real present value of $93,409,701. The deduction from the latter amount of the $83,181,488 which the complainants would receive under the proposed *pro rata* distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy-five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050, representing the real value of $37,023,000 par value of the old common stock would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value
420 of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the par value of $100 each. The proposed *pro rata* plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and "proportional amounts thereof for fractional shares of the stock of this company" $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And

$30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety-nine one hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden, of showing the amount of property in which the complainants would share under the proposed plan, clearly, in view of the fact that the company is chargeable with full knowledge of the character
421 amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one twelfth of $11,117,104; less than one eleventh of $10,228,213; less than one ninth of $8,803,166; and less than one eighth of $7,513,822. It is unnecessary, and would be tedious, to discuss in this connection and on the present application the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit it should be borne in mind that the right of the complainants to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock

of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons.

422 The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the first named company was organized, and the affidavits are conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in Denver & R. G. R. Co. *v.* United States, 124 Fed. 156, 161, as follows:

"The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such appli-

cation, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

July 15, 1904.

EDWARD G. BRADFORD, J.

423 Circuit Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

against

THE NORTHERN SECURITIES COMPANY and THE NORTHERN Pacific Railway Company, Defendants.

Decree for Injunction.

(Filed August 18, 1904.)

This cause came on to be heard at this term upon the motion of the complainants for a preliminary injunction and was argued by counsel and thereupon, upon consideration thereof, and of complainants' bill of complaint and exhibits thereto, and the several affidavits in support of said motion filed by the complainants and the several affidavits filed on behalf of the defendants in opposition to said motion, the court thereupon do order, adjudge and decree as follows:

That a writ of special injunction do issue out of and under the seal of this court, directed to the Northern Securities Company, restraining it, its directors, officers, agents and employees, until the final determination of the suit, or until further order of this court, from in any manner transferring, assigning, distributing or otherwise disposing of or parting with three hundred and seventy thousand, two hundred and thirty (370,230) shares of the common stock of the Northern Pacific Railway Company alleged in the bill to have been received by the said Northern Securities Company from the complainants Edward H. Harriman and Winslow S. Pierce on or about the 18th day of November, 1901, or any part thereof; and from transferring, assigning, distributing or otherwise disposing of or parting with three hundred and forty-seven thousand and ninety (347,090) shares of the common stock of the Northern Pacific Railway Company received by the said Northern Securities Company

from the Northern Pacific Railway Company on or about the
424 27th day of December, 1901; and from transferring, assigning, distributing or otherwise disposing of or parting with the certificates representing said stock, or any of them or any part thereof.

It is further ordered, that before the said writ of injunction issue, complainant Oregon Short Line Railroad Company shall file a bond with the clerk of this court in the penal sum of two million dollars, with such surety as the court shall approve, conditioned to indemnify all persons whom this court may ultimately find to have sustained loss or damage resulting from said injunction, if the same shall be found to have been improperly issued.

August 18, 1904.

EDWARD G. BRADFORD, J.

United States Circuit Court, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,

vs.

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Bond.

(Filed August 18, 1904.)

Know all men by these presents:

That the Oregon Short Line Railroad Company, a corporation duly organized and existing under the laws of the State of Utah, as principal, and The United States Fidelity and Guaranty Company, a corporation duly organized and existing under the laws of the State of Maryland, having an office at Trenton, in the State of New Jersey, and having authority to transact business in said State, pursuant to an act of Congress, of August 13th,
425 1894, entitled: "An act relative to cognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon" as surety, are held and firmly bound unto the United States of America in the sum of two million dollars ($2,000,000), lawful money of the United States of America, for the payment of which, well and truly to be made, unto the United States of America, said Oregon Short Line Railroad Company and said The United States Fidelity and Guaranty Company bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Whereas, a suit is now pending in the United States circuit court for the district of New Jersey, wherein Edward H. Harriman,

Winslow S. Pierce, The Oregon Short Line Railroad Company and The Equitable Trust Company of New York, are complainants and The Northern Securities Company, a corporation duly organized and existing under the laws of the State of New Jersey, and The Northern Pacific Railway Company, a corporation duly organized and existing under the laws of the State of Wisconsin are defendants, in which a motion has been made by the complainants for a special writ of injunction *pendente lite;* and

Whereas, an order has been entered in said suit granting said motion, and directing that before the said writ of injunction issue, the complainant, The Oregon Short Line Railroad Company, shall file a bond with the clerfk of the United States circuit court for the district of New Jersey in the sum of two million dollars ($2,000,000);

Now, therefore, the condition of this obligation is such, that if the said Oregon Short Line Railroad Company shall indemnify the Northern Securities Company and all persons whom the United States circuit court for the district of New Jersey may ultimately find to have sustained loss or damage resulting from such writ of injunction, if the same shall be found to have been improperly issued, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

In witness whereof, the said Oregon Short Line Railroad Company has caused these presents to be signed by its vice-president and attested by its assistant secretary, and its corporate seal to be hereto affixed, and the said The United States Fidelity and Guaranty Company has caused these presents to be signed by its man-
426 ager and attested by its attorney-in-fact, and its corporate seal to be hereto affixed this third day of August, one thousand nine hundred and four.

OREGON SHORT LINE RAILROAD COMPANY.
WM. D. CORMISH, Vice-President.

Attest:
JOS. HELLEN,
Ass't Secretary.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

[L. S.]

Attest:
CHAS. W. YOUNG,
Attorney-in-fact.

The foregoing bond is satisfactory as to form and substance and surety, to the defendant, Northern Securities Company.

JOHN W. GRIGGS,
Sol. for Defendant Northern Securities Company.

Aug. 17, 1904.

STATE OF NEW YORK, }
County of New York, } ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Oregon Short Line Railroad Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Oregon Short Line Railroad Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with Charles W. Young and knows him to be attorney in fact of said company; and that the signature of said Charles W. Young subscribed to said bond is the genuine handwriting of said Charles W. Young and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent;
427 and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000).

SYLVESTER J. O'SULLIVAN, Manager.

Sworn to, acknowledged before me, and subscribed in my presence this 17th day of August, 1904.

EDWARD H. ROWLEY,
Notary Public, Kings Co.

Certificate filed in New York Co.

The within bond is approved as to form and sufficiency of surety

EDWARD G. BRADFORD, *J.*

August 18, 1904.

Affidavit.

CITY OF NEW YORK,
County of New York, State of New York, } ss:

Sylvester J. O'Sullivan, being by me duly sworn deposes and says that he is manager of the United States Fidelity and Guaranty Company, acting by power of attorney granted to him by the board

of directors of the said company; that he is familiar with the assets and liabilities of the said company, and that the assets of the said company exceed the liabilities of said company by more than two million dollars ($2,000,000.) as will more fully appear by the annexed statement, marked "Exhibit A." showing the assets and liabilities of the said company at the close of business June 30th, 1904, which said statement is hereto referred to and made a part hereof as if fully incorporated herein, and deponent further says that he knows of his own knowledge that the said statement is a true and correct summary of the assets and liabilities of the said company at the close of business June 30th, 1904.

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 17th day of August, 1904.

EDWARD H. ROWLEY,
Notary Public, Kings Co.

Certificate filed in New York Co.

428 Statement.

The United States Fidelity and Guaranty Company—Home Office, Baltimore, Md.

At the Close of Business, June 30th, 1904.

Commenced Business, August 1st, 1896.

Assets.

Investments, stocks and bonds (market value)	$1,931,238.40
Cash on hand and in banks	405,590.02
Collateral loans	47,960.00
Loans secured by mortgages	19,650.00
Ground rents	49,000.00
Real estate	340,635.70
Mortgages and other collateral a/c salvage	4,000.00
Agents' balances, fidelity and surety, less commissions	259,171.68
Agents' balances, burglary, less commissions	78,991.97
Due for subscriptions, department guaranteed attorneys	28,600.80
Aduance a/c contracts, secured	122,211.56
Interest due and accrued	29,792.16
	$3,316,842.29

Liabilities.

Capital stock paid in cash	$1,700,000.00
Cash deposited as collateral	112,898.71
Surplus and reserve	1,503,943.58
	$3,316,842.29

JOHN R. BLAND, President.
GEORGE R. CALLIS, Secretary.

STATE OF MARYLAND, City of Baltimore, } ss:

On this 8th day of July, 1904, before me, A. D. Patrick, a notary public in and for the city and State aforesaid personally appeared John R. Bland and George R. Callis, president and secretary respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say
429 that they are such officers of the said company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of the said company, as they appeared upon the books of the said company on the 30th day of June, A. D. 1904.

In witness whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[L. S.]

A. D. PATRICK,
Notary Public.

"Exhibit A."

Injunction.

(Filed August 22, 1904.)

UNITED STATES OF AMERICA, Third Circuit, District of New Jersey, } ss:

[L. S.] The President of the United States to the Northern Securities Company, Greeting:

Whereas, Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York, lately exhibited their bill of complaint, in the circuit court of the United States, for the district of New Jersey, against you and The Northern Pacific Railway Company, defendants, praying to be relieved touching the matters therein complained of and especially that you be enjoined from transferring or disposing of certain preferred and common stock of the Northern Pacific Railway Company therein referred to,

We therefore, in consideration thereof, and also of the particular matters in the said bill set forth, do strictly command and enjoin you, the said The Northern Securities Company your directors, officers, agents and employees, until the final determination of the suit, or until further order of this court, from in any manner transferring, assigning, distributing or otherwise disposing of or parting with three hundred and seventy thousand two hundred and thirty (370,230) shares of the common stock of the Northern Pacific Railway Company alleged in the bill to have been received by the said Northern Securities Company from the complainants Edward
430 H. Harriman and Winslow S. Pierce on or about the 18th day of November, 1901, or any part thereof; and from transferring, assigning, distributing or otherwise disposing of or parting with three hundred and forty-seven thousand and ninety (347,090) shares of the common stock of the Northern Pacific Railway Company received by the said Northern Securities Company from the Northern Pacific Railway Company on or about the 27th day of December, 1901; and from transferring, assigning, distributing or otherwise disposing of or parting with the certificates representing said stock, or any of them or any part thereof.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Trenton, this nineteenth day of August, nineteen hundred and four.

S. D. OLIPHANT,
Clerk of Circuit Court.

Served the within injunction on the defendant, The Northern Securities Company at Hoboken, N. J., on the 19th day of August, 1904, by delivering to and leaving with George W. Butts, vice-president of the Hudson Trust Company, registered agent of the defendant company, personally, a copy thereof, and at the same time showing him this original and informing him of its contents.

THOMAS J. ALCOTT,
United States Marshal.

In the United States Circuit Court for the District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Co., and The Equitable Trust Co. of New York, Complainants,

against

THE NORTHERN SECURITIES COMPANY and THE NORTHERN Pacific Railway Company, Respondents.

Assignment of Errors.

(Filed September 1, 1904.)

431 The Northern Securities Company, which is the only respondent which has been served with process or has appeared in this cause, files the following assignment of errors upon which it will rely upon its appeal from the interlocutory order made by this honorable court on the 18th day of August, 1904, granting an injunction *pendente lite* in said cause.

The respondent assigns in error upon this appeal the following, namely:—The circuit court erred in making said interlocutory order.

1st. In deciding that the said court had jurisdiction.

2nd. In deciding that a writ of special injunction should issue in accordance with the prayer of the bill of complaint directed to the Northern Securities Company and restraining said company, its directors, officers, agents and employees, until the final determination of the suit or until further order of the court, from in any manner transferring, assigning, distributing or otherwise disposing of or parting with 370,230 shares of the common stock of the Northern Pacific Railway Company alleged in the bill to have been received by the said Northern Securities Company from the complainants Edward H. Harriman and Winslow S. Pierce on or about the 18th day of November, 1901, or any part thereof.

3rd. In deciding that a writ of special injunction should issue in accordance with the prayer of the bill of complaint directed to the said respondent, The Northern Securities Company, restraining said company, its directors, officers, agents and employees until the final determination of the suit or until the further order of this court, from transferring, assigning, distributing or otherwise disposing of or parting with 347,090 shares of the common stock of the Northern Pacific Railway Company received by the said Northern Securities Company from the Northern Pacific Railway Company on or about the 27th day of December, 1901.

4th. In deciding that a special injunction should issue in accordance with the prayer of the bill of complaint directed to the said respondent, The Northern Securities Company, and restraining said

company, its directors, officers, agents and employees until the final determination of the suit or until further order of this court, from transferring, assigning, distributing or otherwise disposing of or parting with the certificates representing said shares of stock of the Northern Pacific Railway Company or any of them or any part thereof.

5th. In not deciding that the motion of the complainants for a preliminary injunction should be dismissed with costs in favor of the respondents.

In order that the foregoing assignment of errors may be
432 and appear of record, the said respondent presents the same to the court and prays that such disposition may be made thereof as is in accordance with law and the statute of the United States in such case made and provided.

All of which is respectfully submitted.

JOHN W. GRIGGS,
JOHN G. JOHNSON,
Per J. W. BAYARD,
Solicitors for said Respondent.

In the United States Circuit Court for the District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, Oregon Short Line Railroad Co., and The Equitable Trust Co. of New York, Complainants, *against* THE NORTHERN SECURITIES COMPANY and The Northern Pacific Railway Company, Respondents.	On Bill in Equity.

Petition for Appeal.

(Filed September 1, 1904.)

To the honorable the judges of the United States circuit court:

The above named respondent in the above entitled cause, The Northern Securities Company, which is the only respondent which has been served with process or has appeared in this cause, conceiving itself aggrieved by the order made and entered by the above named court in the above entitled cause on the 18th day of August, 1904, wherein and whereby it was and is ordered that a special injunction be issued as prayed in the bill of complaint in this cause directed to the said respondent, The Northern Securities Company, restraining said company, its directors, officers, agents and employees, until the final determination of the suit or until further order of this court, from in any manner transferring, assigning,

distributing or otherwise disposing of or parting with 370,230 shares of the common stock of the Northern Pacific Railway Com-
433 pany alleged in the bill to have been received by the said Northern Securities Company from the complainants, Edward H. Harriman and Winslow S. Pierce on or about the 18th day of November, 1901, or any part thereof, and further restraining the said Northern Securities Company, its directors, officers, agents and employees from transferring, assigning, distributing or otherwise disposing of or parting with 347,090 shares of the common stock of the Northern Pacific Railway Company received by the said Northern Securities Company from the Northern Pacific Railway Company on or about the 27th day of December, 1901, and from transferring, assigning, distributing or otherwise disposing of or parting with the certificates representing said stock or any of them or any part thereof; by which interlocutory order the complainants were awarded a preliminary or special injunction against the said respondent: hereby petitions the said court for an order allowing said respondent to prosecute an appeal from said interlocutory order granting said preliminary or special injunction to the honorable United States circuit court of appeals for the third circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said respondent shall give and furnish on such appeal: and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States circuit court of appeals for the third circuit.

And your petitioners will ever pray, etc.

JOHN W. GRIGGS,
JOHN G. JOHNSON,
Per J. W. BAYARD,
Solicitors for The Northern Securities Company,
Respondent.

And now, this first day of September, 1904, this appeal is allowed.

W. M. LANNING, Judge.

434 In the United States Circuit Court for the District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
against
THE NORTHERN SECURITIES COMPANY and THE NORTHERN PACIFIC Railway Company, Respondents.

Bond.

(Filed September 1, 1904.)

Know all men by these presents: That we, the Northern Securities Company, a corporation, as principal, and National Surety Company as surety, are jointly and severally held and firmly bound unto the above named Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York in the sum of one thousand dollars ($1,000) lawful money of the United States of America to be paid to the said Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York, their certain attorneys, executors, administrators, successors and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns severally, firmly, by these presents.

Sealed with our seals dated the 30th day of August in the year of our Lord one thousand nine hundred and four (1904).

The condition of the above obligation is such that whereas the Northern Securities Company has taken an appeal to the circuit court of appeals for the third circuit to reverse an interlocutory order rendered and entered by the circuit court of the United States in and for the district of New Jersey, which order was made and entered in the above entitled cause on the 18th day of August, 1904;

435 *Now, therefore, the condition of the above obligation is such* that if the above named, The Northern Securities Company, respondent herein, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE NORTHERN SECURITIES COMPANY,
By JAS. J. HILL, President.

Attest:
[SEAL.] EDWARD T. NICHOLS, Secretary.

NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT, Res. Vice-President.

Attest:
[SEAL.] RICHARD J. MORIARTY, Res. Ass't Sec'y.

The foregoing bond is hereby approved this first day of September, 1904.

W. M. LANNING, Judge.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK, County of New York. } ss.:

On this 30th day of August one thousand nine hundred and four, before me personally came Robert M. Nugent, known to me to be the res. vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Northern Securities Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of New York, State of New York; that he is the res. vice-president of said company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13, 1894; that the seal affixed to the within bond of Northern Securities Company is the corporate seal of said company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as res. vice-president of said company, and that he is acquainted with Richard J. Moriarty and knows him to be the res. ass't secretary of said company; and that the signature of said Richard J. Moriarty subscribed to said bond is in the genuine handwriting of said Richard J. Moriarty, and was thereto subscribed by order and
436 authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of one million dollars.

E. A. Armstrong of Camden is our agent to acknowledge service in the judicial district wherein this bond is given.

ROBERT M. NUGENT.

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of August, 1904.

[L. S.]

BELLE L. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens counties.

Citation.

(Filed September 6, 1904.)

By the Honorable William M. Lanning, judge of the district court of the United States for the district of New Jersey, and *ex-officio* a judge of the circuit court of the United States for said district, in the third circuit.

To Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and the Equitable Trust Company of New York:

Whereas, the Northern Securities Company has lately appealed to the United States circuit court of appeals for the third circuit, from an order for preliminary injunction lately rendered in the circuit court of the United States, for the district of New Jersey, made in favor of you, the said Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York, and has filed the security required by law; you are, therefore, hereby cited to appear before the said United States circuit court of appeals, for the third circuit, to be held at the city of Philadelphia, in the State of Pennsylvania on the thirtieth day of September, instant, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton, in the district of New Jersey, in the third circuit, the first day of September, in the year of our Lord one thousand nine hundred and four.

W. M. LANNING, Judge.

437 Service of a copy of the within citation acknowledged this third day of September, 1904.

LINDABURY, DEPUE & FAULKER,
Solicitors for Complainants and Appellees.

Clerk's Certificate.

UNITED STATES OF AMERICA, District of New Jersey, } ss:

I, S. D. Oliphant, clerk of the circuit court of the United States, for the district of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the record in the case of Edward H. Harriman *et al. against* Northern Securities Company *et al.* as the same remains on file and of record in my office.

In testimony whereof I have subscribed my name and affixed the seal of said court at Trenton, in said district, this sixteenth day of September, nineteen hundred and four.

[L. S.] S. D. OLIPHANT, Clerk.

438 Supplemental Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

NORTHERN SECURITIES COMPANY, Defendant and Appellant,
vs.
EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York. } No.—.

On Appeal from the Circuit Court of the United States for the District of New Jersey.

Filed October 25, 1904.

438½ Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
versus
NORTHERN SECURITIES COMPANY, Defendant.

Order Granting Leave to File Amended Bill.

(Filed April 26, 1904.)

This matter being opened to the court by Lindabury, Depue & Faulks, solicitors and of counsel with the complainants in the above-entitled cause, who exhibit to the court a verified amended bill of complaint, which the complainants desire to file and no copy of the original bill having been taken out of the office of the clerk of this court, and the defendant not having answered, pleaded or demurred to the original bill; and it appearing from said amended bill of complaint that it is proposed to add as a defendant the Northern Pacific Railway Company, a corporation of the State of Wisconsin, which is not an inhabitant of or found within the district of New Jersey, it is

Ordered that the complainants Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York be and they are hereby granted leave to file said amended bill of complaint herein, so as among other things to make the Northern Pacific Railway Company a party defendant and that the exhibits filed with the original bill be deemed annexed to said amended bill, and that such amended bill be filed without prejudice to the proceedings already had in this cause, or

to the restraining order granted herein on the 20th day of April 1904, which is continued until the hearing and decision of the motion for a preliminary injunction, and it is further

Ordered that the absent defendant, Northern Pacific Railway Company, be and it is hereby directed to appear, plead, answer, or demur by the first Monday of June, 1904, and that a copy of this order together with a copy of said amended bill be served upon such absent defendant, wherever found, and also upon the defendant Northern Securities Company as the person in possession or
439 charge of the certificates of the common stock of the Northern Pacific Railway Company referred to in the amended bill of complaint.

Trenton, New Jersey, April 26th, 1904.

ADAM KIRKPATRICK, Judge.

United States Circuit Court, District of New Jersey.

EDWARD H. HARRIMAN, ET AL., Complainants,
vs.
NORTHERN SECURITIES COMPANY, Defendant. } On Bill, &c.

Affidavit of George D. Mulligan.

(Filed May 11, 1904.)

DISTRICT OF NEW JERSEY, }
County of Essex, } ss:

George D. Mulligan, of full age, being duly sworn according to law, on his oath says:

I am a member of the bar of the State of New Jersey and am employed in the office of Lindabury, Depue & Faulks, the solicitors of the complainants in the above entitled cause. On the twenty-ninth day of April, nineteen hundred and four, I served a copy of the order made in the said cause on the twenty-sixth day of April, nineteen hundred and four, granting leave to the complainants to file an amended bill of complaint herein, together with a copy of such amended bill of complaint, upon the defendant Northern Securities Company by handing a copy of the said order and of the said amended bill of complaint to J. H. P. Reilly, the secretary of the Hudson Trust Company, the registered agent of the said defendant in the State of New Jersey, and explaining to him the contents thereof.

GEO. D. MULLIGAN.

Sworn and subscribed before me this ninth day of May, A. D. 1904.

J. FRED WHERRY,
Notary Public of New Jersey.

[L. S.]

440 Circuit Court of the United States, District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Affidavit of William M. Coleman.

(Filed May 25, 1904.)

UNITED STATES OF AMERICA,
Southern District of New York State, State and County of New York.

William M. Coleman, being first duly sworn, deposes and says that he is upwards of eighteen years of age and a clerk in the office of William D. Guthrie, of counsel with the complainants herein:

That on April 27, 1904, at No. 32 Nassau street, and at No. 49 Wall street, both in the borough of Manhattan, city of New York, respectively, he served an order and an amended bill of complaint, of which the annexed are true copies, upon the defendants Northern Securities Company and Northern Pacific Railway Company, respectively, by delivering the same to and leaving the same with William P. Clough, the vice-president of the defendant Northern Securities Company and George H. Earl the secretary and treasurer of the defendant Northern Pacific Railway Company.

Deponent further says that at the time of such service he knew the persons so served to be William P. Clough and George H. Earl, and that they were respectively the vice-president of the above-named defendant Northern Securities Company, and the secretary and treasurer of the above-named defendant Northern Pacific Railway Company, respectively.

WILLIAM M. COLEMAN.

Subscribed and sworn to before me this 29th day of April, 1904

JOHN P. TUOMEY,
[L. S.] Notary Public, Kings Co., N. Y.

Certificate filed in New York county.

441 Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Order Granting Leave to File Second Amended Bill.

(Filed June 4, 1904.)

Now, on this 4th day of June, 1904, this cause came on further to be heard on the application of Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, the complainants herein, for leave to file their second amended bill and the verified second amended bill of complaint which the complainants desire to file having been exhibited to the court, and no copy of the original bill or of the amended bill having been taken out of the office of the clerk of this court, and the defendants not having answered, pleaded or demurred to the original bill or to the amended bill; on motion of Lindabury, Depue & Faulks, solicitors and of counsel for the complainants, it is

Ordered, that the complainants Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York be and they are hereby granted leave to file said second amended bill of complaint herein in the form so exhibited, and that such second amended bill be filed without prejudice to the proceedings already had in this cause, or to the restraining order granted herein on the 20th day of April, 1904, which is hereby continued until the decision of the motion for a preliminary injunction and the entry of an order thereon. The affidavits already filed by the respective parties on the motion for an injunction are to be considered as if said amendment had not been made.

June 4, 1904.

EDWARD G. BRADFORD, Judge.

442 We hereby waive notice of application for the foregoing order and have no objection to the making thereof, it being understood and agreed that the pending motion for a special injunction shall be determined upon the second amended complaint and the papers and briefs heretofore submitted and upon the supplemental briefs which are to be filed on or before Tuesday, June 14th, 1904, all as though the second amended bill of complaint had been filed preceding the oral argument.

JOHN G. JOHNSON,
Sol'r Northern Sec. Co.

Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY, Defendant.

Affidavit of Winslow S. Pierce.

(Filed April 20, 1904.)

UNITED STATES OF AMERICA,
State, County, and City of New York, } ss:

Winslow S. Pierce, being duly sworn, deposes and says:

I. I am one of the complainants named in the foregoing bill of complaint and have read the same. The matters and things therein stated, so far as they relate to the acts and deeds of the Oregon Short Line Railroad Company, Edward H. Harriman or myself are true to my own knowledge, and so far as they relate to the acts and deeds of others I believe them to be true.

II. I am, and since long prior to November, 1901, have been a director of the Oregon Short Line Railroad Company, and as such had personal knowledge of the fact that prior to the 18th day of November, 1901, the Oregon Short Line Railroad Company had duly acquired $37,023,000 par value of common capital stock of the Northern Pacific Railway Company and $41,085,000 par
443 value of the preferred stock of said company. The said stock of the Northern Pacific Railway Company was registered in the names of Mr. Edward H. Harriman and myself, and was held by us as trustees for the Oregon Short Line Railroad Company, which company was the beneficial owner thereof.

III. Said Harriman and I were present at the office of the Northern Securities Company on the 18th day of November, 1901, when certificates for said preferred and common stock of the Northern Pacific Railway Company were delivered to the Northern Securities Company. Upon such delivery Mr. Harriman and I received from Mr. James J. Hill, president of said Northern Securities Company certificates for $82,491,871 par value of the stock issued in our names, and we also received a check for $8,915,629 in cash.

IV. I had theretofore been advised by Mr. Harriman that he had agreed that the preferred stock of the Northern Pacific Railway Company should be converted into common stock of the same nominal par value and that such conversion should be by means of the issue of bonds of said railway company which should be convertible into common stock.

V. My information and belief in regard to the allegations of the bill of complaint concerning the legal proceedings instituted by the Attorney-General of the United States in the circuit court of the United States for the district of Minnesota, third division, against the Northern Securities Company, the Northern Pacific Railway Company, and other parties, as in the bill of complaint herein alleged, have been derived from a perusal of a copy of the record of the appeal in said case to the Supreme Court of the United States purporting to have been printed by the clerk of the Supreme Court of the United States and from a copy of the opinion of the circuit court of the United States for the district of Minnesota and of the Supreme Court of the United States as duly published.

My information and belief in regard to the allegations of the bill of complaint as to the issue of stock of the Northern Securities Company and its holdings of stock of the Great Northern and Northern Pacific Railway Companies have been derived from a perusal of a copy of an affidavit sworn to by Mr. James J. Hill, president of the Northern Securities Company on the 11th day of April, 1904, in connection with the proceedings of intervention brought by the Oregon Short Line Railroad Company, Mr. Harriman and myself, as hereinafter stated.

444 I have received by mail from the Northern Securities Company, as a stockholder of record therein, what purports to be a circular issued on behalf of the Northern Securities Company, and being the same as Exhibit E to the bill of complaint. Such circular so mailed to me as aforesaid was accompanied by a form of proxy prepared by the Northern Securities Company, of which a fac similie is hereto annexed as Schedule A to this affidavit.

My information and belief in regard to the allegations of the bill of complaint concerning the action of the Northern Securities Company and its directors in connection with the adoption of certain preambles and resolutions on the 22d of March, 1904, as alleged in the bill of complaint, have been derived from said circular and proxy and also from the statements made to me by Mr. Edward H. Harriman, who is a director of the Northern Securities Company, to the effect that he attended the meeting of the board of directors of said company on said 22d day of March, 1904, and that the preambles and resolutions referred to in the bill of complaint were then adopted by a majority of the directors, and that the circular annexed to the complaint was then directed to be issued, and that at such meeting a communication was submitted from him stating that he had been advised that there were serious legal objections to the plan which was proposed and requested an adjournment of the meeting, but that such adjournment was not granted. Mr. Harriman further informed me that although present at such meeting as a director of the Northern Securities Company he did not vote.

VI. Upon being advised that said Northern Securities Company intended to proceed with its plan for the distribution of the stock of said Great Northern and Northern Pacific Railway Companies *pro*

rata among its stockholders, the Oregon Short Line Railroad Company and Mr. Harriman and myself presented a petition to the circuit court of the United States for the district of Minnesota, third division, asking leave to intervene in said suit *pro interesse suo* in order that the rights of the petitioners might be adjudicated in that suit. Such application was presented to the court on Tuesday and Wednesday, the 12th and 13th of April, 1904, and taken under advisement, and subsequently and on the 19th of April, 1904, said court entered an order denying the petitioners leave to file their petition of intervention, giving their reasons therefor in an opinion, a copy of which, as received by telegraph over the wires of the Western Union Telegraph Company, is hereto annexed as Schedule B to this affidavit.

VII. The reason why an affidavit is not made by Mr. Harri-
445 man personally is that he is at present in the West upon a tour of inspection over the railroads with which he is connected, and that it is impracticable to secure his return in time to make an affidavit or to send one to him.

WINSLOW S. PIERCE.

Subscribed and sworn to before me this 20th day of April, 1904.
[L. S.] JAMES L. MOCK,
Notary Public, Kings County.

Certificate filed in New York county.

SCHEDULE A TO AFFIDAVIT OF W. S. PIERCE.

Know all men by these presents, that the undersigned, —— —— hereby make, constitute and appoint James J. Hill, or in his absence Edward T. Nichols, or in the absence of both —— —— the lawful attorney-in-fact and proxy of the undersigned, for and on behalf of the undersigned, to attend a special meeting of the stockholders of the Northern Securities Company, to be holden at the offices of said company, in Hoboken, in the State of New Jersey, at 11 o'clock a. m., on the 21st day of April, A. D. 1904, and all adjournments of said meeting, and at the said special meeting, and at every adjournment thereof, for and on behalf, and in the name of the undersigned, to cast all votes which the undersigned, if present in person, might cast, on account, or by authority of, any and all shares of the capital stock of the said Northern Securities Company, standing upon the books of the said Northern Securities Company as held or owned by the undersigned; and in particular, to cast any and all votes, which the undersigned might be authorized to cast, if present in person, in favor of the adoption, approval and ratification of an alteration of the certificate of incorporation of the said Northern Securities Company, proposed in certain preambles and resolutions heretofore adopted by the board of directors of the said Northern Securities Company, which preambles and resolutions were as follows, to wit:

Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

446 Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

Whereas, this company has issued, and there are now outstanding 3,954000 shares of its own capital stock; and

Whereas, this company desires and intends to comply with the decree in the said suit, fully, and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the board of directors of this company hereby declares it advisable that article fourth (4th) of this company's certificate of incorporation be amended, so as to read as follows:

Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents

447 ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them respectively,

shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general office of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock a. m., on April 1st, A. D. 1904.

And the undersigned does hereby further empower the said attorney-in-fact and proxy, for, and on behalf, and in the name of the undersigned, to give, subscribe and acknowledge the assent of the undersigned to the alteration of the certificate of incorporation of the Northern Securities Company, proposed by the said resolutions, and to do all other acts and execute all other instruments, that may be necessary or desirable, under the laws of the State of New Jersey, to make legal and effective the said proposed alteration; hereby ratifying and confirming all that the said attorney-in-fact and proxy may do in the premises, in conformity with this instrument.

Witness — hand and seal on this — day of ——, A. D. 1904.

—— ——. [SEAL.]

448 SCHEDULE B TO AFFIDAVIT OF W. S. PIERCE.

Circuit Court of the United States for the District of Minnesota, Third Division.

UNITED STATES OF AMERICA
v.
THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont.

Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. Maxwell Evarts and Mr. John D. Baldwin, (Mr. John F. Dillon was with them on the brief for the petitioners.)

Mr. Elihu Root, Mr. John G. Johnson, Mr. Frank B. Kellogg and Mr. C. A. Severance for the Northern Securities Company.

Hon. P. C. Knox, Attorney-General for the United States.

Before Sanborn, Thayer, Van Devanter, and Hook, Circuit Judges.

THAYER, circuit judge, stated the conclusions of the court.

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to

intervene *pro interesse suo* in the case of The United States *vs.* The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed recently by the Supreme Court of the United States.

The petitioners recite as the ground of their application that Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, are the registered owners of $82,491,871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that company to the extent of ninety-
449 nine per cent., and are about to submit the scheme for approval to the stockholders of the company, that the plan so proposed contemplates that the stockholders of the Securities Company shall surrender ninety-nine per cent. of the stock of that company which they respectively hold, each stockholder receiving in exchange $39.27 in stock of the Northern Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that company in exchange for Northern Pacific stock; and, as they verily believe, that the proposed plan of distribution if carried out will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who co-operated in the forming of the Securities Company and would continue the common management of the two competing railway companies and render the decree of this court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case, after the entry of a final decree, are very unusual.

They are never granted as a matter of course, and owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise.

The principal ground as it seems on which the petitioners Harriman and Pierce base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given (Root *v.* Woolworth, 150

U. S., 401, 411; Minnesota Company *v.* St. Paul Company, 2 Wall., 609), but we fail to perceive that further orders are necessary in the case in hand to insure the due execution of the decree according to its terms. The decreee was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction
450 against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make a disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly *from* the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of the said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned or exclude other methods of disposi-
451 tion of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Se-

curities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last mentioned but will lead to a very wide distribution of the stock, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits or excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. The United States is the complainant in this case. It is the conservator of the public welfare and has a right to speak for the public. According to well established rules the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for
452 the protection of their own individual interests and for that purpose only in the event that they can obtain adequate protection in no other way. The United States, speaking by its Attorney General, says that it "neither admits nor denies the allegations of the petition but objects to the proposed intervention. This case was heard before this court on bill, answer and testimony and a final decree was entered enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States the decree of this court was affirmed in every particu-

lar, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable disposition of the stock of the two railway companies if they can do so, which will not be in violation of law, feeling confident of its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies and preferring to challenge the validity of any such combination by an independent bill rather than by any future proceedings in this case.

It was further contended in agument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government's bill in this case, that it has never been released from such custody, although a final decree has been entered, and that on this ground the petitioners, who assert a right to have particular shares of the Northern Pacific Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that so long as property remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. In matters of Howard, 9 Wall. 175., 184, and cases cited, Williams *v.* Morgan, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to that court for relief, and as a general rule cannot obtain relief elsewhere. This court, however, has never assumed the custody of the stock of the Northern
453 Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill, which was filed by the Government, one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated. Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action and if it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of

that company in the two railway companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers, is competent to enforce.

Leave to intervene is denied.

454 Circuit Court of the United States, District of New Jersey.
In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE Railroad Company, and The Equitable Trust Company of New York, Complainants,

versus

NORTHERN SECURITIES COMPANY, Defendant.

Affidavit of Alexander Millar.

(Filed April 20, 1904.)

UNITED STATES OF AMERICA, State, County, and City of New York, } ss:

Alexander Millar, being duly sworn, deposes and says as follows:

I. That he is the secretary of the Union Pacific Railroad Company, and has been secretary of said company since its organization in 1897, and is also and has been for many years secretary of numerous other companies, and that as such secretary he has full charge of the issue and transfer of the capital stocks of said companies, and is and has been for many years familiar with the methods of issuing and transferring stocks.

II. That it is the custom of all corporations having a large issue of capital stock to keep stock books and stock ledgers in which a record is kept of each and every certificate issued by the corporation, and which record shows the name of the person to whom each share of stock has been issued, and likewise the name of the person, or persons, into which any such stock may be transferred, together with a record of each and every certificate surrendered for transfer or in exchange for a new certificate. That it is likewise the custom of all such corporations to keep books of account in which it appears for what purpose stock has been issued, whether for property, and what kind of property, or for cash, and to have a transfer agent or other officer or a transfer agency for the purpose of keeping a true and accurate record of all transfers of stock, and that such transfer agent, officer or agency countersigns each and every certifi-
455 cate issued by the corporation. That such corporation also, in compliance with the general custom and the requirements

of the New York stock exchange, appoints registrars of transfers, for the purpose of having a duplicate record and check of the issue and reissue of all certificates of stock.

III. That the defendant Northern Securities Company, from the time of its incorporation in November, 1901, until the present time, has had a transfer agent who has registered all transfers of stock and who has countersigned all certificates of stock, and that during all this time it has also had a registrar of transfers, namely, the Manhattan Trust Company of New York, which registrar has kept a record of all certificates of stock issued by the said Northern Securities Company, and that the certificates standing in the names of Messrs. Harriman and Pierce, as stated in the bill of complaint in the above entitled suit, were countersigned by said transfer agent and said registrar of transfers and are in the possession of the complainant The Equitable Trust Company of New York.

IV. That he is familiar with the method of bookkeeping prevailing with orporations in the city of New York and elsewhere in the United States and the office books kept by such corporations and their transfer agents and registrars of transfers. That such books of account contain detailed entries in regard to the number, character and identity of each certificate of stock issued by the corporation, and whenever certificates are surrendered for transfer into other names, that such books of account show exactly what certificates have been surrendered and cancelled and what new certificates have been issued in place thereof; and that it is entirely feasible and a common occurrence to trace the origin of a certificate of stock outstanding and to show to whom the first issue of the stock was made and for what consideration, and to whom it has subsequently been transferred, no matter how many transfers may have been made in the meantime.

V. To my knowledge in November, 1901, the capital stock of the Northern Pacific Railway Company consisted of a total authorized issue of $155,000,000, of which $75,000,000 par value consisted of preferred stock and $80,000,000 par value consisted of common stock. Of said common stock at that time issued and outstanding, Messrs. Harriman and Pierce held $37,023,000 par value, and Messrs. Hill and Morgan and their associates held or claimed to hold and control about $42,000,000 par value thereof, making
456 the aggregate of the joint holdings of said Harriman and Pierce and said Hill, Morgan and associates $79,023,000, out of a total outstanding issue of $80,000,000. Of the preferred stock outstanding, $41,085,000 was registered and held in the names of said Harriman and Pierce, and the remainder partly by the said Hill, Morgan and associates and partly by the public.

VI. On or about the 13th day of November, 1901, the board of directors of the Northern Pacific Railway Company resolved to retire the preferred stock through an issue of bonds, which bonds were to be convertible into new common stock of an amount equal to the pre-existing preferred stock, namely, $75,000,000 par value; that

said preferred stock was subsequently so retired, and that the whole amount thereof was thereupon converted into an equal amount of common stock.

ALEXANDER MILLAR.

Subscribed and sworn to before me this 20th day of April, 1904.

[SEAL.] JAMES L. MOCK,
Notary Public, Kings Co., N. Y.

Certificate filed in New York county.

Clerk's Certificate.

UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States, for the district of New Jersey, do hereby certify that the foregoing are true copies of the original order granting leave to file amended bill, affidavits of George D. Mulligan and William M. Coleman, affidavits of Winslow S. Pierce and Alexander Millar and order granting leave to file second amended bill in the suit of Edward H. Harriman *et al.* against Northern Securities Company *et al.* as the same remains of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this twenty-sixth day of October, nineteen hundred and four.

[L. S.] S. D. OLIPHANT, Clerk.

457 Supplemental Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

NORTHERN SECURITIES COMPANY, Defendant and Appellant,
vs.
EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York. } No. —.

On Appeal from the Circuit Court of the United States for the District of New Jersey.

Filed November 10, 1904.

458 Circuit Court of the United States, District of New Jersey. In Equity.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT Line Railroad Company, and The Equitable Trust Company of New York, Complainants,
versus
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILway Company, Defendants.

Amended Bill.

(Filed April 26, 1904.)

To the honorable the judges of the circuit court of the United States for the district of New Jersey:

Edward H. Harriman and Winslow S. Pierce, residents and citizens of the State of New York; Oregon Short Line Railroad Company, a corporation organized and existing under the laws of the State of Utah and a resident and citizen of said State, and the Equitable Trust Company of New York, a corporation organized and existing under the laws of the State of New York and a resident and citizen of said State, bring this their amended bill of complaint against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey, and a resident and citizen of said State and an inhabitant of the district of New Jersey, and the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin and a resident and citizen of said State.

And thereupon your orators complain and say:

I. Your orators Edward H. Harriman and Winslow S. Pierce are severally residents and citizens of the State of New York; your orator Oregon Short Line Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah as a railroad corporation, and a resident and citizen of said State; and your orator The Equitable Trust Company of New York is a corporation organized and existing under and by virtue of the laws of the State of New York and a resident and citizen of said State.

459 II. The defendant Northern Securities Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a resident and citizen of said State and an inhabitant of the district of New Jersey. The defendant Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and a resident and citizen of said State, but is not an inhabitant or found within the district of New Jersey and is without the jurisdiction of this court.

III. The defendant Northern Securities Company was organized on or about the 13th day *day* of November, 1901, by filing in the office of the secretary of state of New Jersey, as required by the statutes of said State in such case made and provided, a certificate of incorporation wherein and whereby it was, among other things, recited that said corporation was organized for the object of acquiring and holding shares of the capital stock of other corporations, that its authorized capital stock should be four hundred million dollars ($400,000,000) divided into four million shares of the par value of one hundred dollars ($100) each, and that its duration should be perpetual, as will more fully and at length appear by said certificate of incorporation so filed in the office of the secretary of state of New Jersey, of which a true copy is annexed as Exhibit A to this amended bill and to which reference is prayed.

IV. Your orators further show that said Harriman and Pierce are now and ever since November 18, 1901, have been the registered owners and holders of $82,491,871 par value of the capital stock of said defendant Northern Securities Company, and that such holding of stock by them is and at all times has been as trustees for the use and benefit of your orator, Oregon Short Line Railroad Company, which company was then and still is the beneficial owner thereof.

V. Your orators further show that heretofore and by indenture dated July 17, 1902, said Oregon Short Line Railroad Company duly pledged $82,491,000 par value of said stock of said defendant Northern Securities Company with your orator, The Equitable Trust Company of New York, as trustee for an issue of bonds of said Oregon Short Line Railroad Company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding, as will more fully and at length appear by said indenture, of which

a copy is annexed as Exhibit B to this amended bill and to which reference is prayed.

VI. Your orators are informed and verily believe and
460 therefore, aver that prior to the 9th day of April, 1903, about $176,822,900 par value of the stock of said Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of said Northern Pacific Railway Company, and about $211,057,600 par value of the stock of said Northern Securities Company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, a railroad corporation organized and existing under the laws of the State of Minnesota, and about $7,522,000 was issued to the public for cash used for the purchase of other property and for corporate purposes.

VII. Your orators are informed and verily believe and therefore aver that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to the par value of $155,000,000, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, that such proceedings were had in November and December, 1901, that said preferred stock was converted into common stock so as to make the entire issue of stock of said railway company consist of one class, or common stock, and that such is the authorized amount of its capital stock at the present time, of which all or nea-ly all has been issued and is now outstanding. They are further informed and verily believe and, therefore, aver that the authorized capital stock of the Great Northern Railway Company in the year 1901 was and still is about $125,000,000 par value, of which about $123,000.000 par value has been issued and was then and is now outstanding.

VIII. Your orators further show that said $82,491,871 par value of the stock of said defendant, Northern Securities Company, standing in the names of your orators Harriman and Pierce, trustees as aforesaid, was part of the original issue of the stock of the said Northern Securities Company, and was issued to them and in their name by said Northern Securities Company on or about November 18, 1901, in exchange for $37,023,000 par value of common stock, and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company, and that at the time of such exchange there was also paid to the said Harriman and Pierce by or in behalf of said defendant, Northern Securities Company, the sum of $8,915,629 in cash. The same stock so issued to said Harriman and Pierce on November 18, 1901, is still registered in their names and the certificates therefore are now actually in the custody of your orator, The Equitable Trust Company of New York, as pledgee, as aforesaid, and are
461 available for tender, return or restoration as hereinafter tendered.

IX. Your orators further aver that at the time of such exchange, on said 18th of November, 1901, it was understood and agreed by said Harriman and Pierce and said defendant Northern Securities

Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company, and as your orators are informed and verily believe and, therefore, aver, said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value, and certificates for such common stock were substituted in lieu and place of the certificates for said preferred stock, and the Northern Securities Company now holds within the jurisdiction of this court all and singular the certificates for said common stock so originally received from your orators Harriman and Pierce and the certificates for said common stock into which said preferred stock was so converted.

X. Your orators further aver that after the organization of said Northern Securities Company, and on or about the 10th day of March, 1902, the Attorney-General of the United States, under and by virtue of the provisions of the act of Congress of July 2, 1890, commonly known as the anti-trust act, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies," filed in the circuit court of the United States for the district of Minnesota, third division, a petition or bill of complaint in the name and on behalf of The United States of America against the defendant above named, Northern Securities Company, and against The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel Lamont, as defendants in said suit, in and by which bill of complaint it was, among other things, alleged that the defendants in said suit had entered into an unlawful combination or conspiracy in violation of the provisions of said anti-trust act, and praying that such combination or conspiracy be adjudged and decreed unlawful, and that it be adjudged and decreed that the defendant Northern Securities Company had acquired all and singular the shares of stock of the Northern Pacific and the Great Northern Railway Companies held or acquired by it in
462 pursuance of an unlawful combination or conspiracy; that the Northern Securities Company, its stockholders, officers, directors, agents and servants, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company; that a mandatory injunction issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, rendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued; that the Northern Pacific Railway Company be perpetually en-

joined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock; that the defendant Great Northern Railway Company be likewise perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock; that the individual defendants above named be perpetually enjoined from in any manner holding, voting or acting as the owner of any of the stock of the Northern Securities Company issued in exchange for stock of either of the said railway companies, unless authorized by said circuit court of the United States, and that a mandatory injunction issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by them and accept therefor the stock of the defendant railway company in exchange for which the same was issued; and that thereafter, such proceedings were had in said suit that the various defendants therein duly answered, and issue was joined by the filing of replications on behalf of the United States to the separate and several answers of said defendants; all as will more fully and at large appear by the record in said suit remaining on file in the office of the clerk of said circuit court of the United States for the district of Minnesota, third division, of which a transcript or copy is annexed as Exhibit C to this amended bill and to which reference is prayed.

XI. Your orators further show that such proceedings were had in said suit in the circuit court of the United States for the district of Minnesota that thereafter on or about the 9th day of April, 1903,
a final decree was entered in favor of the complainant United
463 States of America and against the defendants in said suit, in
and by which decree it was, among other things, adjudged and decreed that said defendants in said suit had entered into a combination or conspiracy in restraint of trade such as the said anti-trust act denounced as illegal, that all of the stock of the Northern Pacific Railway Company and all of the stock of the Great Northern Railway Company then claimed to be held and owned by the defendant Northern Securities Company was acquired and was then held by it in virtue of such unlawful combination or conspiracy, that the Northern Securities Company, its officers, servants, agents and employees, should be and they were enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies, that the Northern Securities Company should be and it was enjoined from voting the aforesaid stock or from voting at any meeting of the stockholders of either of the aforesaid railroad companies or from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railroad companies, or either of them, by virtue of its holding of such stocks therein, that the said railway companies, their officers, directors, servants and agents be and they were enjoined from permitting the stock aforesaid to be

voted by the Northern Securities Company or in its behalf at any corporate election, or from paying any dividends to the Northern Securities Company on account of stock of either of the aforesaid railway companies which it then claimed to own and hold, and that the railway companies be and they were enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. Said decree further contained a provision that nothing therein contained should be construed as prohibiting the Northern Securities Company from returning or transferring to the stockholders of the Northern Pacific and the Great Northern Railway Companies, respectively, all or any of the shares of stock in either of said railway companies which said Northern Securities Company had theretofore received from said stockholders in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Northern Securities Company from making transfers and assignments of the stock aforesaid to such person or persons as might then be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway
464 companies; all as will more fully and at length appear by reference to the decree of said circuit court of the United States for the district of Minnesota, third division, dated on said April 9, 1903, of which a copy is annexed as Exhibit D to this amended bill and to which reference is prayed.

XII. Your orators further show that the defendants in said cause thereupon appealed to the Supreme Court of the United States from said decree and that such proceedings were had upon said appeal that thereafter and on or about the 14th day of March, 1904, a decision was entered in said Supreme Court, affirming said decree of said circuit court of the United States for the district of Minnesota, and that thereafter and on or about the 15th day of April, 1904, the mandate of the Supreme Court of the United States was duly issued and on or about the 19th day of April, 1904, was duly filed in the office of the clerk of said circuit court of the United States for the district of Minnesota, which said mandate affirmed said decree of the 9th day of April, 1903.

XIII. Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally ex-

changed the same for stock of the Northern Securities Company or their assigns.

XIV. Your orators further show that immediately upon the rendition of such decision by the Supreme Court of the United States the defendant Northern Securities Company, by action of its board of directors, determined to fully and unreservedly abandon and terminate said unlawful combination and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof or to $3,954,000 par value, and to distribute and divide the stock of each of said Great Northern and Northern Pacific Railway Companies held by it *pro rata* among the stockholders of said Northern Securities Company, but not to return and retransfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, or their assigns,
465 any of the shares of stock in either of said railway companies which said Northern Securities Company originally received from such stockholders in exchange for its own stock.

Thereupon and in order to consummate said purposes, as your orators are informed and verily believe and, therefore, aver, the board of directors of the Northern Securities Company on or about March 22, 1904, adopted certain preambles and resolutions in the words and figures following

Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

Whereas, this company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the board of directors of this company hereby declares it advisable that article fourth (4th) of this company's certificate of incorporation be amended, so as to read as follows:

Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine

thousand five hundred forty (39,540) shares of one hundred
466 dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

Resolved, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general officers of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock a. m., on April 21, A. D. 1904.

Your orators further show that thereupon a circular or notice was directed to be issued and immediately was issued by and on behalf of the defendant, Northern Securities Company, addressed to its stockholders, notifying them of a special meeting of stockholders
for the purpose of voting upon the propositions submitted by
467 the directors as in said preambles and resolutions stated, and that such meeting was held on the 21st day of April, 1904. A copy of the notice or circular so issued by the defendant Northern Securities Company is hereto annexed as Exhibit E of this amended bill and made a part hereof.

Your orators further show that at such meeting of stockholders the stock of said Northern Securities Company was reduced ninety-nine per cent. by the vote of more than seventy per cent. in interest of its stockholders, and that by a like vote said plan of *pro rata* distribution was assented to, but that your orators then and there duly protested that said plan of distribution was illegal and in violation

of the rights of your orators, who did not vote for or assent thereto and have not assented thereto.

XV. As your orators are informed and verily believe and, therefore, aver, the books of account and stock ledgers kept by the defendant Northern Securities Company and the records of its transfer agent and registrar of transfers show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of said Northern Pacific or said Great Northern Railway Company, and will show that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of said railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of said railway companies, and that, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the said Northern Securities Company so transferred to third parties can be traced and shown in and by said records and books so that the assigns of the original holders of stock of the defendant Northern Securities Company can be identified and the stock of either railway company originally exchanged by their assignors can be delivered to said assigns in exchange for their present holdings of stock of the defendant Northern Securities Company.

XVI. Your orators further show that the defendant Northern Securities Company threatens and intends, immediately after the holding of said meeting of its stockholders to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such dis-
468 tribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of the Northern Pacific Railway Company to which your orators are so entitled or any like amount of shares could not be purchased in any market or from any persons whomsoever.

XVII. Your orators further show that the proposed distribution *pro rata* in place of the return and restitution of the stock of said railway companies would represent a very large loss of annual income to your orators, amounting to over one million dollars, that is to say, the dividends at the rate now being paid upon the stock of the Northern Pacific Railway Company to which your orators are entitled would exceed by the sum of over one million dollars per annum the dividends upon the stock of the Great Northern and Northern Pacific Railway Companies which they would receive upon such *pro rata* division, and that the value of the Northern Pacific Railway stock to which your orators are entitled exceeds by the sum or value of over ten million dollars the aggregate value of

the *pro rata* share of the holdings of each of the said railway companies which your orators would receive on any such proposed *pro rata* distribution, which latter would be as follows: viz., $32,070,612 par value of Northern Pacific stock and $24,638,919 par value of Great Northern stock instead of $78,108,000 par value of Northern Pacific stock.

XVIII. Your orators further show and aver that they are ready, able and willing, and they hereby offer to return and deliver, or cause to be returned and delivered, and they hereby tender to the said Northern Securities Company all and singular the certificates for the shares of its capital stock so received by them as aforesaid, and said sum of $8,915,629 in cash so paid to them by or on behalf of the said Northern Securities Company, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, so delivered and exchanged by them as aforesaid, and the common stock of said railway company into which the preferred stock so exchanged was converted as aforesaid, and they hereby offer to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court shall direct and in all respects to do and perform equity and right in the premises.

469 XIX. Your orators futher show that after the distribution and return of all and singular the shares of stock of said railway companies so acquired and held by the defendant, Northern Securities Company, under and by virtue of said illegal combination, there will remain in the treasury of said defendant property in no way involved in the said suit in the district of Minnesota of a value in excess of the sum of $3,954,000 to which the capital stock of the Northern Securities Company has been reduced, and in addition thereto said company would have the sum of over $8,915,629, so now tendered by the complainants with which to pay and redeem any and all of the $7,522,000 par value of stock of the defendant issued as aforesaid to the public for cash.

In consideration whereof and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where matters of this kind are cognizable, your orators pray the aid of this honorable court to the end that it be decreed that they are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and said sum in cash; and that the said defendant Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator

Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employees be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in ex-
470 change for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same.

Your orators further pray that it may please your honors to grant unto your orators a writ of subpœna of the United States of America issued out of and under the seal of this honorable court to be directed to said defendant, Northern Securities Company, therein and thereby commanding it on a day certain to be named, and under a certain penalty, to be and appear before this honorable court, and then and there to answer all and singular the premises, under its corporate seal, but not under oath which is expressly waived, and to stand to, perform and abide by such further order, direction and decree therein as may be made against it in the premises.

And your orators further pray a like writ of subpœna to be directed to the defendant Northern Pacific Railway Company therein and thereby commanding it on a day certain to be named, to appear and answer at its option.

And your orators as in duty bound will ever pray, &c.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Complainants.

R. V. LINDABURY,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
BAINBRIDGE COLBY,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, State, County, and City of New York, } ss:

William D. Cornish of full age, being duly sworn, on his oath says: I am vice-president of The Oregon Short Line Railroad Company, one of the complainants in the foregoing amended bill of complaint named. I have read the said amended bill and am
471 familiar with the contents thereof, and the matters and things therein set forth so far as they relate to the acts and deeds of said Oregon Short Line Railroad Company are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

WM. D. CORNISH.

Subscribed and sworn to before me this 26th day of April, 1904.

JAMES L. MOCK,
[SEAL.] Notary Public, Kings County, N. Y.

Certificate filed in New York county.

UNITED STATES OF AMERICA,
Southern District of New York, State, County, and City of New York, } ss:

Alvin W. Krech, of full age, being duly sworn, on his oath says: I am president of The Equitable Trust Company of New York, one of the complainants in the foregoing amended bill of complaint named. I have read the said amended bill and am familiar with the contents thereof, and the matters and things therein set forth so far as they relate to the acts and deeds of said trust company are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

ALVIN W. KRECH.

Subscribed and sworn to before me this 26th day of April, 1904.

JAMES L. MOCK,
[SEAL.] Notary Public, Kings County, N. Y.

Certificate filed in New York county.

472 Clerk's Certificate.

UNITED STATES OF AMERICA,
District of New Jersey, } ss:

I, H. D. Oliphant, clerk of the circuit court of the United States, for the district of New Jersey, do hereby certify that the foregoing is a true copy of the original amended bill, in the suit of

Edward H. Harriman *et al.*, against Northern Securities Company *et al.*, as the same remains of record and on file in my office.

In testimony whereof I have hereunto subscribed my [L. S.] name and affixed the seal of said court this eighth day of November, nineteen hundred and four.

H. D. OLIPHANT, Clerk.

473 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original and supplemental transcripts of record filed in the cause wherein The Northern Securities Company is appellant, and Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, are appellees, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eleventh day of January in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

474 And afterwards to wit on the ninth day of November A. D. 1903 this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit on the third day of January, A. D. 1905, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion by Dallas, circuit judge, and Gray, circuit judge dissenting.

475 United States Circuit Court of Appeals for the Third Circuit.

NORTHERN SECURITIES COMPANY
v.
EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, and THE EQUITABLE TRUST COMPANY of NEW YORK.

Before Acheson, Dallas, and Gray, Circuit Judges.

DALLAS, Circuit Judge:

This is an appeal by the Northern Securities Company from a decree of the circuit court for the district of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But
476 now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought, in our judgment, to be determined upon the merits, and without further delay. Western Union Telegraph Co. *v.* Pennsylvania R. Co., 123 Fed. Rep. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is some strong reason for it." Massie *v.* Buck, 128 Fed. Rep. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the circuit court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now

as at any time hereafter. The only substantial question is
477 as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, territory or country.

(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

478 The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

"Authorized Capital Stock, $400,000.000.

No. —. — Shares.

Northern Securities Company.

Incorporated and Registered under the Laws of the State of New Jersey.

This certifies that —— —— is the registered holder of —— shares of the capital stock of the Northern Securities Company of one hundred dollars each, transferable only on the books of the com-
479 pany by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its president and treasurer this — day of ——, A. D. 190–.

—— ——, President.

—— ——, Treasurer.

Countersigned this — day of ——, A. D. 190–.

—— ——,
Transfer Agent.

Countersigned and registered this — day of ——, A. D. 190–.

MANHATTAN TRUST COMPANY,
Registrar of Transfers,

By —— ——, Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the circuit court for the district of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. The object of this bill was to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" and the suit which it originated was so proceeded with that in April,
480 1903, the said circuit court adjudged and decreed—

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company

and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the North-
481 ern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. * * *"

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197), and thereupon, viz., on March 22, 1904, the board of directors of the Securities Company adopted the following preamble and resolutions:

"Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present
482 stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this company, by any shareholder, of the entire number of shares and parts of shares of this company stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof, for fractional shares of the stock of this company.

The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders
483 of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

Resolved, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson and State of New Jersey, at 11 o'clock a. m., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the company was reduced

ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants allege "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they
484 are entitled, will be lost to your orators." The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee;" and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, The Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock * * * at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the
485 fully paid up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to

about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes;" the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway
486 Company, and a majority of the common stock of the Northern Pacific Railway Company "to organize a holding company * * * and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company;" and that "in pursuance of said agreement said Northern Securities Company was organized * * * and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that
487 "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned

has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree
488 that it should not continue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2,500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of The United States *v.* The Northern Securities Company, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued;" but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act." 193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which
489 has been already quoted; and the added clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company, and the Great Northern Railway Company respectively, any and all shares of stock in either of said railway companies

which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the circuit court for the district of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but, in denying it, the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement
490 is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. * * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that, in view of all the circumstances,
491 might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stock-

holders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the Government suit, and the further contention that it was at least authoritively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. "The circuit court has done only what the actual situation demanded. Its
492 decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357. We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the circuit court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed. As was stated by the learned judges who made it—

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and

would restore it to the markets of the world where it would
493 have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which The United States was complainant, the duty of this court to independently consider- it has seemed to us to be both plain and imperative

The conclusion reached upon the questions we have discussed render- it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the circuit court must be reversed, and therefore it is so ordered.

GRAY, J., dissenting:

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the
bill. I say, to make necessary the dismissal of the bill, because
494 it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree as prayed for, in favor of complainants. Nothing but a clear conviction that complainants' bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court
495 should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether
496 the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

Filed January 3, 1905.

497 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

NORTHERN SECURITIES COMPANY, Appellant,
vs.
EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON Short Line Railroad Company, and The Equitable Trust Company of New York. } No. 52.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the district of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause, be, and the same is hereby reversed with costs.

Philadelphia, January 4, 1905.

(Signed) GEO. M. DALLAS,
Cir. Judge.

498 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages (date of argument, majority opinion of the court and dissenting opinion, and decree) to contain a full, true, complete and faithful copy of the proceedings of this court in the case of The Northern Securities Company, appellant, and Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, appellees, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-fourth day of January in the year of our Lord one thousand nine hundred and five and of the Independence of the United States the one hundred and twenty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

499 Supreme Court of the United States, October Term, 1904.

EDWARD H. HARRIMAN ET AL., Petitioners,
vs.
NORTHERN SECURITIES COMPANY. } No. 512.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On consideration of the petition for a writ of certiorari herein to the United States circuit court of appeals for the third circuit, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said petition be, and the same is hereby, granted.

It is further ordered that the transcript of the record filed as an exhibit to the petition stand as a return to said writ and that the cause be, and the same is hereby, assigned for argument on Monday, February 20th, next, after the cases heretofore assigned for that day.

January 30, 1905.

500 [Endorsed:] File No. 19612. Supreme Court of the United States. Term No. 512. October term, 1904. Order on petition for writ of certiorari. Filed Jan. 30, 1905.

501 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Being informed that there is now pending before you a suit in which Northern Securities Company is appellant, and Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you
502 that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

503 [Endorsed:] File No. 19612. Supreme Court of the United States. No. 512, October term, 1904. Edward H. Harriman *et al. vs.* Northern Securities Co. Writ of certiorari.

In the United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

NORTHERN SECURITIES COMPANY

v.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. ACHESON, C. J., concurred with him.

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned Judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought in our judgment be determined upon the merits, and without further delay. Western Union Telegraph Company v. Pennsylvania

Railroad Company, 123 Fed. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is some strong reason for it." Massie v. Buck, 128 Fed. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other

corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

"AUTHORIZED CAPITAL STOCK, $400,000,000.

No. -------- -------- Shares

NORTHERN SECURITIES COMPANY.

Incorporated and Registered Under the Laws of the State of New Jersey.

This Certifies that ---------- is the registered holder of ---------- shares of the Capital stock of the

Northern Securities Company of One hundred dollars each. transferable only on the books of the company by the holder hereof, in person of by duly authorized attorney, upon the surrender of this certificate.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this -------- day of ---------- A. D. 190--

---------- --------
President.

Treasurer.

Countersigned this -------- day of ---------- A. D. 190--

Transfer Agent.

Countersigned and Registered this -------- day of ---------- A. D. 190--

MANHATTAN TRUST COMPANY
Register of Transfers.
By ----------
Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel Lamont. The object of this bill was to restrain the violation of the Act of Congress of July 2, 1890, 26 Stat., c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies"; and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an Act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several

States ; that the Northern Securities Company, its officers, agents, servants and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies ; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein ; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold ; and that the aforesaid railway companies, their officers directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies * * * ."

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S., 197), and thereupon, viz., on March 22, 1904, the Board of Directors of the Securities Company adopted the following preample and resolutions.

" WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company ; and 1,181,242 shares in the capital stock of the Great Northern Railway Company ; and

WHEREAS, in a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company, held by this company ; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its capital stock ; and

WHEREAS, This Company desires and intends to comply with the decree in said suit, fully and unreservedly, and without delay;

Resolved, in consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it.

Resolved, That the Board of Directors of this Company hereby declares it advisable that Article (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH. The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement, ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares, and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stock of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alterations of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson, and

State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the Company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants alleged " that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* amongst its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled will be lost to your orators * * * ". The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them " as custodian, depositary, or trustee " ; and that the " legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and

sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the Board, and the only authority it conferred was "to purchase said stock * * * at an aggregate price of $91,497,500, payable as to $32,491,871 thereof in the fully paid-up and non-assessible shares of the capital stock of this company at par, and as to $8,915,629 in cash". It is obvious that this resolution contemplated a "purchase", and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "Used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common stock of the Northern Pacific Railway Company, "to organize a holding company, * * * and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agree-

ment said Northern Securities Company was organized * * *, and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contracts of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was

made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and, 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree that it should not continue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the United States v. The Northern Securities Company, or if it had been passed upon, though but incidently, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act"—193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are: "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company

and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but, in denying it, the court said: "The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as those acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two Railway Companies, so long as it was in the hands of the Securities Company valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time, It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stock-

holders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said Railway Companies which the Northern Securities Company had acquired in exchange for its own stock and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two Railway Companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and made an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do." The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the goverment suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it ; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree.

"The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain inter-state and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S., 357.

We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that by that decree no property interests had been disturbed. As was said by the learned judges who made it, "When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that Company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested." The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusions reached upon the questions we have dis-

cussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is

So ordered.

GRAY, J., dissenting.

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree, as prayed for, in favor of complainants. Nothing but a clear conviction that complainant's bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo* until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction,

a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrameled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties, or a reviewing court, of the benefit to result from the examination and judgment of a court of first instance. This salutary feature, of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of the questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction, *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

Filed, January 3, 1905.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

ANSWER AND RETURN TO ANSWER, FILED IN UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

(19,512.)

(19,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANSWER AND REPLICATION TO ANSWER, FILED IN UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

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Circuit Court of the United States,

District of New Jersey.

In Equity.

EDWARD H. HARRIMAN, WINSLOW H. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Complainants,
vs.
NORTHERN SECURITIES COMPANY and others, Defendants.

THE SEPARATE ANSWER OF THE DEFENDANT, THE NORTHERN SECURITIES COMPANY, TO THE SECOND AMENDED BILL OF COMPLAINT OF THE PLAINTIFFS.

I.

This defendant admits the statements of paragraph I of the bill of complaint.

II.

This defendant admits the statements of paragraph II of the bill of complaint.

III.

This defendant admits that in November, A. D., 1901, the outstanding capital stock of the Northern Pacific Railway Company was of the aggregate par value of one hundred and fifty-five million dollars ($155,000,000), and consisted of seventy-five million dollars ($75.000,000) preferred stock and eighty million dollars ($80,000,000) common stock. This defendant denies that any part of the said preferred stock was or could have been converted into common stock, but avers that, in the exercise of a right to do so belonging to it, under the laws of the State of Wisconsin, to which it begs leave to refer, and in pursuance of resolutions duly adopted by its Board of Directors at a meeting thereof regularly held on November 13th, A. D. 1901, the Northern Pacific Railway Company duly paid off at par, in cash, and retired, on or as of the 1st day of January, A. D. 1902, all of the said preferred stock, and that since the last named date all the said preferred stock has ceased to exist, and never since has been represented by any form of stock of the Northern Pacific Railway Company.

For the sole purpose of raising the moneys required for so paying off and retiring the said preferred stock, the Northern

Pacific Railway Campany, in pursuance of the said resolutions adopted by its Board of Directors, duly issued and sold, in the month of November, A. D. 1901, at par, for cash, to the holders of the said eighty million dollars ($80,000,000) of its common stock, in proportion to their respective holdings of such stock, its bonds, to the amount of seventy-five million dollars ($75,000,000), par value, convertible into new common stock of like amount, at par.

After the issuance and sale of such convertible bonds, and on and prior to January 1st, A. D. 1902, all the said convertible bonds were actually converted into new common stock of the Northern Pacific Railway Company of like amount; so that since January 1st, A. D. 1902, the outstanding capital stock of the Northern Pacific Railway Company has consisted of shares amounting to one hundred and fifty-five million dollars ($155,000,000), par value, all of like form and rights.

The authorized capital stock of the Great Northern Railway Company consists of shares amounting to one hundred and twenty-five million dollars ($125,000,000), par value, all of like form and rights, of which about one hundred and twenty-three million dollars ($123,000,000) are now outstanding.

IV.

This defendant admits that, during the times mentioned in said bill of complaint, the said Railway Companies owned or otherwise controlled, and operated, systems of railways located in the region mentioned in paragraph IV of said bill of complaint.

V.

This defendant admits that on or about November 13, A. D. 1901, it was incorporated under the laws of the State of New Jersey, with power to buy, own and sell the stocks and other securities of other corporations; and that its authorized capital stock is four hundred million dollars ($400,000,000) divided into shares of one hundred dollars ($100) each; and avers that the objects and purposes of the organization of this defendant are fully and completely set forth in its certificate of incorporation, and denies that the promoters of its incorporation, or its incorporators, or its stockholders, or its Board of Directors or its officers have ever had any design to use this defendant for any purpose not fully stated in the said certificate.

This defendant denies that the persons named in paragraph V of the said bill of complaint, or any of them, or said persons and any other persons associated with them, or with any of them, have at any time owned, or otherwise controlled, a ma-

jority of the capital stock of either of the said Railway Companies; and denies that the said persons, or any of them, or any of said persons and any other persons associated with them, or with any of them, have ever agreed that this defendant should acquire or hold a majority of the stocks of said Railway Companies in perpetuity, or for any period of time whatever, or have ever agreed that this defendant should hold any stock, or any other property, acquired by it, in perpetuity, or for any period of time whatever, or that any existing holder of stock of either of the said Railway Companies should deposit the same with this defendant for any purpose whatever, or upon any condition or terms whatever, or that this defendant should act as custodian, depositary or trustee of any stock of either of said Railway Companies.

This defendant denies that it was incorporated in pursuance of any agreement as stated in said paragraph of the said bill of complaint; and denies that it has ever agreed to acquire or to hold any share of railway stock, or any other property, as custodian, depositary or trustee, or to issue in exchange therefor any certificate of its own stock on that basis.

VI.

This defendant admits that there have been issued and now are outstanding certificates for 3,954,000 shares (each of the par value of $100) of its capital stock, which certificates (besides $45,332,236.50) in cash were issued and paid as follows, viz.:

1,768,229 shares (and $43,625,481.50 in cash) for 1,537,594 shares (each of the par value of $100) of the common stock and 410,850 shares of the preferred stock of the Northern Pacific Railway Company; which preferred stock was delivered and transferred to the Northern Pacific Railway Company in consideration of and exchange for $41,085,000 cash received therefor by this defendant with the knowledge and assent of the said Edward H. Harriman and Winslow S. Pierce;

2,110,576 shares (and $1,707,200 in cash) for 1,181,242 shares (each of the par value of $100) of the capital stock of the Great Northern Railway Company;

75,220 shares to the public for cash used for the purchase of other property, and for corporate purposes. Since its purchase of said railway stocks it has caused all the same to be transferred and registered on the stock transfer books of the said Railway Companies to itself, either in its own name or in the names of other persons for it, and still holds all the said railway stocks so transferred and registered.

This defendant admits that all and singular the persons to

whom the stock of this defendant was issued, whether for shares of either of said railway companies or for cash, on and prior to the 18th day of November, 1901, including the complainants Harriman and Pierce, had full knowledge and information of the purposes for which this defendant was organized, and of the fact that a majority of the capital stock of each of said companies had come, or might come, into the ownership of this defendant for its corporate purposes; but this defendant avers that a very large majority of the stock of this defendant has been sold and issued to, and is held by, persons not concerned in promoting this defendants' organization, and who never have had any knowledge or means of knowledge of the purposes of the said promoters, save as they appear upon the face of said certificate; and this defendant denies that any person ever knew, or ever had any reason for supposing, that any share of the said railway stocks had ever been, or would be, deposited with or held by this defendant as custodian or depositary.

VII.

This defendant admits that on November 18th, A. D. 1901, forty-one million eighty-five thousand dollars ($41,085,000), par value of the preferred stock, and of thirty-seven million twenty-three thousand dollars ($37,023,000), par value, of the common stock of the Northern Pacific Railway Company, were standing upon the stock transfer books of the said Railway Company, registered in the personal names of the plaintiffs, Harriman and Pierce; and that on said day the plaintiffs Harriman and Pierce, duly transferred to this defendant all the said preferred and common stock, they receiving therefor the lump and unapportioned sum and price of ninety-one million four hundred seven thousand five hundred dollars ($91,407,500), of which eight million nine hundred fifteen thousand six hundred twenty-nine dollars ($8,915,629) were cash, and the remainder, eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) were in the stock of this defendant, at par.

The said transfer was fully completed on said day, through the delivery by the said Harriman and Pierce, to this defendant, of the proper certificates of the Northern Pacific Railway Company for all said preferred and common stock of that company, together with properly executed instruments for the transfer thereof to this defendant upon the books of the Northern Pacific Railway Company, and through payment by this defendant, to said Harriman and Pierce, of the sum of eight million nine hundred fifteen thousand six hundred twenty-

nine dollars ($8,915,629), in cash, and the delivery to them, by this defendant, of its proper certificates for eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) of its capital stock.

The said acquisition by this defendant of the said preferred and common stocks of the Northern Pacific Railway Company was absolute and unconditioned, and was intended so to be both by the said Harriman and Pierce and this defendant.

This defendant admits that, since its acquisition from said Harriman and Pierce, of said Northern Pacific stock, it has been informed, and it believes, that the stock of this defendant, issued to them, as aforesaid, in part payment therefor, is in fact the property of the plaintiff, the Oregon Short Line Railroad Company, for which said plaintiffs hold the same in their personal names, as trustees.

There has never been any understanding or agreement, express or implied, between this defendant and the Oregon Short Line Railroad Company, or between this defendant and the said Harriman and Pierce, as to how long the said preferred or common stock should be held or retained by this defendant, or as to how it should be managed or voted while this defendant should continue to hold it.

VIII.

This defendant admits that all the said eighty-two million four hundred ninety-one thousand dollars ($82,491,000), par value, of capital stock of this defendant, sold and issued to the plaintiffs, Harriman and Pierce, have been, by the said plaintiffs, mortgaged and pledged to the plaintiff, the Equitable Trust Company, to secure an issue of bonds of the said Oregon Short Line Railroad Company to an equal amount; all of which bonds are now outstanding, and are held and owned by sundry persons and corporations; but this defendant denies that any part of the said mortgaged or pledged shares of this defendant's stock is available for tender, return or restoration to this defendant under the conditions offered by the bill of complaint.

IX.

This defendant denies that it has ever agreed or undertaken with any of the plaintiffs, or with any other person or corporation, that the said preferred stock of the Northern Pacific Railway Company acquired by this defendant from the said Harriman and Pierce, should be converted into common stock of the said Railway Company, or as to whether this defendant should retain said stock or dispose of it, or as to what disposition this defendant should make of the same.

This defendant denies that any part of the said preferred stock ever has been converted, or has ever been capable of conversion, into common stock of the said Railway Company, or into anything else except cash, at par. This defendant admits and avers that the said Railway Company has issued to this defendant shares of its new common stock to the amount of thirty-four million seven hundred nine thousand and sixty-two dollars ($34,709,062), par value, which shares stand on the books of the said Railway Company in the name of this defendant as owner thereof; but this defendant denies that any part of the said new common stock has ever been substituted by this defendant, or by the said Railway Company, for any part of the said preferred stock purchased from the plaintiffs.

And this defendant avers that all the said thirty-four million seven hundred nine thousand and sixty-two dollars ($34,709,062) new common stock of the said Railway Company was issued to this defendant in exchange for a like amount of bonds of the said Railway Company, convertible into its stock, which this defendant had previously purchased from the said Railway Company, for cash, at par, and which at the time of such exchange were exclusively the property of this defendant.

X.

This defendant admits that on or about March 10th, A. D. 1902, the United States began a suit in the Circuit Court of the United States, for the District of Minnesota, against this defendant and others, in which suit pleadings were filed by the several parties, and other proceedings were had, substantially as set forth in paragraphs X, XI and XII of the bill of complaint herein; but this defendant denies that either or any of the plaintiffs in this suit was represented in the said litigation with the Government of the United States by any of the defendants therein, save in regard to such rights and interests as were, or might have been, held by the said plaintiffs as stockholders of this defendant, in common with all other stockholders of this defendant, and in proportion to their respective holdings of this defendant's stock, but not in regard to anything which might be the subject of a claim by the plaintiffs herein, or by any of them, adversely to this defendant, or to its other stockholders.

XI.

This defendant denies that the effect of the decree in said suit rendered by the Circuit Court, and affirmed by the Supreme Court of the United States, was to determine or establish that this defendant has acquired, and now holds, the stocks of the

said Railway Companies as a mere custodian or trustee, and not as absolute owner; and denies that ownership of said railway stocks by this defendant was, or is, in any way called in question by said decree.

XII.

This defendant admits and avers that after affirmance by the said Supreme Court of the said decree of the said Circuit Court, and on March 22nd, A. D. 1904, the Board of Directors of this defendant, at a meeting thereof duly held, duly and lawfully determined that in its opinion the certificate of incorporation of this defendant should be amended so as to reduce this defendant's capital stock to the sum of three million nine hundred fifty-four thousand dollars ($3,954,000), and that the stocks of the said Railway Companies owned by this defendant which, upon such reduction would become surplus assets of this defendant, should be distributed ratably among all defendant's stockholders, and that the proposition for such reduction of capital stock, and consequent distribution of surplus assets, should be submitted to defendant's stockholders, at a meeting thereof to be called for the special purpose; and to that end the said Board at said meeting duly adopted the preambles and resolutions set forth in paragraph XIV of the bill of complaint herein.

Afterward, and on April 21st, A. D. 1904, upon due notice of the time and place of meeting, given as required by the laws of the State of New Jersey, the said meeting of stockholders duly convened, and by the affirmative votes of the holders of more than two-thirds, and of nearly three-fourths, of all this defendant's outstanding capital stock, resolutions were duly adopted in favor of the proposed reduction of stock and distribution of assets.

All the said proceedings of this defendant's Board of Directors and stockholders were regular and legal, and in accordance with the laws of the State of New Jersey, in every particular, and none of the said proceedings has in any way violated any right of any of the plaintiffs.

XIII.

As to whether shares of stock of the Northern Pacific Railway Company, to the amount claimed by the plaintiffs in their bill of complaint, could be purchased in the market, or from individuals, this defendant has no knowledge or information sufficient to form a belief; but suggests that in event of distribution of all defendant's holdings of said stock ratably among all its stockholders, the ownership of the entire capital stock of the Northern Pacific Railway Company, aggregating one hundred

fifty-five million dollars ($155,000,000), will be scattered among nearly three thousand (3,000) separate holders, all of them presumably subject to the ordinary motives that actuate the owners of property ; but defendant denies that the said proposed distribution of said railway stock will inflict any injury whatever upon the plaintiffs or upon any of them.

XIV.

These defendants admit that the ratable proportions of said railway stocks which will accrue to the plaintiffs on the distribution proposed by this defendant will be thirty-two million seventy thousand six hundred twelve dollars ($32,070,612), par value, of Northern Pacific stock, and twenty-four million six hundred thirty-eight thousand nine hundred nineteen dollars ($24,638,919), par value, of Great Northern stock ; the current rate of dividend on each of said railway stocks now being seven per cent. per year ; and that consequently the aggregate income from said distributive proportions would not now equal seven per cent. per year on the sum of seventy-eight million one hundred and eight thousand dollars ($78,108,000) ; but this defendant avers that the annual income, at seven per cent. per annum, on the said distributive proportions exceeds, by a very large sum of money, the dividends at the current annual rate, viz : four and one-half per cent. per annum, upon the eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871), par value, of the stock of this defendant taken by said Harriman and Pierce in part payment for the said seventy-eight million one hundred and eight thousand dollars ($78,108,000), par value, of preferred and common stock of the Northern Pacific Railway Company, so that the effect of acceptance by plaintiffs of their ratable proportion of the two railway stocks will be to largely increase their income from their investment in the stock of this defendant.

XV.

This defendant denies that plaintiffs are able to return or to restore to this defendant the whole or any part of the certificates for this defendant's stock, delivered as aforesaid, in part payment for said railway stock purchased by it, otherwise than upon, and in consideration of the acceptance by the plaintiffs of the ratable proportion of the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company which will accrue to the plaintiffs under the plan of distribution proposed and adopted by this defendant ; all of which will more fully appear by examination of the said deed of trust, to which reference is hereby made.

XVI.

This defendant admits that since it began to do business it has kept books of account, and registers of the transfers and ownership of its stock; and avers that the methods used by it for the keeping of all its accounts and stock records have been the most modern, and the most approved by those having the best experience in that class of business; and that such accounts and records have always been accurately kept by competent and skillful men in this defendant's employment, and contain accurate statements of all the transactions therein recorded.

This defendant admits and avers that the said accounts and records accurately show the consideration for each and every original issue of stock by this defendant, and also what stock certificates of this defendant have been surrendered to it for cancellation, upon transfer, on this defendant's books, of the stock covered by such certificates.

This defendant avers that all the stock certificates which have been issued by it since commencement of its business have been of the same form and tenor, save as to the number of shares covered thereby; that none of said certificates has in any way indicated the consideration for which the stock covered thereby was originally issued, or whether such consideration was cash, or the sale to this defendant of the stocks of one or both the said Railway Companies; that in a number of instances a single person or copartnership has sold to this defendant large amounts of the stock of both said Railway Companies as a single and lump transaction, and has received payment therefor from this defendant in shares of its own stock; that in every such instance this defendant has issued to the seller or sellers certificates for its own stock in payment, which, in respect to the number of shares covered, had no reference or application to any specific amount or kind of railway stocks received; that since this defendant began to do business, in November, A. D. 1901, its stock has been freely traded in upon the public markets of the United States and foreign countries, and privately between individuals, and among bankers and brokers; and many thousand sales of such shares have been made; that since this defendant began to do business it has issued altogether about eighty-five thousand (85,000) separate stock certificates; that about sixteen thousand (16,000) separate transfers of its stock have been registered upon its books; but it has reason to believe, and does believe, and therefore avers, that the unrecorded transfers of such stock, effected by mere delivery of the stock certificates, accompanied by blank powers of attorney for transfer, but without registration on this de-

fendant's books, have far exceeded in number and amount those made upon its books; that large amounts of this defendant's stock, issued originally for purchases of both kinds of railway stocks, in one transaction, as aforesaid, have been sold and transferred by their original owners, and been dispersed among a large number of other holders; that in a large number of instances, probably the majority, transfers of this defendant's stock upon its books have been accomplished by the surrender to it of two or more of its stock certificates, covering different numbers of shares, of different and undisclosed origins, and the issuance by this defendant of two or more new certificates, covering numbers of shares not corresponding to the numbers covered by the surrendered certificates, but aggregating the same total; that by reason of the facts aforesaid, it is not now possible to determine the original considerations received by this defendant for shares of its stock covered by a very large proportion of its present outstanding stock certificates.

XVII.

By way of further defense this defendant avers that each and every one of the owners of this defendant's stock now outstanding, has acquired the same, for a valuable consideration, in the belief, and with the right to believe, that such stock represents a ratable proportion of all this defendant's assets, and not a mere chose in action to recover from this defendant specific property or money; that ever since the 14th day of November, A. D. 1901, the plaintiff, E. H. Harriman, has been a director of this defendant, and in that capacity has usually attended the numerous meetings of this defendant's Board of Directors, and has participated in all the business transactions at such meetings; that the plaintiffs, E. H. Harriman and Winslow S. Pierce, and the Oregon Short Line Railroad Company, at all times since this defendant began business, and the plaintiff, the Equitable Trust Company of New York, ever since its acceptance of the trusts under the said pledge or mortgage to it of the said eighty-two million four hundred ninety-one thousand eight hundred seventy-one dollars ($82,491,871) of this defendant's stock, have each and all fully known all the facts aforesaid concerning the issuance and sale by this defendant of its stock, including the sale of seven million five hundred twenty-two thousand dollars ($7,522,000) thereof for cash in the public market, and concerning the sales and transfers of said stock, after issuance, by and between persons, partnerships and corporations, and that neither of the said plaintiffs has at any time ever objected to any of said transactions; but on the contrary each and all of them have always fully acquiesced therein.

And this defendant avers that in consequence of such acquiescence the plaintiffs cannot, nor can any of them, now equitably claim that the said transactions shall not be accorded the legal effect which, on their face, they appeared to have, and which all the participants therein supposed them to have, of vesting in the purchasers and holders of this defendant's stock, a ratable proportion of all this defendant's assets, including the said railway stocks.

And this defendant avers that the plaintiffs, by their course of conduct since this defendant began to do business, have conclusively agreed and undertaken, with each and every other holder and owner of this defendant's stock, that any distribution by this defendant, among its stockholders, of the said railway stocks, shall be ratable to each stockholder, in proportion to his holdings of this defendant's stock.

XVIII.

And by way of further defense, this defendant avers that the plaintiffs, Harriman and Pierce, since this defendant began to do business, and the plaintiff, the Oregon Short Line Railroad Company, since its acceptance of the said mortgage or pledge of the said stock of this company, have at all times been fully acquainted with and informed about all the plans, purposes and business transactions of this defendant, including the purposes with which this defendant has made all of its purchases of stocks of the said Railway Companies; and each and all of said plaintiffs have fully approved and concurred in all of this defendant's said plans and purposes, and in all of its said purchases of railway stocks made in pursuance thereof.

And this defendant denies all and all manner of unlawful combination or conspiracy, wherewith, by the said bill of complaint it is charged, without this, that any other matter, cause, or thing in the said bill of complaint contained, necessary or material for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

NORTHERN SECURITIES COMPANY,
(L. S.) By JAS. J. HILL, *President.*
JOHN W. GRIGGS,
Solicitor and of Counsel for Defendant,
Northern Securities Company,
JOHN G. JOHNSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON,
Of Counsel for Defendant, Northern Securities Company.
(*Filed Sept. 3, 1904.*)

Circuit Court of the United States,

District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and EQUITABLE TRUST COMPANY of New York, Complainants,
vs.
NORTHERN SECURITIES COMPANY *et al.*, Defendants.
} On Bill, &c. Replication to Answer.

These replicants, Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and the Equitable Trust Company of New York, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Northern Securities Company for replication thereunto, say that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law, to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants.

(*Filed Sept. 24, 1904.*)

UNITED STATES OF AMERICA, *District of New Jersey,* } *ss.:*

I, Henry D. Oliphant, Clerk of the Circuit Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original answer and replication to answer, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court at Trenton, in said District, this Fourteenth day of February, nineteen hundred and five.

[SEAL.]

H. D. OLIPHANT,
Clerk Circuit Court, U. S.

FILE COPY.

Office Supreme Court, U. S.
FILED
FEB 28 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PROCEEDINGS IN CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, IN THE MATTER OF THE PETITION OF EDWARD H. HARRIMAN AND OTHERS TO INTERVENE IN *The United States of America* vs. *The Northern Securities Company* et al.

(19,512.)

(19,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PROCEEDINGS IN CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA IN THE MATTER OF THE PETITION OF EDWARD H. HARRIMAN AND OTHERS TO INTERVENE IN *The United States of America* vs. *The Northern Securities Company et al.*

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Notice of Presentation.

(Filed April 19, 1904.)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA—THIRD DIVISION.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER, and DANIEL S. LAMONT,
Defendants.

You will please take notice, that on Tuesday, the twelfth day of April, 1904, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, application will be made in the above entitled suit to the judges of this court, at the United States Circuit Court room in the Post Office Building, in the City of St. Paul, Minnesota, by the undersigned, for leave to file the petition of intervention of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railway Company, verified March 31, 1904, of which a copy is herewith served upon you, and for leave to intervene therein and become parties thereto, and to proceed and be heard upon the subject matter of their petition in respect of the execution of the final decree of this court, entered in this cause on the 9th day of April, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as may be just, equitable and proper, and to the Court may seem meet.

Dated April 2, 1904.

JOHN N. BALDWIN,
Omaha, Nebraska,
Solicitor for said Edward H. Harriman, Winslow S. Pierce and Oregon Short Line Railway Company;

JOHN F. DILLON,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
Of Counsel.

To The Honorable Philander C. Knox,
Attorney-General of the United States.
Honorable C. C. Houpt,
Attorney for the United States for the District of Minnesota;
Honorable John W. Griggs and George B. Young,
Solicitors for defendants Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy and George F. Baker;
M. D. Grover, Esq.,
Solicitor for defendant Great Northern Railway Company;
C. W. Bunn, Esq.,
Solicitor for defendant Northern Pacific Railway Company;
Francis Lynde Stetson, Esq.,
Solicitor for defendants J. Pierpont Morgan and Robert Bacon;
David Wilcox, Esq.,
Solicitor for defendant Daniel S. Lamont.

Petition for leave to intervene.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

For the District of Minnesota,

Third Division.

The United States of America,
Complainant,

v.

The Northern Securities Company, The Great Northern Railway Company, The Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont,
Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota, Third Division:

The petition of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company, respectfully shows to this Honorable Court as follows:

I. Your petitioners Harriman and Pierce are now, and ever since November 18, 1901, have been the registered owners and

holders of $82,491,871 par value of the capital stock of the defendant Northern Securities Company, and such holding of stock by them is and was as trustees for the use and benefit of your petitioner, the Oregon Short Line Railroad Company, which company was and still is the beneficial owner thereof.

II. Your petitioner, Oregon Short Line Railroad Company, is a railroad corporation duly organized and existing under the laws of the State of Utah, and heretofore and by indenture dated July 17, 1902, pledged $82,491,000 par value of said stock with The Equitable Trust Company of New York, a corporation organized under the laws of the State of New York, as trustee for an issue of bonds of your said petitioner, of which $82,491,000 face value have been certified and issued; but under the terms of said trust indenture the stock so pledged and standing in the name of your petitioners Harriman and Pierce is available to your petitioners for the purpose of tender, return and restoration of the *status quo* as hereinafter alleged and prayed, which will fully appear by reference to said trust indenture to be produced on the hearing.

III. As your petitioners are advised and verily believe, over ninety-eight and one-half per cent. of the outstanding capital stock of said Northern Securities Company was issued in exchange for shares of the capital stock of the Northern Pacific and Great Northern Railway Companies, respectively, and less than one and one-half per cent. of such stock was issued for other property. They are further informed and verily believe that about $178,284,000 par value of the stock of said Northern Securities Company was issued in exchange for $153,759,425 par value of the stock of the Northern Pacific Railway Company and about $212,600,000 par value of said Securities Company stock was issued in exchange for $118,124,250 par value of the stock of the Great Northern Railway Company.

IV. The said $82,491,871 par value of stock of the Northern Securities Company, now standing in the names of said Harriman and Pierce, trustees as aforesaid, was part of the original issue of the stock of said Northern Securities Company, and was issued directly to them by said Northern Securities Company on or about November 18, 1901, in exchange for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company; and at the time of such exchange, there was also paid to them by or on behalf of said Securities Company the sum of $8,915,629 in cash. The original certificates so issued to them in November, 1901, are still registered in their names and are now actually in the custody of the said Trust Company as pledgee as aforesaid and available for tender, return and restoration as aforesaid.

V. At the time of such exchange, it was understood and agreed that the said $41,085,000 par value of the said preferred stock should be converted into common stock of said Northern

Pacific Railway Company; and thereupon, after the exchange as aforesaid of said preferred stock for stock of the Northern Securities Company, said preferred stock was converted by said Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value, and certificates for such new common stock substituted in lieu and place of the certificates for said preferred stock, and the Northern Securities Company now holds all and singular the common stock so originally received from your petitioners and the common stock into which said preferred stock was so converted.

VI. The final decree in the above entitled cause entered in this court on the 9th day of April, 1903, was on Monday, the 14th day of March, 1904, duly affirmed by the Supreme Court of the United States, and in the decision then announced, affirming such decree, it was directed that the judgment of the Supreme Court of the United States should be "that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require."

The mandate upon such decision of the Supreme Court of the United States has not yet issued, and under the rules will not issue until the expiration of thirty days from the date of said decision, unless by special order.

VII. Immediately upon the rendition of such decision by the Supreme Court of the United States so affirming the decree of this court in this cause entered on the 9th of April, 1903, the individual defendants above named and said Northern Securities Company determined, without waiting for the issue of the mandate of the Supreme Court and without any order of this court in execution of its decree, to distribute and divide the stock of the Great Northern and the Northern Pacific Railway Companies held by the Northern Securities Company *pro rata* among the stockholders of said Northern Securities Company according to their holdings of its stock and not to return and retransfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said Northern Securities Company originally received from such stockholders in exchange for its own stock, nor to transfer and assign the stock in either of said railway companies to any such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for such stock of said railway companies respectively.

VIII. Upon being informed of such purpose and intention to distribute the stock of the Northern Pacific and Great Northern Railway Companies *pro rata* among the stockholders of the Northern Securities Company, your petitioners submitted the matter to counsel and were advised that there were serious doubts as to the legality of the proposed plan. The fact that they had been so advised was promptly communicated by your

petitioners to the Northern Securities Company, with the request that the meeting of the board of directors of said company, which had been called for March 22, 1904, be adjourned for a few days so as to afford an opportunity for further consideration by your petitioners and their counsel, but such request for adjournment was not granted; and at such meeting, held in the City of New York on said date, notwithstanding said request for an adjournment was submitted, the following preambles and resolutions were adopted, your petitioner Harriman being present as a director of said Northern Securities Company, but declining to vote, viz.:

"WHEREAS, in the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, in a suit brought by the United States against this Company, the said railway companies, and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company, held by this Company; and

WHEREAS, this Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, this Company desires and intends to comply with the decree in the said suit, fully, and unreservedly, and without delay;

Resolved, in consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, that the Board of Directors of this Company hereby declares it advisable that Article Fourth (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH: The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares, and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the number of shares held by them, respectively shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, that a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held, at the general offices of this Company in the City of Hoboken, County of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21st, A. D. 1904."

The directors of said Northern Securities Company at said meeting further resolved that a circular or notice should be forthwith sent to the stockholders of the Northern Securities Company explaining in detail the proposed plan of distribution, and thereupon such circular or notice was immediately sent to the stockholders and a copy thereof is hereto annexed as Exhibit "A."

IX. Your petitioners are prepared, able and willing and hereby offer to restore to the said Northern Securities Company all and singular the original certificates for stock of the Securities Company so received by said Harriman and Pierce, and to repay the money paid them by or on behalf of the said Northern Securities Company in such sum as the court shall fix in restoration of the *status quo*, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company so exchanged and the common stock of said railway company representing the preferred stock converted as aforesaid.

X. As your petitioners are informed and verily believe, and, therefore, aver, such plan of distribution so adopted by said

board of directors of the Northern Securities Company, if consummated, would vest a majority of the stock of both the Great Northern and the Northern Pacific Railway Companies in the same individual stockholders of the Great Northern Company who originally co-operated in the promotion and organization of the Northern Securities Company, and who are still cooperating and acting in concert and combination and would continue the common management and direction of said two competing railway companies, and render the decree of this court ineffectual and defeat or evade its true intent and purpose.

Wherefore and forasmuch as your petitioners are without other relief in the premises, your petitioners pray that they be granted leave to file this petition in said suit above entitled and to intervene therein *pro interesse suo* for the protec tion of their rights; that the individual defendants and said Northern Securities Company and each of them be required to make full and true answer in the premises, but not under oath which is hereby expressly waived, and thereupon that your petitioners be permitted in proper time to proceed to a hearing in due form upon proof and upon such notice as may be directed by the court as to all and singular the matters alleged in the above petition.

Your petitioners further pray that it may be ordered and adjudged, in execution of the said final decree of this court so affirmed by the Supreme Court of the United States, that the said Northern Securities Company return and transfer to your petitioners the common stock of the Northern Pacific Railway Company received from them and the common stock of said railway company into which the preferred stock of said company has been converted as aforesaid, in exchange for its own stock, and upon the payment of such sum as the court shall fix in the restoration of the *status quo*.

Your petitioners further pray that, pending the hearing and determination of the manner in which said decree of this court shall be executed, the defendant Northern Securities Company be enjoined and restrained from distributing its present holdings of stock of said Northern Pacific Railway Company under the plan of distribution proposed by it as aforesaid, or otherwise than by return as authorized by said decree, and that your petitioners may have all such other or further or different relief as may be just, equitable and proper.

And as in duty bound, your petitioners will ever pray, etc.

EDWARD H. HARRIMAN.
WINSLOW S. PIERCE.
OREGON SHORT LINE RAILROAD COMPANY,
By EDWARD H. HARRIMAN,
President.

JOHN N. BALDWIN,
Solicitor for Petitioners,
Omaha, Nebraska.

JNO. F. DILLON,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
Of counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, } ss.:

EDWARD H. HARRIMAN and WINSLOW S. PIERCE, being duly sworn, doth, each for himself, depose and say, that he is one of the petitioners named in the foregoing petition, and as such has subscribed the same; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD H. HARRIMAN.
WINSLOW S. PIERCE.

Subscribed and sworn to before me this 31st day of March, 1904.

CHARLES J. HOEHNLE,
[SEAL.] Notary Public,
Kings County.
Certificate filed in N. Y. Co.

(*Exhibit "A" to Intervening Petition.*)

NORTHERN SECURITIES COMPANY.

DIRECTORS.

Robert Bacon,	Daniel S. Lamont,
George F. Baker,	John S. Kennedy,
George C. Clark,	Edward T. Nichols,
William P. Clough,	George W. Perkins,
Edward H. Harriman,	Jacob H. Schiff,
James J. Hill,	James Stillman,
D. Willis James,	Nicholas Terhune,

Samuel Thorne.

26 LIBERTY STREET,
NEW YORK, March 22, 1904.

TO THE STOCKHOLDERS OF THE NORTHERN SECURITIES COMPANY:

Since the formation of your Company with a view of promoting, developing and enlarging the commerce and traffic of the country served by the Great Northern and Northern Pacific Railway Companies, and by the Chicago, Burlington and Quincy Railroad Company, the traffic and earnings of the three railways have largely increased. Rates paid by the public have been materially reduced. The respective railways have been extended and their condition and facilities improved and increased.

The stock of the Northern Securities Company was issued solely for the shares of the Northern Pacific and Great Northern Railway Companies, and other properties purchased by it.

In forming the Company and disposing of its shares, no commissions were paid, nor has the Company incurred any expenses save those necessary for obtaining its charter, and for the economical conduct of its affairs.

The Company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice FULLER, and Associate Justices EDWARD D. WHITE, RUFUS W. PECKHAM and OLIVER WENDELL HOLMES, in the suit brought by the United States against the right of the Company to hold and vote the shares. However, the majority of the Court, disregarding as irrelevant any beneficial increase of commerce, was of the opinion, that as a matter of law your Company's holding of the stocks of the two Railway Companies in itself constituted a restraint of interstate commerce prohibited by the so-called Sherman Act of 1890. Accordingly the Railway Companies have been forbidden to permit your Company to vote or to collect dividends on the shares held by it.

Therefore, your Directors, at a meeting held this day, have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the Company, and to distribute to its shareholders the shares of stock of said Railway Companies now held by it.

To this end they have adopted resolutions recommending to the stockholders:

First. That the capital stock of this Company be reduced from 3,954,000 shares, now outstanding, to 39,540 shares, being a reduction of 99 per centum.

Second. That said 99 per cent. of the present outstanding shares be called in for surrender and cancellation.

Third. That against each share of the stock of this Company so to be surrendered, there will be delivered

$39.27 stock of the Northern Pacific Railway Company,

$30.17 stock of the Great Northern Railway Company,

and proportionate amounts thereof for each fraction of a share of stock of this Company so to be surrendered.

As required by the laws of the State of New Jersey, under which the Company was created, a special meeting of the shareholders of this Company has been called by the Board of Directors, for Thursday, April 21, 1904, at eleven o'clock in the forenoon, at the office of the Company, 51 Newark Street, Hoboken, N. J., to vote upon said resolutions and upon such other business as may be brought before said meeting.

For the purpose of this meeting, the stock transfer books will be closed April 18, 1904, at three o'clock P. M.

Holders of this Company's stock to a large extent have already expressed their approval of the recommendations of the Board, but the laws of New Jersey require a two-thirds vote of the shareholders to permit the Company to reduce its capital stock. Such vote is the first step necessary for the proposed distribution of the Railway Companies' shares. The collection of the May

and subsequent dividends on such shares being forbidden by the decree until such distribution has been made, the importance of promptly executing and forwarding proxies is obvious.

The assets of the Company remaining in its treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit, producing income, and conservatively valued at an amount in excess of the $3,954,000, to which it is proposed to reduce the stock of your Company.

Notice of the due approval by the special meeting of the recommendations of the Board of Directors will be immediately published, whereupon, stockholders should deliver their *entire* holdings of stock at this office promptly on and after April 23, 1904. Against such delivery, certificates for the one per centum thereof to be retained by stockholders, will be returned to them, together with amount of stock of each of said railway companies, to which they may become entitled as above, on account of the ninety-nine per centum of their holdings of Northern Securities stock surrendered for cancellation. Fractional parts of shares will be adjusted by the delivery of scrip certificates.

All stock surrendered must be fully executed for transfer, either upon the certificates or upon an attached power of transfer.

By order of the Board of Directors.

Admission of Service of Notice and Petition.

Service of a copy of the within notice and petition is hereby admitted.

ST. PAUL, Minn., April 2, 1904.

CHAS. C. HOUPT,
U. S. Dist. Atty.
M. D. GROVER,
Atty. for G. N. Railway Co.
C. W. BUNN,
Atty. for Northern Pacific Ry. Co.
FRANCIS LYNDE STETSON,
Solicitor for Defts. Morgan and Bacon.
DAVID WILLCOX,
Solicitor for Daniel S. Lamont.

Proofs of Service of Notice and Petition.

STATE OF NEW YORK, }
County of New York, } ss.:

GEORGE E. DOWNS, being by me duly sworn, deposes and says: That he delivered to John W. Griggs, Esq., attorney of record for defendants The Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy and George F. Baker, at his office in the City of New York, at about four o'clock P. M. on Monday, April 4, 1904, a true copy of the

above and foregoing notice, and of the petition of intervention of Edward H. Harriman and Winslow S. Pierce, and the Oregon Short Line Railroad Company.

GEO. E. DOWNS.

Subscribed and sworn to before me this 7th day of April, 1904.

CHARLES FRANKLIN,
Notary Public,
New York County.

[NOTARIAL SEAL.]

BEFORE ME, the undersigned authority, personally appeared David A. Chambers, who after being by me duly sworn on oath deposed that he delivered to the Honorable Henry M. Hoyt, Solicitor-General of the United States, in Washington, D. C., at 3.15 o'clock P.M., April 5, 1904, a true copy of the above and foregoing Notice, and of the Petition of Intervention of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company, verified March 31, 1904, in the above entitled suit; and that the Honorable Philander C. Knox, Attorney-General of the United States, was absent from Washington, D. C., this Fifth day of April, 1904.

DAVID A. CHAMBERS.

Subscribed and sworn to before me this 5th day of April, 1904.

EDWIN S. CLARKSON,
Notary Public,
District of Columbia.

[NOTARIAL SEAL.]

Affidavit of Edward T. Nichols.

(*Filed April 19, 1904.*)

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA, Plaintiff, AGAINST NORTHERN SECURITIES COMPANY and others, Defendants.	Affidavit of Edward T. Nichols. 9 April, 1904.

IN RE APPLICATION OF EDWARD H. HARRIMAN AND WINSLOW S. PIERCE FOR LEAVE TO INTERVENE.

STATE OF NEW YORK,
City and County of New York, } ss.:

I, WILLIAM H. BRUDER, a Notary Public in and for the State and County aforesaid, do hereby certify that on the ninth day of April, A. D. 1904, at said State and County, Edward T. Nichols came before me in person, and having been by me first duly sworn, did depose and say:

I am 51 years of age, and reside at Morristown in the State of New Jersey. Continuously since November 14, 1901, I have been and now am Secretary and Treasurer of the Northern Securities Company, and in those capacities I have continuously had charge and supervision of its records and accounts.

I am well acquainted with the evidence taken in the said suit, and I know all the individual defendants in said suit and all the persons referred to in said evidence as those consulted about the formation of the Northern Securities Company; they do not exceed ten or twelve persons altogether.

The individual defendants in said suit and all the other holders of stock of the Great Northern Railway Company, or of the Northern Pacific Railway Company, referred to in said evidence as having been consulted about the formation of the Northern Securities Company, now hold altogether nine hundred ninety-six thousand and sixteen (996,016) shares in the stock of the Northern Securities Company. The aggregate of their holdings upon the ratable distribution proposed by the Board of Directors of the Northern Securities Company would be: of the stock of the Northern Pacific Railway Company, three hundred eighty seven thousand two hundred and twenty-four (387,224) shares, being twenty-four and nine-tenths (24.9) per cent of the whole stock of that company: and of the stock of the Great Northern Railway Company, two hundred and ninety-seven thousand four hundred and ninety-three (297,493) shares, being twenty-three and eight-tenths (23.8) per cent of the whole stock of that company.

Excluding the eight hundred twenty-four thousand nine hundred eighteen and 71/100ths (824,918.71) shares of the Northern Securities Company standing on the books of that company in the names of Edward H. Harriman and Winslow S. Pierce, the holdings of the fifty-eight (58) next largest stockholders of that company would have to be aggregated to form a majority of the stock of that company. The total aggregate holdings of the said fifty-eight (58) next largest holders of that stock are two million, one thousand, five hundred and eighty-one (2,001,581) shares. The aggregate of their holdings of the stock of the Northern Pacific Railway Company under the plan of ratable distribution proposed by said Board of Directors would be seven hundred seventy-eight thousand one hundred and sixty one (778,161) shares.

Excluding the ratable proportion of the stock of the Great Northern Railway Company that Messrs. Harriman and Pierce would receive under the plan of distribution proposed by said Board, the ratable portion of this last mentioned stock that would be received by the seventy-two (72) next largest holders of stock of the Northern Securities Company would have to be aggregated to make a majority of the stock of the Great Northern Railway Company. The ratable portion of the stock of the Northern Pacific Railway Company that would be

received by Messrs. Harriman and Pierce under the said proposed plan of distribution, added to the aggregate of the ratable portion of said stock that would be received by the individual defendants, and all others who were consulted as to the formation of the Northern Securities Company, would amount to forty-five and sixty-seven one-hundredths (45.67) per cent of all the stock of the Northern Pacific Railway Company.

The portion of the stock of the Great Northern Railway Company that would be received by Messrs. Harriman and Pierce under the said proposed plan of ratable distribution, added to the aggregate of the ratable portion of said stock that would be received by the individual defendants, and all others who were consulted as to the formation of the Northern Securities Company, would amount to forty-three and one-half (43½) per cent of all the stock of the Great Northern Railway Company.

SECOND.

Referring, specifically to the petition filed herein, March 31, 1904, though involving some repetition, I further depose and say as follows:

It is not true, as alleged in Article X. of the petition, that the plan of distribution adopted by the Board of Directors of the Northern Securities Company, if consummated, would vest a majority of the stock of both the Great Northern and the Northern Pacific Railway Companies in the same individual stockholders of the Great Northern Company who originally co-operated in the promotion and organization of the Northern Securities Company; it is not true that such parties are still co-operating or acting in concert, excepting that they are all supporting the plan of ratable distribution adopted by the Board of Directors of the Northern Securities Company; and it is not true that the plan of distribution adopted by the Board of Directors would continue the common management and direction of said two competing railway companies and render the decree of the Court ineffectual, and defeat or evade its true intent or purpose. But, on the contrary thereof, it is true that the necessary effect and result of granting the said petition of Harriman and Pierce would be to vest in the Union Pacific Railway Company, owner of substantially all the stock of the Oregon Short Line Railroad Company, of both of which companies the said Harriman is President, the control of the Northern Pacific Railway Company and of the Chicago, Burlington and Quincy Railroad Company, which two railroads are keenly competitive with the railroad of either the Union Pacific Railway Company or the Oregon Short Line Railroad Company, as is stated in the petition of the United States filed herein March 10, 1902, and as is shown by the testimony herein; and such common control would be contrary to and forbidden by the constitutions and laws of other States in which such railroads or some part thereof are situated and are operated.

The facts and the results of such common ownership are as follows:

Every person (other than the persons interested in the Union Pacific Railway Company) named or referred to in the said petition of the United States filed herein March 2, 1902, or in the opinion or decree of the Circuit Court or of the Supreme Court herein, as an original or co-operating stockholder of either the Great Northern Railway Company (including the holders of the 300,000 shares of the capital stock of the Great Northern Railway Company, specifically referred to in the opinion of Judge Thayer as having been originally acquired by the Northern Securities Company) or of the Northern Pacific Railway Company, is included in the following list: Robert Bacon, George F. Baker, James J. Hill, D. Willis James, John S. Kennedy, Daniel S. Lamont, Lord Mount Stephen, Lord Strathcona, Samuel Thorne, J. P. Morgan, J. P. Morgan & Co., William P. Clough, who now own in the aggregate 996,016 shares of the stock of the Northern Securities Company.

The result of the ratable distribution proposed would be to vest in the individuals above named 387,224 shares or $24\frac{9}{10}$ per cent of the capital stock of the Northern Pacific Railway Company, and 297,493 shares or $23\frac{8}{10}$ per cent of the capital stock of the Great Northern Railway Company, being about one-fourth of each company.

The result of the ratable distribution above proposed would be to vest in the Oregon Short Line Railroad Company 320,706 shares, or 20.69 per cent of the capital stock of the Northern Pacific Railway Company and 246,389 shares, or 19.71 per cent of the capital stock of the Great Northern Railway Company, being about one-fifth of each company.

The result of the ratable distribution above proposed would be to vest in about 3,000 persons, scattered over the face of the world, without any relation to each other, 1,229,294 shares or 79.31 per cent. of the capital stock of the Northern Pacific Railway Company and 993,578 shares or 79.4 per cent. of the capital stock of the Great Northern Railway Company, being more than a majority of both companies.

Thus the effect of the ratable distribution proposed by the Board of Directors would be to scatter and distribute the majority of the stock of each company among more than 2,500 different holders, while the granting of the petition of Harriman and Pierce would be to concentrate and vest in the competitive Union Pacific Railway System the absolute control of the Northern Pacific Railway Company.

THIRD.

From the organization of the Northern Securities Company to close of business on April 5th, 1904, eighty-five thousand nine hundred and nine (85,909) certificates of stock of that company have been issued and delivered to stockholders therein. During

the same period approximately sixteen thousand (16,000) transfers of the stock of the Northern Securities Company have been made by the holders thereof and have been registered upon the stock transfer books of the said company.

During the same period approximately three thousand one hundred (3,100) separate stock accounts with stockholders of the Northern Securities Company have been opened upon the stock books of that company, of which approximately twenty-six hundred (2,600) accounts remain open, representing an equal number of separate holdings of said stock at this date.

The stock of the Northern Securities Company has been issued for the following named purposes and for the following named considerations:

1. For cash, at par to the incorporators.
2. In payment for Northern Pacific original common stock.
3. In payment for Northern Pacific preferred stock.
4. In payment for Northern Pacific new common stock.
5. For cash in the open market, the proceeds being used in the purchase, for cash, of Great Northern stock and other stocks now held by the Northern Securities Company.

Of the stock of the Northern Securities Company issued and transferred in payment by that company for stocks of the Northern Pacific Railway Company and the Great Northern Railway Company large amounts have been sold and transferred by the original holders to others, and have since been traded in on the markets and in private transactions, and have undoubtedly passed through many thousand separate ownerships, so that now it would be impossible to determine with any reasonable accuracy what Northern Pacific or Great Northern stock formed the original consideration for any one of many thousand of the present outstanding certificates of stock of the Northern Securities Company.

For example, in very many instances the same persons sold to the Northern Securities Company both Northern Pacific and Great Northern stock in unequal amounts, and received therefor certificates for the stock of the Northern Securities Company which had for their consideration the sales of both railway stocks. The original holders of these certificates afterward sold parts of their Northern Securities stock, and those parts were again divided and subdivided in subsequent dealings. In sundry instances, a certificate representing a sale of both Northern Pacific and Great Northern stock to the Northern Securities Company would be surrendered to the latter, together with other certificates coming from other sources and originally issued for other considerations, and a new certificate or certificates be issued, representing a consolidation of all the previous certificates surrendered. After this the last named certificates would be subdivided by sales on the market and new certificates be again issued.

For about twenty-five years last passed I have continuously

been an officer, in the City of New York, of railway and other corporations, all said time having in charge the keeping of the records and accounts of stock transfers and the issuance of stock certificates, and I am familiar with all details of that class of work; and I feel sure it would be absolutely impossible now to ascertain the specific number of shares of stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, represented by any one of a very large proportion of the present outstanding certificates of stock in the Northern Securities Company.

EDW'D T. NICHOLS.

Subscribed and sworn to before me this 9th day of April, 1904.

WM. H. BRUDER,
Notary Public,
New York County.

[SEAL.]

Affidavit of James J. Hill.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

Third Division.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT,
Defendants.

STATE OF MINNESOTA, County of Ramsey, } ss.:

JAMES J. HILL, being duly sworn, says: That he is president of the Northern Securities Company, and that, as shown by its books, the stock of said Company has been issued and is now outstanding as follows:

There have been issued and now are outstanding certificates for 3,954,000 shares (each of the par value of $100) of the capital stock of the Northern Securities Company, which certificates (besides $45,332,236.50 in cash) were issued and paid as follows, viz.:

(*a.*) 1,768,229 shares (and $43,625,036.50 in cash) for 1,537,594 shares (each of the par value of $100) of the common stock, and

410,850 shares of the preferred stock of the Northern Pacific Railway Company, which preferred stock was delivered and transferred to the Northern Pacific Railway Company in consideration of and exchange for $41,085 cash received therefor by the Northern Securities Company, with the knowledge and assent of the said Edward H. Harriman;

(*b.*) 2,110,576 shares (and $1,707,200 in cash) for 1,181,242 shares (each of the par value of $100) of the capital stock of the Great Northern Railway Company;

(*c.*) 75,220 shares to the public for cash used for the purchase of other property, and for corporate purposes.

JAS. J. HILL.

Subscribed and sworn to before me this 11th day of April, 1904.

A. J. DIXON,
Notary Public,
Ramsey County, Minnesota.

[NOTARIAL SEAL.]

Verified Minutes Northern Pacific Railway Company.
(Filed April 19, 1904.)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT,
Defendants.

STATE OF NEW YORK,
City and County of New York, } ss.:

GEORGE H. EARL, being duly sworn, deposes and says:

I am Secretary of the Northern Pacific Railway Company, one of the defendants in this suit, and have been Secretary of said Company continuously from November, 1901. During that time I have regularly attended the meetings of the Board of Directors, and of the Executive Committee of said Company, and have kept and have entered accurate minutes of the proceedings of all such meetings in books belonging to the Company, which during all such period have been and now are in my custody in

the office of the Company in the City of New York. I have made a true copy of all such minutes from November 13, 1901, as relate to the retirement of the preferred stock and the issue of common stock, and have annexed the same hereto as part of my deposition. All action therein recorded was taken as therein stated, and by the affirmative vote of every Director therein recorded as having been present at the meeting at which such action was taken, and in every instance every Director so recorded as present at any meeting was so present, and voted in favor of every resolution in said minutes recorded as having been adopted at such meeting.

GEO. H. EARL.

Subscribed and sworn to before me, in the City of New York, this 7th day of April, 1904.

WM. H. BRUDER,
[SEAL.] Notary Public,
New York County.

(*Northern Pacific Railway Company. Directors' Eighty-third Meeting. November 13, 1901.*)

At a meeting of the Board of Directors held pursuant to due notice at the office of the Company, No. 49 Wall Street, New York City, on Wednesday, November 13, 1901, at 2 o'clock P. M., there were present the following newly elected Directors (constituting a quorum), viz.:

Messrs. Baker,
HARRIMAN,
Hill,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rea,
Rockefeller,
Steele,
Stillman,
Thomas,
Twombly.

On motion, Mr. Ives was chosen to act as Chairman. He thereupon took the chair and announced the meeting ready for organization.

The Secretary then submitted the report of the Inspectors of Election, showing that at the annual meeting of Stockholders held on October 1, 1901, the following were elected Directors for the ensuing year, to wit:

Robert Bacon,
George F. Baker,

EDWARD H. HARRIMAN,
James J. Hill,
Brayton Ives,
D. Willis James,
John S. Kennedy,
Daniel S. Lamont.
Charles S. Mellen,
Samuel Rea,
William Rockefeller,
Charles Steele,
James Stillman,
Eben B. Thomas,
Hamilton McK. Twombly.

The Directors then proceeded to the election of officers.

On motion it was

Resolved: That the Secretary be, and hereby he is, directed to cast a ballot in favor of the election of the following named persons to serve as officers of this Company for the ensuing year, to wit:

For President.....Charles S. Mellen,
For Vice-President.....Daniel S. Lamont,
For Comptroller.....Henry A. Gray,
For Treasurer.....Charles A. Clark,
For Secretary and Assistant Treasurer..George H. Earl,
For Assistant Secretary.....Richard H. Relf,
For General Counsel in New York.....Francis Lynde Stetson,
For General Counsel in St. Paul.....Charles W. Bunn.

The Secretary cast the ballot as directed, and the Chairman announced that the above named persons were duly elected to the offices set opposite their names respectively.

Mr. Ives then resigned the chair in favor of Mr. Mellen.

The resignation of Mr. Robert Bacon as a Director of this Company was presented, and, on motion, the same was accepted.

Mr. Samuel Spencer was nominated as a Director to fill the vacancy caused by the resignation of Mr. Bacon, and on motion, the Secretary was directed to cast a ballot in favor of the election of Mr. Spencer. This was done and the Chairman announced that Mr. Samuel Spencer had been duly elected a Director of this Company to fill the existing vacancy.

On motion of Mr. Steele, it was

Resolved, That the following Directors be and hereby they are appointed as the Executive Committee of this Company, viz.: Messrs. Baker, HARRIMAN, Hill, Kennedy, Spencer and The President, or in his absence The Vice-President, *ex-officio*.

The following preamble and resolutions offered by Mr. Kennedy and seconded by Mr. Baker, WERE UNANIMOUSLY ADOPTED:

WHEREAS, Under and pursuant to an agreement dated, July 13, 1896, the Northern Pacific Railway Company did acquire from Messrs. J. P. Morgan & Co. a copartnership in the City of New York (in said agreement called the Reorganization

Managers), certain stocks, bonds and other property representing the system formerly of the Northern Pacific Railroad Company, and in consideration of such agreement and transfer did issue and deliver to the Reorganization Managers certificates for 750,000 shares of its fully-paid and non-assessable preferred stock and 800,000 shares of its fully-paid and non-assessable common stock, of the character described in a certain plan and agreement for the reorganization of the Northern Pacific Railroad System, dated March 16, 1896; and, furthermore, did agree at all times and in all ways and particulars to coöperate with the Reorganization Managers and to assist them in carrying into effect and in accomplishing the purposes of said plan and agreement of reorganization; and

WHEREAS, In and by the said plan and agreement of reorganization it was expressly provided that the right would be reserved by the new company (being the Northern Pacific Railway Company) to retire this preferred stock in whole or in part at par from time to time upon any first day of January during the twenty years succeeding the date of said reorganization agreement; it being the purpose and the intent of the said agreement that the ultimate control of the new company should be held and be exercised by the holders of the common stock, and that the preferred stock should as soon as practicable, be liquidated and be paid off in cash at par; and

WHEREAS, Upon the first day of July, 1896, at a meeting of the stockholders of the Northern Pacific Railway Company, each and every stockholder being present and voting in favor thereof, a resolution was duly adopted providing for the issue of $80,000,000 of common stock and of $75,000,000 of preferred stock of the Northern Pacific Railway Company, and expressly prescribing that such preferred stock should be issued upon the condition that at its option the Company might retire the same in whole or in part, at par, from time to time, upon any first day of January prior to 1917; and

WHEREAS, At a meeting of the Directors of the Northern Pacific Railway Company, duly held on the 8th day of July, 1896, a form of certificate for the preferred stock of the Company, with the conditions and regulations to be incorporated therein or endorsed thereon, was duly adopted by the unanimous vote of the Board of Directors of the Northern Pacific Railway Company, including the following provision:

> "The Company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock in whole or in part, at par, from time to time on any first day of January prior to 1917;" and

WHEREAS, At a meeting of the stockholders of the Northern Pacific Railway Company, duly held upon July 13, 1896, the said resolution of the Board of Directors adopting the said form of stock certificate to be issued for the preferred stock

was duly ratified and approved by the affirmative vote of every stockholder of the Company; and

WHEREAS, Each and every certificate for the $75,000,000 of preferred stock of the Northern Pacific Railway Company, containing the express provision for the retirement thereof, from time to time thereafter was issued under and pursuant to the provisions of the said resolution of July 1, 1896, and each and every certificate for stock now outstanding contains such express provision for the retirement thereof; and

WHEREAS, Under and pursuant to Section 8 of the Act, Chapter 244 of the Private and Local Laws of Wisconsin, approved April 15, 1895, it was expressly provided that all the affairs of this Company should be managed by a Board of Directors who should be stockholders, and who thereby were invested with all the powers of the corporation save as thereinafter provided; and

WHEREAS, In and by Section 11 and Section 12 of the said Act, Chapter 244 of the Laws of 1895, it was expressly provided that this Company might make its preferred stock convertible into common stock upon such terms and conditions as should be fixed by the Board of Directors, and that it might in its corporate name execute and deliver its notes, bonds, debentures or other evidences of indebtedness in such form as from time to time should be prescribed by the Board of Directors, and in such amount as should be deemed from time to time by said Board expedient, and might make the same convertible into its capital stock of any class upon such terms and conditions as to the Board of Directors might seem advisable; and

WHEREAS, The holders of a majority of the common stock of the Northern Pacific Railway Company have requested the Board of Directors to take all such action as may be requisite to retire the whole of the preferred stock upon the First day of January, 1902, and have given satisfactory assurances that the necessary moneys for that purpose will be furnished, and that all action requisite for that purpose will be taken by the holders of the common stock; and

WHEREAS, In the judgment of the Board of Directors of the Northern Pacific Railway Company, it is desirable that this Company should now exercise the option to retire the preferred stock in whole upon the First day of January, 1902;

NOW, THEREFORE, It is hereby unanimously

Resolved, (1) That the Northern Pacific Railway Company, in exercise of its right specifically expressed in each and every certificate of stock of this Company, has determined, and hereby does determine, to retire the preferred stock of the Northern Pacific Railway Company, in whole, at par, upon the first day of January, 1902.

(2) That notice of the retirement of the preferred stock, substantially in the form of that annexed to the minutes of this meeting, be published in the manner prescribed by the by-laws

for notice of stockholders' meetings, and that a copy thereof be mailed to every stockholder of this Company.

(3) That for the purpose of raising the funds necessary to retire the preferred stock, this Company will make and will issue its negotiable bonds, dated November 15, 1901, for the aggregate principal sum of $75,000,000, payable January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at this Company's office in the City of New York, with interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such bond shall be convertible into shares of the common stock of this Company, at the rate of one share of $100 for each $100 of the principal sum of such bond remaining unpaid at the date of such conversion; and upon surrender to it of any such bond this Company will issue to the holder of such surrendered bond, shares of this Company's common stock at the rate aforesaid. Such conversion may be made by the Company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such bond at any time on or after the first day of January, 1902. Such bonds shall be coupon bonds or registered bonds, in denominations each of $1,000 or of some multiple thereof, and shall be in such form as shall be determined by the President or the Vice-President of this Company. Every such bond shall be subscribed by the President or a Vice-President, and by the Secretary or an Assistant Secretary and shall be issued under the corporate seal.

(4) That the President and the Vice-President of this Company, and each of them, be, and hereby they are, authorized and empowered to contract to sell and to sell all or any of said bonds at a price not less than par and accrued interest; and in such contract to provide for the delivery of all or any part of said bonds upon receiving such payment therefor, on or prior to or after December 31, A. D. 1901; and also to covenant and agree that any and all moneys received for said bonds shall be specifically appropriated and used exclusively for the retirement of the preferred stock at par; and accordingly it is hereby expressly declared that all such proceeds shall be set apart and shall be held as a trust fund for such purpose.

Any such contract for delivery of such bonds prior to January 1, 1902, may provide for the payment of the whole or any part of the purchase price of said bonds with allowance of interest, at a rate not exceeding four per cent. per annum from the time of the receipt of the price of such bonds until January 1, 1902, the date when such bonds begin to bear interest.

Any and every such contract shall contain a provision giving to the holder of every share of this Company's common stock now outstanding suitable opportunity on demand to receive through or from the purchaser of said bonds under said contract, at a price not exceeding par and accrued interest, such

bonds (or a like amount of common stock received upon conversion of such bonds, if theretofore converted) to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder; and for the purpose of providing for subdivision of interests, suitable certificates representing fractional interests in bonds from time to time may be issued, and may be redeemed in such manner as shall be determined by the President or the Vice-President.

(5) That the proper officers of this Company be, and hereby they are, directed, out of the proceeds of said bonds, and out of any other moneys in the Company's treasury available for that purpose, to pay at the Company's New York office, to each holder of record of the preferred stock of this Company on and after January 1, 1902, upon surrender of the certificates for such stock, $100 for each and every of the shares of preferred stock for which the certificates shall be so surrendered.

(6) That all of the preferred stock of this Company be, and hereby it is, declared to be retired from and after December 31, A. D. 1901; and that from and after that date all of the authorized capital stock of this Company, fixed at $155,000,000 by resolution of this Company's stockholders at the meeting thereof held on the first day of July, 1896, be of one kind and be without preference in favor of any part thereof, and the total authorized capitalized stock of this Company continue to be $155,000,000 as so fixed at said meeting.

(7) That the President, the Vice-President, the Treasurer and Secretary of the Northern Pacific Railway Company be, and hereby they are, authorized from time to time to take all proceedings and to do all acts necessary or suitable to carry these resolutions fully into effect.

(8) That for the purpose of the retirement of the preferred stock, the transfer books of the stock of this company be closed at three o'clock P. M. on Tuesday, December 10, 1901; and that the transfer books of the common stock be reopened upon Thursday, January 2, 1902, at ten o'clock A. M.

* * * * * * * *

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

NORTHERN PACIFIC RAILWAY COMPANY.

RETIREMENT OF PREFERRED STOCK.

To the Holders of Preferred Stock of the Northern Pacific Railway Company:

Notice hereby is given that in exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every outstanding stock certificate, the Company has duly determined to retire the preferred stock, and the same will

be retired, in whole, at par, upon the first day of January, 1902. Accordingly each and every holder of preferred stock is notified to present and to surrender his certificate for such preferred stock at the office of the Northern Pacific Railway Company, 49 Wall street, in the City of New York, on and after the first day of January, 1902, and upon such surrender to receive payment in cash of the par amount thereof.

For the purpose of such retirement, the transfer books of the Northern Pacific Railway Company will close at three o'clock P. M. on Tuesday, December 10, 1901, and the transfer books of the common stock will reopen Thursday, January 2, 1902, at ten o'clock A. M.

By order of the Board of Directors,
GEO. H. EARL,
Secretary.

Dated November 13, 1901.

NORTHERN PACIFIC RAILWAY COMPANY.

EXECUTIVE COMMITTEE,

EIGHTY-SEVENTH MEETING, NOVEMBER 15, 1901.

The Executive Committee of the Board of Directors of the Northern Pacific Railway Company met, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Friday, November 15, 1901, at 3:30 o'clock P. M.

The following Directors (constituting a quorum) were present:

Messrs. George F. Baker,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

The Chairman laid before the Committee a form of convertible certificate, which had been prepared to meet the requirements of the resolutions of November 13, 1901.

After consideration of such form of proposed convertible certificate, it was, by the affirmative vote of all present,

Resolved, That the form of convertible certificate now submitted by the Chairman for the purpose of meeting the requirements of the resolutions of November 13, 1901, be and hereby the same is, approved; and that the President or any Vice-President, and the Secretary or any Assistant Secretary, be, and hereby they are, authorized and directed from time to time to make and execute such convertible certificates for the aggregate principal sum of $75,000,000; and that the proper officers of the Company be, and hereby they are, authorized from time to time to issue the same for the purposes, and upon the terms specified in the said resolutions of November 13, 1901.

The Chairman then laid before the Committee a form of agreement or contract with The Standard Trust Company of New York as Contractor, for the sale and delivery of such con-

vertible certificates at a price not less than par and accrued interest, as provided for in the fourth of said series of resolutions adopted November 13, 1901.

On motion, and by the affirmative vote of every member present, it was

Resolved, That the President and Vice-President of this Company, and each of them, be and hereby they are, authorized and empowered to execute and deliver the said contract under the corporate seal of this Company, and that the Secretary be, and hereby he is, authorized to affix the corporate seal and to attest the same.

On motion, the following resolutions were unanimously adopted:

Resolved, That the President or Vice-President be, and hereby he is, authorized to sell, at their par value, on or before January 1, 1902, to any holder of common stock of this Company, an amount of the convertible certificates of this Company authorized by the resolutions of the Board of Directors, passed November 13, 1901, equal to seventy-five eightieths of the par amount of the common stock held by such stockholder, provided that in case any such sale shall be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the re-opening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock shall release any and all right to purchase any of such bonds from this Company.

Resolved, That to the extent of any moneys received by this Company from sales of convertible bonds of the issue authorized by the Board of Directors by the resolutions passed November 13, 1901, the President or Vice-President be, and hereby he is authorized to retire or take up any of the preferred stock of this Company and to pay therefor upon surrender of the certificates for such preferred stock, duly endorsed in blank for transfer a sum equal to the par value of such preferred stock; and in case any such preferred stock shall be retired or taken up prior to the closing of the transfer books on December 10, 1901, a sum equal to the dividend of one per cent. thereon declared payable on January 1, 1902, shall be paid to such holder out of the surplus of the Company.

Resolved, That to the extent that preferred stock of this Company shall have been retired or taken up, the President or Vice-President be authorized to cause the convertible certificates of this Company that shall have been issued under the resolutions of the directors passed November 13, 1901, to be converted at par into common stock, and to cause the common stock of this Company to be issued upon any such conversion.

Resolved, That the officers of this Company be authorized and directed, under the direction of the President or Vice-

President, to do all acts and things required to carry the foregoing resolutions into effect.

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

No..... UNITED STATES OF AMERICA. $.....

NORTHERN PACIFIC RAILWAY COMPANY.

TEMPORARY FOUR PER CENT. CONVERTIBLE CERTIFICATE.

Northern Pacific Railway Company (hereinafter termed the "Railway Company"), for value received, promises to pay to bearer, or to the registered holder of this certificate, if the same shall be registered, on the first day of January, 1907, upon presentation and surrender of this certificate for cancellation, at its office in the City of New York,.....
.....Dollars, in the gold coin of the United States of America of the present standard of weight and fineness, and to pay interest thereon at the rate of four per cent. per annum from January 1, 1902, such interest being payable at said office, in like gold coin semi-annually, on the first day of January and the first day of July in each year, to the bearer or to the registered holder of this certificate, upon presentation of the certificate and endorsement of such payment thereon. Both the principal and interest of this certificate are payable without deduction for any tax or taxes which the Railway Company may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State, county or municipality therein.

Upon demand of the holder of this certificate at any time after January 1, 1902, and upon presentation and surrender of this certificate for cancellation, this certificate shall be convertible into common stock of the Railway Company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate, and upon such demand and such presentation and surrender of the certificate, the Railway Company will issue to the holder its common stock at the rate aforesaid. In case the Railway Company shall fail to make such conversion, then and in every such case, at the option of the holder, the principal of this certificate shall become and be forthwith due and payable, with the interest accrued and unpaid.

At any time after the date hereof, at its election, the Railway Company may require the holder of this certificate to convert the same into common stock of the Railway Company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and upon advertisement by the Railway Company of such election, in either "The New York Times" or "The New York Tribune," newspapers published in the City of New York, the holder shall, upon presentation

and surrender hereof, be entitled to receive common stock of the Railway Company at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and from and after such advertisement no interest shall accrue or be payable upon or in respect of this certificate from the interest day next preceding the date of such advertisement, and the principal of this certificate shall not be payable in cash, but the holder shall be entitled only to receive common stock of the Railway Company in exchange for this certificate as hereinbefore provided.

This temporary certificate is exchangeable for an engraved or lithographed certificate when the same shall be ready for delivery and is one of a series of similar certificates of the Railway Company, issued and to be issued for the aggregate principal sum of $75,000,000, such issue having been authorized by resolution of the Board of Directors of the Railway Company passed November 13, 1901, to which reference hereby is made. All moneys received for the certificates of said issue have been specifically appropriated and will be used exclusively for the retirement at par of the preferred stock of the Railway Company, and will be set apart as a trust fund for such purpose.

This certificate may be registered in the owner's name on the books of the Railway Company, at its office or agency in the City of New York, such registry being noted on the certificate by the certificate registrar of the Railway Company. After such registration, no transfer shall be valid unless made on the Railway Company's books by the registered owner and similarly noted on the certificate; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored; but this certificate again from time to time may be registered or transferred to bearer as before.

IN WITNESS WHEREOF, The Northern Pacific Railway Company has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and to be attested by its Secretary or an Assistant Secretary, this fifteenth day of November, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
By

[L. S.] .....

President.

Attest:

.....

Secretary.

MEMORANDUM OF AGREEMENT, made this..... day of November, A. D. 1901, by and between NORTHERN PACIFIC RAILWAY COMPANY, a corporation of the State of Wisconsin, of the first part, and THE STANDARD TRUST COMPANY OF NEW YORK, a corporation of the State of New York (hereinafter termed the "Trust Company"), of the second part,

WITNESSETH, That the parties hereto have mutually agreed as follows:

ARTICLE I.

On January 1, 1902, Northern Pacific Railway Company agrees to sell and to deliver to the Trust Company, and the Trust Company agrees to buy from Northern Pacific Railway Company, at their face value, all the convertible certificates of indebtedness of the Northern Pacific Railway Company for the aggregate principal sum of Seventy-five million dollars ($75,000,000), of the issue authorized by vote of the directors of said Company passed November 13, 1901, except such of said certificates as shall be purchased by the holders of the common stock of said corporation, as recited in Article III. of this Agreement.

Such convertible certificates are to be dated November 15, 1901, and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at Company's office in the City of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of One hundred dollars ($100) par value for each One hundred dollars ($100) of the principal of such certificate remaining unpaid at the date of such conversion; and upon surrender to it of any such certificate said Railway Company will issue to the holder of such surrendered certificate shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company, at its option, at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902 Such certificate shall be in denominations each of One thousand dollars, or some multiple thereof, and shall be substantially of the tenor of the draft thereof, marked "Exhibit A," hereto attached.

Until engraved or lithographed certificates can be prepared, temporary certificates, in form satisfactory to the Trust Company, shall be deliverable hereunder, which temporary certificates shall be exchangeable for engraved or lithographed certificates as soon as the same shall be ready for delivery.

ARTICLE II.

Northern Pacific Railway Company covenants and agrees with the Trust Company that all moneys received for such cer-

tificates shall be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and shall be set apart as a trust fund for such purpose.

ARTICLE III.

It is understood and agreed that suitable opportunity shall be given to every holder of common stock of the Northern Pacific Railway Company registered at the closing of the transfer books on December 10, 1901, to purchase and to pay for, at the price hereinafter stated, an amount of such certificates (subject to a proper adjustment for fractional amounts of certificates) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder.

At any time prior to the sale and delivery of such certificates to the Trust Company, the Northern Pacific Railway Company may sell and deliver, at the price hereinafter stated, to any such holder of common stock, the amount of such certificates which such holder of the common stock is to be given such opportunity to purchase; but in case any such sale be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the reopening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock, prior to such reopening of the transfer books, shall release any and all right to purchase any of such certificates from the Northern Pacific Railway Company. As soon as practicable, the Northern Pacific Railway Company, by notice, shall extend to each holder of its common stock registered at the closing of the transfer books on December 10, 1901, suitable opportunity, until January 1, 1902, to purchase, at the price hereinafter stated, an amount of such certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder.

After the sale and delivery to the Trust Company of such of said certificates as shall not have been purchased by the stockholders of the Northern Pacific Railway Company, the Trust Company will give to every holder of common stock of said Company registered at the closing of the transfer books on December 10, 1901 (other than holders of common stock who previously shall have purchased, or shall have had suitable opportunity to purchase, a ratable share of such certificates, as aforesaid), suitable opportunity, not later than March 1, 1902, to receive, on demand, through or from the Trust Company, upon payment to the Trust Company of the price hereinafter stated, an amount of such certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder (or a

like amount of common stock received upon conversion of such certificates if theretofore converted).

The price payable for all such certificates sold under this Article on or before January 1, 1902, shall be a sum equal to the principal thereof. The price payable for all such certificates sold and delivered under this Article after January 1, 1902, shall be a sum equal to the principal thereof, and the interest accrued thereon. The price payable for any stock received upon conversion of such certificates shall be the same as the price which would have been payable for a corresponding amount of such certificates.

Under the provisions of this Article every such holder of common stock shall *only* be given the opportunity to purchase, either from the Trust Company or from the Northern Pacific Railway Company, such amount of such certificates (or stock) as in the aggregate shall be equal to seventy-five eightieths of the par amount of the common stock owned of record by such stockholder at the closing of the transfer books on December 10, 1901.

ARTICLE IV.

In case the Northern Pacific Railway Company shall fail to sell and to deliver such certificates to the Trust Company at the times and in the manner herein provided, or shall fail to comply with all its agreements herein contained, or in case the Northern Pacific Railway Company shall fail to issue its common stock in exchange for all certificates delivered hereunder to the Trust Company when and as demand therefor shall be made by the Trust Company or other holder, then and in any such case the Trust Company, at its option, by notice delivered at the office of the Northern Pacific Railway Company in the City of New York, may forthwith rescind this agreement, and thereupon the Northern Pacific Railway Company, upon surrender to it of any such certificates, shall be bound to repay to the Trust Company or other holder the price paid for such certificates hereunder, with proper allowance of interest.

This agreement shall be deemed strictly *inter partes*, and shall not give any rights to any person or corporation except the Trust Company and the Northern Pacific Railway Company, except as provided in the certificates themselves.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their officers duly authorized the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,

by

.....

THE STANDARD TRUST COMPANY OF NEW YORK.

by

.....

NORTHERN PACIFIC RAILWAY COMPANY

EXECUTIVE COMMITTEE,

EIGHTY-EIGHTH MEETING, NOVEMBER 18, 1901.

The Executive Committee of the Board of Directors of the Northern Pacific Railway Company met, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Monday, November 18, 1901, at 2 o'clock P. M.

The following Directors (constituting a quorum) were present:

Messrs. George F. Baker,
EDWARD H. HARRIMAN,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

* * * * * * * *

On motion, the following resolutions WERE UNANIMOUSLY ADOPTED:

Resolved, That the President or Vice-President cause to be engraved and printed new forms of stock certificates of this Company to be issued after January 1, 1902, on which date the retirement of the preferred stock of this Company is to take effect, which new forms of stock certificates shall be substantially of the following tenor, to-wit:

Capital Stock $155,000,000.

No. .... Shares.

NORTHERN PACIFIC RAILWAY COMPANY

This is to certify that
is the owner of fully-paid and non-assessable shares, of the par value of one hundred dollars each, in the capital stock of the Northern Pacific Railway Company, transferable only in person, or by attorney, upon the books of the Company, at the office of its Transfer Agents in the City of New York, upon surrender of this certificate.

This certificate is not valid unless registered by the Registrar of Transfers of the Company in the City of New York.

Witness the signatures of the President or one of the Vice-Presidents of said Company, and of J. P. Morgan & Co., its Transfer Agents in the City of New York.

New York.....

Vice-President.

Transfer Agents.
Registered:
CENTRAL TRUST COMPANY OF NEW YORK,
By.....Registrar.

Secretary.

Resolved, That until January 2, 1902, and until the common stock to be issued in exchange for the convertible certificates of this Company, issued and to be issued under the resolutions of the Board of Directors, passed November 13, 1901, shall have been listed at the New York Stock Exchange, the President or Vice-President, and the Secretary, in behalf of the Company, shall cause to be executed and delivered temporary certificates for any such common stock to be issued upon the conversion into common stock of any such convertible certificates, which temporary stock certificates shall be signed by the President or Vice-President and by the Secretary, but shall not require the signature of the transfer Agents, and shall not be registered by the registrar of transfers; and such temporary stock certificates shall be substantially of the following tenor, viz.:

No..... .....Shares.

NORTHERN PACIFIC RAILWAY COMPANY.

TEMPORARY CERTIFICATE FOR COMMON STOCK.

Issued upon Conversion of 4% Convertible Certificates under Resolutions of the Board of Directors passed November 13, 1901.

This is to certify that is the owner of fully paid and non-assessable shares, of the par value of one hundred dollars each, of the Common Capital Stock of the Northern Pacific Railway Company, transferable only in person or by attorney upon the books of the Company upon surrender of this certificate.

Witness the signatures of the President, or one of the Vice-Presidents, of said Company, and of the Secretary, this day of

Vice-President.

Secretary.

Resolved: That the Secretary be, and hereby he is, authorized and directed in behalf of the Company, to issue and publish an offer to Stockholders of common stock of record on December 10, 1901, substantially as follows:

NORTHERN PACIFIC RAILWAY.

OFFER TO HOLDERS OF COMMON STOCK.

NEW YORK, November 23, 1901.

To holders of common stock of Northern Pacific Railway Company of record December 19, 1901:

Every holder of the common stock of the Northern Pacific Railway Company registered as such at the closing of the transfer books on Tuesday, December 10, 1901, will have, and hereby

is offered, the opportunity to purchase at par, to an amount equal to seventy-five eightieths of the par amount of the common stock held by him at the closing of the transfer books on December 10, 1901, convertible certificates of indebtedness of the Northern Pacific Railway Company, part of a total issue for $75,000,000 authorized by vote of the Directors of the Company passed November 13, 1901.

Such convertible certificates are to be dated November 15, 1901, and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at the Company's office, in the City of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of one hundred dollars ($100) par value for each one hundred dollars ($100) of the principal of such convertible certificate remaining unpaid at the date of such conversion, and upon surrender to it of any such convertible certificate the Railway Company will issue to the holder of such surrendered convertible certificate, shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902.

Such convertible certificates shall be in denominations each of one thousand dollars or some multiple thereof, and shall be substantially of the tenor of the draft thereof on file in the New York office of the Railway Company. For any fractional interest to which any common stockholder may be entitled under this offer, there will be issued scrip representing such fractional interest redeemable in convertible certificates when presented in even equivalents.

All of the moneys received for such convertible certificates will be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and will be set apart as a trust fund for such purpose.

The Railway Company has contracted to sell and deliver to other parties on the same terms all of said issue of convertible certificates of indebtedness except such as shall be purchased by the holders of the common stock.

Payments for such convertible certificates must be made at the office of the Northern Pacific Railway Company at 49 Wall Street, New York, on or before December 31, 1901. Convertible Certificates in temporary form will be ready for delivery, and payment therefor may be made, at said office at any time during business hours from and after December 11, 1901.

Stockholders desiring to avail of this opportunity to purchase

such Convertible Certificates must file their application therefor in the form herewith enclosed on or before December 24, 1901.

By order of Directors,
GEORGE H. EARL,
Secretary.

Northern Pacific Railway Company, Directors' Eighty-fifth Meeting, January 8, 1902.

At a meeting of the Board of Directors held, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Wednesday, January 8, 1902, at 2 o'clock P. M., there were present the following Directors (constituting a quorum) viz.:

Messrs. Baker,
Clough,
HARRIMAN,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rockefeller,
Steele,
Spencer,
Stillman,
Thomas,
Twombly.

The minutes of meeting held December 11, 1901, were read and approved.

THE EXECUTIVE COMMITTEE REPORTED BY THE READING OF THE MINUTES OF ITS MEETINGS HELD NOVEMBER 15TH AND 18TH, 1901, DECEMBER 14TH, 1901, AND JANUARY 2, 1902, AND ON MOTION THE COMMITTEE'S ACTION AS REPORTED WAS APPROVED, RATIFIED AND CONFIRMED.

The President submitted the following forms of notices which had been duly published, to wit:

NORTHERN PACIFIC RAILWAY CO.

NOTICE THAT PREFERRED STOCK HAS BEEN RETIRED.

To the Holders of Certificates for Preferred Stock of the Northern Pacific Railway Company:

Notice is hereby given that in the exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every stock certificate issued and outstanding prior to Nov. 15, 1901, the Company has retired the preferred stock and the same was retired in whole upon the 1st day of January, 1902. Each and every holder of a certificate for preferred stock not heretofore surrendered is notified that upon

presentation and surrender of his certificate at the office of the Northern Pacific Railway Company, 49 Wall Street, in the City of New York, he will receive payment in cash of the par amount of such certificate.

No holder of any certificate for preferred stock now has or hereafter will have any right as stockholder nor any claim against the Company, except to receive payment for certificates surrendered at the rate above stated.

Dated January 2, 1902.

By order of the directors,
GEORGE H. EARL,
Secretary.

NORTHERN PACIFIC RAILWAY CO.

NOTICE TO HOLDERS OF 4% CONVERTIBLE CERTIFICATES.

JANUARY 2, 1902.

Notice is hereby given to all holders of Four Per Cent. Convertible Certificates of the Northern Pacific Railway Company, dated November 15, 1901, and issued under and pursuant to the resolutions of the Board of Directors of this Company adopted November 13, 1901, that the Railway Company has elected to require and hereby does require the holder of every such certificate to convert the same into Common Stock of the Northern Pacific Railway Company at the rate of one share of $100 for each $100 of the unpaid principal of the certificate and upon presentation and surrender of such certificate at the office of this Company, 49 Wall Street, in the City of New York, the holder will be entitled to receive therefor Common Stock of the Railway Company at the rate aforesaid. No interest will accrue or be payable upon or in respect of any such certificate from and after the first day of January, 1902.

By Order of the Directors.

NORTHERN PACIFIC RAILWAY COMPANY
By DANIEL S. LAMONT,
Vice-President.

Attest:
GEORGE H. EARL,
Secretary.

ON MOTION, it was

Resolved, THAT THE ISSUANCE AND PUBLICATION OF THE FOREGOING NOTICES BE AND THE SAME HEREBY IS APPROVED AND RATIFIED.

The President reported that, pursuant to the resolutions and instructions of the Directors, $75,000,000 of Convertible 4% Certificates were sold by the officers of the Company at par, and the proceeds deposited with the fiscal agents of the Company, for the redemption of the whole of the Preferred Stock Certificates which were duly retired January 1st, of which Certificates for 713,140 shares have already been redeemed and can-

celed; and that the entire issue of $75,000,000 of Convertible Certificates has been exchanged by its owners for a like amount of the Common Stock of the Company, at par, making the present capital of the Company consist of 1,550,000 shares of Common Stock, at $100 each.

Mr. Clough gave notice that at the next regular meeting of the board, he would move for adoption the following resolutions for amendment of the By-Laws.

Resolved, That Section 3 of Article I. concerning notice of meetings of Stockholders, be amended by changing the words "Four" and "three" to "two" before the word "weeks," and by striking out the words "St. Paul," "London and Berlin," so that the same shall read as follows:

SECTION 3. NOTICE OF MEETINGS.—Written or printed notice of every meeting of Stockholders shall be advertised at least once in each week for two weeks immediately preceding such meeting in one or more daily or weekly newspapers published in the cities of Milwaukee and New York, which notice shall, in general terms, state the object of the meeting. At least two weeks before such meeting a copy of such notice shall be mailed from one of the offices of the Company to each Stockholder of record who shall have furnished to the Company's Stock Transfer Agents in the city where the certificates of such Stockholder shall have been issued, an address to which such notice may be sent; but failure to mail any such notice shall not invalidate any action taken at such meeting or at any adjournment thereof.

Resolved, That Section 4 of Article I. of the By-laws be amended by striking out and cancelling the last paragraph thereof, as follows:

These provisions, however, are subject to the rights of the holders of Preferred Stock.

Resolved, That Section 5, Section 6 and Section 7 of Article II. of the By-laws be, and hereby the same are, repealed, and in lieu thereof the following section be, and hereby the same is, adopted:

SECTION 5. MEETINGS OF THE BOARD.—Meetings of the Board shall be held whenever called, by direction of the President or of the Vice-President or of any three of the Directors for the time being in office.

The Secretary or the Assistant-Secretary shall give notice of each meeting, by mailing the same at least two days before the meeting, or by telegraphing the same at least one day before the meeting, to each Director; but such notice may be waived by any Director.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every Director shall be present, even though without notice, any business may be transacted.

Resolved, That Section 10 of Article II. of the By-laws be amended so as to read as follows:

SECTION 8. EXECUTIVE COMMITTEE.—The Executive Committee shall consist of six (6) directors, of whom the President, and in case of his absence from the meeting, the Vice-President, shall be one *ex-officio*. It shall possess and exercise all the powers of the Board of Directors, except when the latter is in session, but it may act only by the concurrent vote of not less than four (4) in number. It shall keep a record of all its proceedings, and the same shall be submitted to the Board of Directors. The Executive Committee shall have the power to fill any vacancy in its own number, but the director so chosen shall serve as a member of the committee only until the next meeting of the Board of Directors, or until a successor shall have been elected by the Board. The Secretary, or, in his absence from the meeting, an Assistant Secretary, or other officer or employee of the Company may act as Secretary of the Committee. A majority of the committee shall be a quorum. Meetings of the Executive Committee shall be held whenever called by the direction of the President or of the Vice-President or of any two members of the Committee.

The Secretary or the Assistant Secretary shall give notice of each meeting by mailing the same, or by telegraphing the same, one day before the meeting, to each member; but such notice may be waived by any member.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every member of the Committee shall be present, even though without notice any business may be transacted.

Resolved, That Section 8, Section 9, Section 10 and Section 11, of Article II. of the By-laws, be amended so as to be numbered, respectively, Section 6, Section 7, Section 8 and Section 9.

Resolved, That Section 4 of Article III. of the By-laws be, and hereby the same is, amended by striking out the second paragraph thereof.

Resolved, That the first clause of subdivision (*b*) of Section 1 of Article IV. of the By-laws be, and hereby the same is repealed.

On motion, the Secretary was instructed to send to each Director at least ten days before the next regular meeting a copy of the proposed amendments.

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

Verified Minutes Northern Securities Company.
(Filed April 19, 1904.)

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA, Plaintiff,
AGAINST
NORTHERN SECURITIES COMPANY and others, Defendants.

IN RE APPLICATION OF EDWARD H. HARRIMAN AND WINSLOW S. PIERCE FOR LEAVE TO INTERVENE.

STATE OF NEW YORK, City and County of New York, } ss.:

I, WM. H. BRUDER, a Notary Public in and for the City and County aforesaid, do hereby certify that on this seventh day of April, 1904, Edward T. Nichols came before me, and having been first duly sworn did depose and say:

I am 51 years of age and live in Morristown, in the State of New Jersey; since November 14, 1901, I have continuously been Secretary of the said company, and a director, and as such have attended all meetings of the Board of Directors of said company, and as Secretary have made all entries of the minutes of the proceedings of said Board in the records of said company.

During all the period aforesaid Mr. Edward H. Harriman, one of the petitioners aforesaid, has also been a director, and a member of the Executive Committee of the Northern Securities Company

During said period meetings of said Board were held on the following named dates, to wit: November 14, 1901, November 19, 1901, December 9, 1902, January 22, 1903, April 17, 1903, November 18, 1903, March 22, 1904, at all of such meetings said Harriman attended, and in the proceedings of which he participated, as a director of the Northern Securities Company.

At the said meeting of November 19, 1901, proceedings were had, with the assent and by the affirmative vote of the said Harriman as such director, set forth in Exhibit No. 1, hereto attached.

The minutes of a previous meeting of said Board, held on November 15, 1901, which minutes were approved by the said Board, at the meeting of November 19th, 1901, are set forth in Exhibit No. 2, hereto attached.

At the said meeting of January 22, 1903, proceedings were had, with the assent and by the affirmative vote of the said Harriman, as such director, set forth in Exhibit No. 3, hereto attached.

Meetings of the Executive Committee of the Northern Securities Company, at which the said Harriman was present, and in the proceedings of which he participated, were held on November 27, 1901, December 19, 1901, January 31, 1902, July 24, 1902, October 16, 1902, January 29, 1903, April 15, 1903, January 11, 1904, and February 24, 1904.

Annual meetings of the stockholders of the Northern Securities Company, for the election of directors, and the transaction of other business, were held at the company's offices in Hoboken, New Jersey, on November 10, 1902, and November 9, 1903.

At each of said meetings the said Harriman and Pierce attended, by myself as their proxy, and participated in all the business transacted at said meetings.

True copies of said proxies are hereto attached as Exhibits 4 and 5.

EDW'D T. NICHOLS.

Subscribed and sworn to before me in the City of New York, this 7th day of April, 1904.

WM. H. BRUDER,
[SEAL.] Notary Public,
New York County.

NORTHERN SECURITIES COMPANY.

INCORPORATORS' FIRST MEETING.

NOVEMBER 13, 1901.

The first meeting of the incorporators of the Northern Securities Company was held at the office of the Hudson Trust Company, at No. 51 Newark Street, in the City of Hoboken, New Jersey, on Wednesday, the 13th day of November, 1901, at 12 o'clock noon.

There were present: George F. Baker, jr., Abram M. Hyatt and Richard Trimble being all the incorporators and all the subscribers to the capital stock of the Company.

The following proceedings were had.

The meeting was called to order by Mr. Baker, and on motion, Mr. Hyatt was elected Chairman and Mr. Trimble was elected Secretary.

Mr. Hyatt took the Chair, and Mr. Trimble presented a copy of the certificate of incorporation of the Company, which was duly recorded in the office of the Clerk of Hudson County, New Jersey, on November 13, 1901, and duly filed in the office of the Secretary of State of New Jersey on November 13, 1901. It was ordered that a copy thereof be prefixed to the minutes of this meeting.

Mr. Trimble then presented a waiver of notice of this meeting, and it was ordered that the same be filed with the Secretary.

Mr. Trimble thereupon submitted for the consideration of the incorporators a set of by-laws. After some discussion, and on motion and by affirmative vote of all present, it was

Resolved, that the by-laws now submitted to this meeting by Mr. Trimble be and hereby the same are adopted as the by-laws of the Corporation, subject to alteration or amendment thereof as therein provided from time to time by the Board of Directors, and that a copy thereof be affixed to the minutes of this meeting.

Upon motion and by affirmative vote of all present it was

Resolved, that the incorporators do proceed to the election of the first Board of Directors of the Company, such Board to consist of three Directors and to be classified, as provided in the by-laws and certificate of incorporation, by electing one Director for a term of one year, one for a term of two years and one for a term of three years; and that Mr. August T. Pupke and Mr. James H. P. Reilly, be, and hereby they are, appointed Inspectors of Election.

The inspectors having duly qualified, the polls were opened, and remained open until all the incorporators and subscribers to the capital stock of the Company had voted; the polls thereupon being closed, the vote was canvassed and the Inspectors reported that the ballot showed that the following named persons were unanimously elected Directors for the terms set opposite their respective names, votes representing three hundred (300) shares having been cast for each of such persons, that is to say:

First Class: George F. Baker jr.—to hold office for one year;

Second Class: Abram M. Hyatt—to hold office for two years.

Third Class: Richard Trimble—to hold office for three years.

The Chairman then presented to the meeting an instrument, signed by all the incorporators and subscribers to the capital stock of the Company, waiving assessments and notice of assessments on their subscriptions, and it was ordered that such instrument be filed with the Secretary.

On motion and by affirmative vote of all present, it was

Resolved, that the Directors assess the stock heretofore subscribed for one hundred (100) per cent., in accordance with the terms of the waiver signed by the subscribers.

The following resolutions were adopted by affirmative vote of all present:

Resolved and ordered, that in compliance with the laws of the State of New Jersey (Revision of 1896, approved April 21, 1896) this Corporation have and continuously maintain a principal office and place of business within the State of New Jersey and have an agent at all times in charge thereof and upon which agent process against this Corporation may be served, and therein keep the stock and transfer books for the inspection

of all who are entitled to see the same and for the transfer of stock; that the books in which the transfers of stock shall be registered and the books containing the names of the shareholders shall be at all times during the usual hours of business open to the examination of every stockholder at such principal office; and that the name of this Corporation be at all times conspicuously displayed at the entrance of its principal office in this State.

Resolved and ordered, that until the location of the principal office of the Company shall be changed by the stockholders or by the Board of Directors, as authorized by law, the principal office and place of business of the Company be in and at the office of the Hudson Trust Company, at No. 51 Newark Street, Hoboken, New Jersey.

Resolved and ordered, that until otherwise directed by the Board of Directors, the Hudson Trust Company be, and hereby it is, appointed agent of this Corporation, upon whom legal process against this Corporation may be served within the State of New Jersey, and also the Transfer Agent of the stock of this Corporation.

On motion, the meeting thereupon adjourned.

Secretary.

NORTHERN SECURITIES COMPANY.

Directors' First Meeting.

November 13, 1901.

The first meeting of the Board of Directors of Northern Securities Company was held at the office of the Hudson Trust Company, No. 51 Newark Street, Hoboken, N. J., on November 13th, 1901, at twelve thirty o'clock in the afternoon.

Present—George F. Baker, jr., Abram M. Hyatt, Richard Trimble, being all the Directors.

On motion, Mr. Hyatt was elected temporary Chairman and Mr. Trimble was elected temporary Secretary of the meeting.

Mr. Hyatt took the Chair and called the meeting to order.

Mr. Trimble then presented the minutes of the meeting of the incorporators and subscribers to the Company's capital stock held this 13th day of November, 1901, and also a waiver of notice of this meeting signed by all the Directors.

Upon motion, it was

Resolved, that the Board proceed to the election of officers by ballot.

Mr. Hyatt was nominated for President, and, no other nominations being made, a ballot was taken, and Mr. Hyatt was unanimously elected President.

Mr. Trimble was nominated for Secretary, and, no other nominations being made, a ballot was taken, and Mr. Trimble was unanimously elected Secretary.

Mr. Baker was nominated for Treasurer, and, no other nominations being made, a ballot was taken, and Mr. Baker was unanimously elected Treasurer.

The Secretary then took and subscribed his oath as Secretary of the Corporation, which was duly filed.

Upon motion it was

Resolved, That the Treasurer be, and hereby is, authorized to open a bank account in behalf of the Corporation with Hudson Trust Company, 51 Newark St., Hoboken, New Jersey.

Upon motion it was unanimously

Resolved, That until otherwise ordered, the President and Treasurer be authorized to draw checks of this Company for any sums on deposit with any depositary of this Company; and that all checks of the Company be signed by the President and the Treasurer.

Upon motion, by affimative vote of all present, it was

Resolved, That an office of the Company be maintained in the City of New York, and that meetings of the Board of Directors from time to time may be held either at the principal office of the Company in the State of New Jersey or at the office in the City of New York or elsewhere as from time to time shall be ordered by the Board of Directors.

The Treasurer then called attention to the written subscriptions to the capital stock of the Company to the amount of three hundred shares of one hundred dollars each, amounting in the aggregate to thirty thousand dollars ($30,000).

On motion, by affirmative vote of all present, it was

Resolved, that a call be made for the payment in full of subscriptions to the capital stock of the Corporation, such call to be payable upon demand of the Treasurer.

On motion, by affirmative vote of all present, it was

Resolved, that until otherwise ordered by the Board of Directors the common corporate seal is and shall be an impression upon paper or wax of a circular device such as that to be impressed upon the margin hereof, being the words "November, 1901" in a centre, surrounded by the words "Northern Securities Company, New Jersey"; and that the Secretary of the Company procure, preserve and keep duplicate stamps for making such impressions of such corporate seal; and, when and as directed by the Board of Directors or by the President, or any Vice-President, the Secretary or any Assistant Secretary may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

The Secretary presented to the Board a draft of certificates for stock of the Company, and

On motion and by affirmative vote of all present, it was

Resolved, that the certificates to be issued by this Company for stock be of the tenor of the draft certificate now submitted, but that pending the preparation of engraved certificates of

such tenor, temporary certificates in form satisfactory to the President and Treasurer may be issued.

On motion and by affirmative vote of all present, it was

Resolved, that the proper officers of the Company be, and hereby they are, authorized and directed in behalf of the company and under its corporate seal or otherwise, to make and file any certificates or other instruments required by law to be filed in any State in which the officers of this Company shall find it necessary to file the same as a condition of transacting the business of the Corporation in that State.

On motion, the meeting thereupon adjourned to meet at the office of the Hudson Trust Company, 51 Newark St., Hoboken, New Jersey, at four o'clock this afternoon.

Secretary.

NORTHERN SECURITIES COMPANY.

Directors' First Meeting (Adjournment).

November 13, 1901.

Meeting of the Board of Directors of the Northern Securities Company, held pursuant to adjournment at No. 51 Newark Street, in the City of Hoboken, on Wednesday, November 13, 1901, at four o'clock, P. M.

Present—George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

The Treasurer reported that he had received $30,000 in full payment of the 300 shares of the capital stock of the Company, subscribed for by the three subscribers to the certificate of incorporation.

Upon motion, and by the affirmative vote of all the Directors, it was

Resolved, that the officers of this Company be, and hereby they are, authorized and directed to make and file in the office of the Secretary of State a certificate stating that the capital stock with which this Company is to begin business—viz., $30,000—has been paid in, in cash.

Upon motion, and by the affirmative vote of all the Directors, it was

Resolved, that certificates for the fully-paid up shares of the capital stock of this Company subscribed for by the three subscribers to the certificate of incorporation, be issued to such subscribers.

Upon motion, and by the affirmative vote of all the Directors, the following resolution was adopted:

Resolved, That the President be, and hereby he is, authorized, for and in behalf of this Company, to purchase any shares of the common capital stock of the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, that shall be tendered to this Company

at a price not exceeding $115 for each share of such capital stock of the par value of $100, such price to be payable in the fully-paid up shares of the capital stock of this Company at par, the Board of Directors having adjudged and determined, and hereby adjudging and determining, that the value of such shares of the capital stock of the Northern Pacific Railway Company is at least $115 per share.

Resolved, That the proper officers of the Company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this Company in payment for any stock of the Northern Pacific Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted.

Resolved, that Manhattan Trust Company of New York be, and hereby is appointed Registrar of Transfers of the stock of this Company.

Resolved, that Hudson Trust Company, of Hoboken, New Jersey, be and hereby is appointed Transfer Agent of the stock of this Company.

Resolved, that Hudson Trust Company be and hereby is appointed agent of this corporation upon whom legal process against this corporation may be served within the State of New Jersey.

Upon motion, the meeting adjourned.

Secretary.

NORTHERN SECURITIES COMPANY.

DIRECTORS' SECOND MEETING,

November 14, 1901.

Meeting of the Board of Directors of the Northern Securities Company, duly held pursuant to notice of adjournment at No. 51 Newark Street, in the City of Hoboken, on Thursday, November 14, 1901, at ten o'clock A. M.

Present—George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

Upon motion, and by the affirmative vote of all the Directors, the following resolution was adopted:

Resolved, That the President be, and hereby he is, authorized, for and in behalf of this Company, to purchase any shares of the preferred capital stock of the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, that shall be tendered to this company at a price not exceeding $180 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid-up shares of the capital stock of this Company at par,

the Board of Directors having adjudged and determined, and hereby adjudging and determining that the value of such shares of the capital stock of the Great Northern Railway Company is at least $180 per share.

Resolved, That the proper officers of the Company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this company, in payment for any stock of the Great Northern Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted:

Resolved, That a meeting of the Board of Directors be, and hereby the same is, called to be held at 31 Nassau Street, in the City of New York, on Thursday, the 14th day of November, 1901, at two o'clock in the afternoon.

The Secretary reported that, pursuant to the request of Messrs. George F. Baker, Jr., Abram M. Hyatt and Richard Trimble, out of the shares of stock held by the said gentlemen in the Northern Securities Company, there have been transferred shares of stock of this Corporation to the following named gentlemen to the amounts set opposite their names, respectively, viz.:

To John S. Kennedy	1 share
D. Willis James	1 "
Samuel Thorne	1 "
Jas. J. Hill	1 "
E. T. Nichols	1 "
George F. Baker	1 "
Robert Bacon	1 "
Geo. W. Perkins	1 "
D. S. Lamont	1 "
E. H. HARRIMAN	1 "
Jacob H. Schiff	1 "
James Stillman	1 "
W. P. Clough	1 "
George C. Clark	1 "
N. Terhune	1 "

On motion, duly seconded, and by the affirmative vote of all present, being all of the Directors of the Company, it was

Resolved, That the By-Laws of the Company be, and hereby they are amended in the following manner, to wit:

The third paragraph of Section 1 of Article II. is hereby amended as follows, viz., by striking out the following words:

"The number of the first Board of Directors shall be three, but the number of Directors may be altered from time to time, and so soon as deemed advisable by the first Board of Directors shall be increased to fifteen, by the alteration of these By-Laws,"

and by inserting in place thereof the following:

"The number of the Board of Directors shall be fifteen, but the number of Directors may be altered from time to time by the alteration of these By-Laws."

Upon motion, and by the affirmative vote of every Director, it was

Resolved, That the Board of Directors, as at present composed, under the power given to them by the provisions of the By-Laws, do now proceed to the election of twelve additional Directors; one-third thereof—to wit, four directors—for the unexpired portion of the term of one year; one-third thereof—to wit, four directors—for the unexpired portion of the term of two years, and one-third thereof—to wit, four directors—for the unexpired portion of the term of three years.

A ballot having been taken, the following persons, all of whom are stockholders of the Company, were duly elected Directors of the Company for the terms hereinafter specified, namely:

First class,—to hold office for the unexpired portion of the term of the directors of the first class (being one year): James J. Hill, George F. Baker, George W. Perkins, Daniel S. Lamont.

Second class,—to hold office for the unexpired portion of the term of the directors of the second class (being two years): Samuel Thorne, Jacob H. Schiff, James Stillman, W. P. Clough.

Third class,—to hold office for the unexpired portion of the term of the directors of the third class (being three years): J. S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon.

Upon motion, the meeting adjourned to reconvene at 31 Nassau Street, in the City of New York, at two o'clock this afternoon.

Secretary.

NORTHERN SECURITIES COMPANY.

DIRECTORS' SECOND MEETING—ADJOURNMENT.

NOVEMBER 14, 1901.

A meeting of the Board of Directors of the Northern Securities Company was held at 31 Nassau Street, in the City of New York, this 14th day of November, 1901, at two o'clock P. M., pursuant to adjournment.

The roll being called the following directors answered to their names: Geo. F. Baker, Jr., Abram M. Hyatt, Richard Trimble, James J. Hill, George F. Baker, George W. Perkins, D. S. Lamont, James Stillman, W. P. Clough, John S. Kennedy and E. T. Nichols.

The President occupied the chair.

The minutes of the first meeting of the Board of Directors and of the adjournment thereof, held on November 13, 1901, and of the second meeting, held on November 14, 1901, were read and approved.

Mr. George F. Baker, Jr., tendered his resignation as director and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, to proceed to the election of a director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. N. Terhune having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Terhune was duly elected director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. Richard Trimble tendered his resignation as director, and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, to proceed to the election of a director of the third class to fill the vacancy caused by the resignation of Mr. Trimble.

MR. E. H. HARRIMAN HAVING BEEN NOMINATED, AND NO OTHER NOMINATIONS BEING MADE, A VOTE WAS TAKEN, AND, ALL THE DIRECTORS PRESENT HAVING CAST THEIR VOTES IN FAVOR OF HIS ELECTION, MR. HARRIMAN WAS DULY ELECTED A DIRECTOR OF THE THIRD CLASS TO FILL THE VACANCY CAUSED BY THE RESIGNATION OF MR. TRIMBLE.

MR. TERHUNE AND MR. HARRIMAN THEN APPEARED AND ACCEPTED THEIR ELECTION AS DIRECTORS, AND TOOK THEIR SEATS IN THE BOARD.

Mr. George F. Baker, Jr., tendered his resignation as Treasurer, and on motion his resignation was accepted.

Mr. E. T. Nichols was thereupon nominated for Treasurer, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was elected Treasurer of the Company.

Mr. Abram M. Hyatt then presented his resignation as President of the Company, to take effect upon the election of his successor.

Upon motion, duly seconded, and by the affirmative vote of all present, it was

Resolved, that the resignation of Mr. Hyatt as President of this Company be accepted, and that the Board proceed to the election of a President to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. James J. Hill was nominated for President, and there being no other nominations, a ballot was taken, and Mr. Hill was duly elected President of this Company, to fill the vacancy caused by the resignation of Mr. Abram M. Hyatt.

Mr. Abram M. Hyatt tendered his resignation as a Director, and his resignation was accepted.

On motion, duly made and seconded it was

Resolved, to proceed to the election of a director of the second class, to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. George C. Clark having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Clark was duly elected a director of the second class to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. Clark then appeared, accepted his election as director, and took his seat in the Board.

Mr. Richard Trimble thereupon tendered his resignation as Secretary of the Company to take effect after the close of this meeting, and such resignation was accepted.

Mr. E. T. Nichols was nominated for Secretary, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was duly elected Secretary of the Company, the election to take effect after the close of this meeting. Mr. Nichols thereupon took the oath prescribed by law.

Upon motion, duly seconded, and by the affirmative vote of all present, it was resolved that the Board proceed to the election of a First, a Second, a Third and a Fourth Vice President of the Company for the ensuing year.

Mr. John S. Kennedy was nominated for First Vice-President and, there being no other nomination, a ballot was taken and Mr. Kennedy was unanimously elected First Vice-President of this Company.

Mr. George F. Baker was nominated for Second Vice-President and, there being no other nomination, a ballot was taken and Mr. Baker was unanimously elected Second Vice-President of this Company.

Mr. D. Willis James was nominated for Third Vice-President and there being no other nomination, a ballot was taken and Mr. James was unanimously elected Third Vice-President of this Company.

Mr. William P. Clough was nominated for Fourth Vice-President and, there being no other nomination, a ballot was taken and Mr. Clough was unanimously elected Fourth Vice-President of this Company.

Mr. W. P. Clough was appointed General Counsel of the Company.

Upon motion, duly seconded, and upon the affirmative vote of all present, it was

Resolved, that the Board do now proceed to the election of the members of the Executive Committee, to be composed of the President, *ex-officio*, and five Directors. Directors Kennedy, Baker, James, HARRIMAN, and Clough were nominated as members of said Committee. THERE BEING NO OTHER NOMINATIONS, A BALLOT WAS TAKEN AND DIRECTORS KENNEDY, BAKER, JAMES, HARRIMAN AND CLOUGH WERE UNANIMOUSLY ELECTED MEMBERS OF SAID COMMITTEE.

The meeting thereupon adjourned until 2:30 o'clock P. M. of

November 15th, A. D. 1901, at the offices on the ninth floor of the building Nos. 27–29 Pine Street, in New York City.

Secretary.

Exhibit No. 2.

The directors of the Northern Securities Company met at No. 27 Pine Street, New York City, on the 15th of November, 1901, at 2:30 P. M., pursuant to adjournment, of which adjournment written notice had been sent to all Directors.

Present—Messrs. James J. Hill, George F. Baker, Daniel S. Lamont, N. Terhune, George W. Perkins, W. P. Clough, George C. Clark, John S. Kennedy, D. Willis James and E. T. Nichols.

The President occupied the chair.

The minutes of the adjournment of the Directors' second meeting, held at 31 Nassau Street, in the City of New York, at 2 o'clock P. M. on November 14th, 1901, were then read and approved.

Upon motion, duly made and seconded, it was unanimously Resolved, that in case of absence or disability of the President, his duties and authority shall be exercised by the respective Vice-Presidents in the order of their numbers, beginning with the first.

The President stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this Company at par, and, as to the remaining $8,915,629, in cash.

On motion, and by affirmative vote of all the Directors present, it was

Resolved, That the President be, and hereby he is, authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

Resolved, That the President be, and hereby he is, author-

ized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this Company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent. per annum, on the sum receivable for such preferred stock.

Resolved, That the President be, and hereby he is, authorized in behalf of this Company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the Board of Directors of the Northern Pacific Railway Company passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this Company.

Resolved, That the President be, and hereby he is, authorized, in case of the purchase by this Company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

Resolved, That the President be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises.

The meeting thereupon, on motion duly made and seconded, adjourned until 2 o'clock P. M. of Tuesday, November 19th, 1901, at the office on the ninth floor of the building No. 27–29 Pine Street, New York City.

Secretary.

Exhibit No. 1.

The Directors of the Northern Securities Company met at 27 Pine Street, New York, on Tuesday, November 19th, 1901, at two o'clock P. M., pursuant to adjournment, of which adjournment written notice had been sent to all Directors.

Present—Messrs. George F. Baker, George C. Clark, W. P. Clough, E. H. HARRIMAN, James J. Hill, D. Willis James, John S. Kennedy, Daniel S. Lamont, E. T. Nichols, George W. Perkins, J. H. Schiff, James Stillman, N. Terhune, and Samuel Thorne.

President Hill took the chair.

The minutes of the Directors' adjourned meeting held at 27 Pine Street, New York, on the 15th November, were read, and on motion, duly seconded, were approved.

A form for the stock certificate of the Company was presented, and on motion, duly seconded, was referred to the Executive Committee, with power.

The By-Laws of the Company were presented and read, and on motion, duly seconded, it was

Resolved, That the By-Laws, as the same appear in the minutes, be, and they hereby are, approved and confirmed.

On motion, duly seconded, it was

Resolved, That the By-Laws be amended, and are hereby amended and supplemented so as to provide for the appointment by the Board, or by the Executive Committee, of two (2) or more additional Vice-Presidents and two (2) or more additional assistant treasurers, for the sole purpose of signing, on behalf of this Company, and if found necessary or desirable, of affixing this Company's corporate seal, to this Company's stock certificates; said officers to be under the direction, and their term of office to continue, during the pleasure of the President.

Resolved, Further, that the acts of such additional vice-presidents and assistant treasurers, in the signature and sealing of the said stock certificates, shall be deemed the act of this Company as fully, and with like effect, as if the same were done by the President and Treasurer of this Company.

On motion, duly seconded, it was

Resolved, That the Manhattan Trust Company of New York be, and is hereby, appointed Registrar of transfers of the stock of this Company.

On motion, duly seconded, it was

Resolved, That Mr. Nichols, Mr. Terhune and Mr. E. A. Bernholz be, and they hereby are, appointed Transfer Agents of the stock of this Company.

On motion, duly seconded, the meeting adjourned, subject to the call of the chair.

Secretary.

Minutes of a special meeting of the Board of Directors of the Northern Securities Company, held at its office, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., November 29th, 1901. Said meeting was held in pursuance of a call of the President, a written agreement of Directors, and a notice to Director Robert Bacon and his acceptance of such notice, copies of which appear below:

"TO THE DIRECTORS OF THE NORTHERN SECURITIES COMPANY:

"A special meeting of the Board of Directors of said Company is hereby called, to meet at its offices, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., on November 29, 1901, for the purpose of considering the approval of the rules of procedure of the Executive Committee, and such other business as may come before the meeting.

"Dated November 25, 1901.

"JAS. J. HILL,
"President.

"We, the undersigned, Directors of the Northern Securities Company, hereby waive notice of the meeting of the Directors,

to be held at Nos. 27–29 Pine Street, in the City of New York, at 11 A. M., November 29, 1901, and hereby assent that such meeting may be held at said time and place, without further notice.

"Dated November 25, 1901.

"JAS. J. HILL.
"JACOB H. SCHIFF.
"DANIEL S. LAMONT.
"GEO. W. PERKINS.
"GEO. C. CLARK.
"E. H. HARRIMAN.
"SAML. THORNE.
"JAS. STILLMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH.
"EDWD. T. NICHOLS.
"N. TERHUNE."

To ROBERT BACON,
Director of Northern Securities Company:

A special meeting of the Board of Directors of said Company has been called by the President, to be held at its offices, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., November 29th, 1901, for the purpose of considering the approval of the rules of procedure of the Executive Committee, and such other business as may come before the meeting. Please wire accepting notice.

Dated November 25th, 1901.

E. T. NICHOLS,
Secretary.

To NICHOLS, MORGAN, N. Y.: Nov. 28, 1901.

Received yesterday and hereby accept notice special meeting your letter dated lurdan.

ROBERT BACON.

Director Robert Bacon having been out of the City when such notice was given, the same was sent to him by the Secretary of the Company by telegraph, and his acceptance of notice, as appearing above, was sent by him by telegraph.

The following Directors were present at the meeting and participated in the proceedings thereof:

Geo. F. Baker.
Geo. C. Clark.
W. P. Clough.
Jas. J. Hill.
D. Willis James.
John S. Kennedy.
Daniel S. Lamont.
Edwd. T. Nichols.

Geo. W. Perkins.
Jacob H. Schiff.
N. Terhune.
Saml. Thorne.

Upon the request of the President, the Secretary read the minutes of all the meetings of the Board of Directors which had been held previously to this meeting; whereupon it was, by the affirmative votes of all the Directors present,

Resolved, that all the acts done and resolutions taken by the Board of Directors at the several meetings prior to the present be, and the same are, in all things approved, ratified and confirmed.

The Secretary then read the minutes of the proceedings of the Executive Committee held on November 27th, 1901, which minutes were as follows:

NORTHERN SECURITIES COMPANY.

Minutes of the first meeting of the Executive Committee of the Northern Securities Company, held at its offices in New York City at 1:30 P. M. on November 27th, 1901, in pursuance of an agreement of the members of the Committee waiving notice of the meeting of which the following is a copy:

"NORTHERN SECURITIES COMPANY.

"The subscribers, members of the Executive Committee of the said Company, hereby agree to hold a meeting of said Committee, for organization and for the transaction of such other business as may come before the Committee, at the offices of the Company, Nos. 27-29 Pine Street, New York City, at 1:30 P. M. on November 27, 1901.

"Dated November 25, 1901.

"JAS. J. HILL.
"E. H. HARRIMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH."

All the members of the Committee were present and participated. On motion, the following rules regulating the procedure of the Committee were unanimously adopted:

NORTHERN SECURITIES COMPANY.

Rules of Procedure of the Executive Committee.

RULE I.

MEETINGS.

Meetings of the Executive Committee shall be held whenever called, in writing, by the Chairman or by any two other members of the Committee, at the offices of the Company in the City of New York, or at the offices of the Company in the State of New Jersey, the place of meeting to be stated in the call.

The Secretary of the Committee shall give notice of each meeting to each member of the Committee by delivery of such notice to the member personally, or by leaving the same for him at his usual place of business, on a business day previous to that fixed for the meeting; but such notice may be waived by any member of the Committee.

At any meeting at which every member of the Committee shall be present, even though without any notice, any business may be transacted.

RULE II.

OFFICERS.

The President of the Company, *ex officio*, and, in his absence, one of the members, in the order in which their names appear upon the list voted for by the Directors, at their election, shall act as Chairman of the Committee.

The Secretary of the Company, and, in his absence, one of the Assistant Secretaries, *ex officio*, shall be Secretary of the Committee, and, as such, shall keep accurate minutes of the proceedings of the Committee.

RULE III.

At all meetings of the Board of Directors of the Company, the Secretary of the Committee shall lay before the Board, for its approval or disapproval, the minutes of meetings of the Executive Committee held in the previous interval between meetings of the Board.

The Secretary then exhibited to the Committee the form of the Company's permanent stock certificate, which was as follows:

AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... .....Shares.

NORTHERN SECURITIES COMPANY,

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies That.....
is the registered holder of.....Shares of the Capital Stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this cer-

tificate to be signed by its President and Treasurer this .....
.....day of ....., A. D. 190.....

... .
President.

.....
Treasurer.

{ Countersigned this.....day
{ of....., A. D. 190....

....., Transfer Agent.

Countersigned and Registered this.....day of..... A. D. 190....

MANHATTAN TRUST COMPANY,
Registrar of Transfers.

By.....
Secretary.

Shares, $100 each.

On motion the said form was unanimously approved.

The Secretary of the Company reported to the Committee that he had obtained bids and models for the stock certificate from the American Bank Note Company and the International Bank Note Company, and had entered into a contract with the International Bank Note Company, their bid being the lowest, to engrave the plates for four denominations of stock certificates for $450, and to furnish stock certificates at the rate of $35 per book of 500 certificates, on the condition that the work shall be approved by this Company and be satisfactory to the New York Stock Exchange. On motion, duly seconded, the action of the Secretary in making this contract was approved.

On motion, duly seconded, the meeting adjourned.

Secretary.

On motion, the acts and resolutions of the Executive Committee at the said meeting were, by the affirmative vote of all the Directors present, approved and confirmed.

On motion, the meeting then adjourned to 3 P. M. on Tuesday, December 3d, at the Company's said offices.

Secretary.

Exhibit No. 3.

NORTHERN SECURITIES DIRECTORS.
22D JANUARY, 1903.

NEW YORK, January 22, 1903.

A meeting of the Board of Directors of the Northern Securities Company was held at the office of the Company, No. 26

Liberty Street, New York, N. Y., at 2.30 P. M., this day, pursuant to call.

Present: Messrs. Bacon, Baker, Clark, Clough, Harriman, Hill, James, Kennedy, Nichols, Perkins, Schiff, Stillman, Terhune and Thorne.

The President took the Chair.

The Secretary read the minutes of the meeting of the Board of Directors held December 9, 1902, which on motion duly seconded, were approved.

The Secretary reported that no meeting of the Executive Committee had been held since the last meeting of the Board of Directors.

The Secretary then read and placed before the Board, for its information, the Balance Sheet of the Company as at December 31, 1902.

The following correspondence between Mr. James J. Hill and this Company was then read:

"GREAT NORTHERN RAILWAY COMPANY,
32 Nassau Street,
NEW YORK, September 10, 1902.

THE NORTHERN SECURITIES COMPANY,
New York City.

DEAR SIRS: Having discussed with some of your Directors the advisability of the issuance of additional stock and the sale thereof, and after that discussion such issuance and sale having been deemed advisable, I hereby agree to lend to you at any time to January 1st, 1903, up to 75,000 shares stock of the Northern Securities Company for the purpose of making deliveries on account of such sales of said stock. Should such issuance and sale not be formally approved by your Directors, or Executive Committee, I agree to accept, in lieu of the return to me of such stock as you may borrow from me in terms of this letter, the proceeds that may be derived by you from the sale thereof, with interest on such proceeds from the date of their receipt by you to the date of their payment to me with interest at five per centum per annum.

It is understood that while any of said stock remains in your hands you will account to me and pay me any dividends that may be paid thereon and turn over to me any privileges that may accrue thereon.

It is understood and agreed that all the stock you may borrow from me on this agreement shall be returned to me or its proceeds be paid over to me as above provided, on or before February 1st, 1903.

Your acceptance of the terms of this letter will constitute a contract between us.

Yours very truly,
(Signed) JAS. J. HILL."

"NORTHERN SECURITIES COMPANY,
26 Liberty Street,
NEW YORK, September 10, 1902.

JAMES J. HILL, ESQ.,
32 Nassau Street, New York, N. Y.

DEAR SIR: We beg to acknowledge the receipt of your letter of September 10, 1902, agreeing to lend to us, on certain terms, up to 75,000 shares of stock of the Northern Securities Company.

We accept all the stipulations of your letter, and in the event of our borrowing from you any part of the 75,000 shares of said stock, we agree that such stock shall be subject to the terms of said letter.

Yours very truly,
(Signed) W. P. CLOUGH
4th Vice Prest.
(Signed) EDW. T. NICHOLS,
Secretary."

The President then explained that, in accordance with the agreement embodied in this correspondence, the Company had borrowed 62,000 shares of the Northern Securities Company stock, and that of said stock the officers of the Company had sold 59,346 shares in the open market at prices averaging nearly 112%, and applied the proceeds to extinguishing the indebtedness of the Company.

On motion, duly seconded, it was

Resolved, that the contract, dated Sept. 10, 1902, signed by the officers of this Company, on its behalf, with James J. Hill, by which Mr. Hill promised to lend to the Company shares of his stock, up to 75,000 in the aggregate, in order to assist the Company in procuring funds for repayment of loans, by sale of its shares in the open market, and also the sales of said borrowed stock, in said market, amounting to 59,346 shares, be, and the same are hereby, in all things approved, ratified, and confirmed.

Resolved, further, that the officers of this Company be, and they are hereby, empowered and directed to do all acts, and to execute all instruments, for and on behalf of this Company, necessary or proper for carrying into effect the provisions of said contract, including the issuance to Mr. Hill of 59,346 shares of the stock of this Company to replace the said shares so sold.

(*Exhibit 4.*)

KNOW ALL MEN BY THESE PRESENTS,

That EDWARD H. HARRIMAN and WINSLOW S. PIERCE of .....do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both,.....to be.....substitute and proxy for.....and in.....name and in.....behalf, to vote at the election of Directors of Northern Securities Company, or on any other business relating to said Company, at the Annual Meeting to be held in the City of Hoboken, N. J., on the 10th day of November, 1902, or at any postponement or adjournment thereof, as fully as we might or could if personally present, and we hereby revoke any other proxy heretofore given by us.

IN WITNESS WHEREOF, we have hereunto set our hands this 2d day of October, 1902.

(Signed) EDWARD H. HARRIMAN
(Signed) WINSLOW S. PIERCE

Witness present,
(Signed) ALEX. MILLAR

(*Exhibit 5.*)

KNOW ALL MEN BY THESE PRESENTS,

That.....of.....
.....do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both.....
.....to be.....substitute and proxy for.....
and in.....name and in.....behalf, to vote at the election of Directors of Northern Securities Company, or on any other business relating to said Company, at the Annual Meeting to be held in the City of Hoboken, N. J., on the 9th day of November, 1903, or at any postponement or adjournment thereof, as fully as.....might or could if personally present, and.....hereby revoke any other proxy heretofore given by.....

IN WITNESS WHEREOF, we have hereunto set our hands this 13th day of Oct., 1903.

(Signed) E. H. HARRIMAN
(Signed) WINSLOW S. PIERCE

Witness present,
(Signed) ALEX. MILLAR
(Signed) JOS. H. ALLEN

Statement of Attorney-General.

(*Filed Feb. 6, 1905.*)

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA, Plaintiff, v. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT, Defendants.	In Equity. No. 789.

UPON PETITION OF EDWARD H. HARRIMAN AND OTHERS FOR LEAVE TO INTERVENE.

STATEMENT OF THE ATTORNEY-GENERAL ON BEHALF OF THE UNITED STATES.

I respectfully submit to the Court that notice has been served upon me that Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company will apply to the Judges of this Court for leave to intervene in this cause and to proceed and be heard in respect of the execution of the final decree of this Court entered on April 9, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as to the Court may seem meet.

The United States neither admits nor denies the allegations of the petition, but objects to the proposed intervention.

This case was heard by this Court on bill, answer, and testimony, and a final decree was entered, enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States, the decree of this Court was affirmed in every particular, the effect of which was to end and close the case.

The United States stands on the decree as affirmed, and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms.

P. C. KNOX,
Attorney-General.

Opinion.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

Third Division.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Mr. WILLIAM D. GUTHRIE, Mr. R. S. LOVETT, Mr. MAXWELL EVARTS and Mr. JOHN N. BALDWIN (Mr. JOHN F. DILLON was with them on the brief), for the petitioners.

Mr. ELIHU ROOT, Mr. JOHN G. JOHNSON, Mr. FRANK B. KELLOGG and Mr. C. A. SEVERANCE for the Northern Securities Company.

Hon. P. C. KNOX, Attorney-General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge, stated the conclusions of the Court.

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of the United States *vs.* The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed lately by the Supreme Court of the United States.

The petitioners recite as the grounds of their application that Harriman and Pierce, as Trustees for the Oregon Short Line Railroad Company, are the registered owners of $82,491,871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company, that the plan so proposed contemplated that the stockholders of the Securities Company shall surrender ninety-nine per cent. of the stock of that Company which they respectively hold, each stockholder receiving in exchange $39.27 in stock of the Northern

Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern Pacific stock; and, as they verily believe, that the proposed plan of distribution if carried out will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who cooperated in forming the Securities Company and would continue the common management of the two competing railway companies and render the decree of this Court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case, after the entry of a final decree, are very unusual.

They are never granted as a matter of course, and owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise.

The principal ground as it seems on which the petitioners Harriman and Pierce base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given (*Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609), but we fail to perceive that further orders are necessary in the case in hand to insure the due execution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly

contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that Company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned or exclude other methods of disposing of it that in view of all circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific

and Great Northern Railway Companies would result in leaving the control of the two railway companies in the hands of persons who co-operated in forming the Securities Company and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its record which tend to show that the proposed plan of distribution would not have the effect last mentioned but will lead to a very wide distribution of the stock of the two Companies, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the party would be entitled to litigate with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits or excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. The United States is the complainant in this case. It is the conservator of a public welfare and has the right to speak for the public. According to well established rules the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has the right to exercise. The petitioners can intervene only for the protection of their own individual interests and for that purpose only in the event that they can obtain adequate protection in no other way. The United States, speaking by its Attorney General, says that it " neither admits or denies the allegations of the petition but objects to the proposed intervention. This case was heard before this Court on bill, answer and testimony and a final decree was entered enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States the decree of this Court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for equitable disposition of the stock of the two railway companies if they can do so, which will not be in violation of the law, feeling confident in its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result in any scheme that

may be devised for the disposition of the stock of the two companies and preferring to challenge the validity of any such combination by an independent bill rather than by further proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government's bill in this case, that it has never been released from such custody, although a final decree has been entered, and that on this ground the petitioners, who assert a right to have particular shares of stock of the Northern Pacific Railway Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that so long as property remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In Matters of Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to that court for relief, and as a general rule cannot obtain relief elsewhere. This Court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill, which was filed by the Government, one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the Court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the grounds last stated. Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action and if it so happens that the decree of this Court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers, is competent to enforce.

Leave to intervene is denied.

Order denying application

(Filed April 19, 1904.)

UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF MINNESOTA,

Third Division.

UNITED STATES OF AMERICA vs. THE NORTHERN SECURITIES COMPANY *et al.*	C. Equity No. 789.

Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. Maxwell Evarts and Mr. John N. Baldwin (Mr. John F. Dillon was with them on the brief) for the petitioners.

Mr. Elihu Root, Mr. John G. Johnson, Mr. Frank B. Kellogg and Mr. C. A. Severance for the Northern Securities Company.

Hon. P. C. Knox, Attorney General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK,
Circuit Judges.

The application of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in this case was heard before this court on April 12th and 13th, 1904, and after due consideration,

It is hereby ORDERED that the said application be, and the same is hereby denied.

ST. PAUL, April 19, 1904.

WALTER H. SANBORN,
AMOS M. THAYER,
WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
Circuit Judges.

Clerk's Certificate.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA, Complainant, vs. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT, Defendants.	In Equity No. 789.

UNITED STATES OF AMERICA,
District of Minnesota,
Third Division. } Sct.

I, HENRY D. LANG, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, to wit:

Petition for leave to intervene and notice of presentation.
Affidavit of Edward T. Nichols.
Affidavit of J. J. Hill.
Verified minutes of Northern Pacific Ry. Co.
Verified minutes of Northern Securities Company.
Statement of Attorney General.
Record of hearing on petition for leave to intervene, Apl. 12.
Record of hearing on petition for leave to intervene, Apl. 13.
Opinion of Court.
Order denying application of Harriman and others for leave to intervene,

in the above entitled cause, with the originals thereof, which are in my custody as such clerk, and that the said paper writings are correct copies of such originals and of the whole thereof, in the cause therein named.

Witness my hand as Clerk and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 7th day of February, A. D. 1905.

HENRY D. LANG,
Clerk.

[SEAL.]

No. 512.

In Chancery of New Jersey.

Between THE CONTINENTAL SECURITIES COMPANY,
Complainant,

AND

THE NORTHERN SECURITIES COMPANY,
Defendant.

On Bill for Injunction 354 and Relief.

Opinion.

CHARLES E. THOMPSON, ESQ., for the Complainant. JOHN W. GRIGGS, ROBERT H. MCCARTER, CHARLES L. CORBIN and THOMAS THATCHER, for the Defendant.

On Rule to Show Cause why an injunction should not issue.

BERGEN, V. C.

Stated as concisely as the matters under consideration will permit, it appears from the bill of complaint, affidavits and exhibits offered and used, by consent, on the hearing, that the defendant was lawfully incorporated under the laws of this State; that the objects for which it was formed, as set forth in its certificate of incorporation, was the purchase, holding and selling of the bonds, evidences of indebtedness or capital stock of other corporations, whether incorporated in this State or elsewhere, and as owner thereof, to exercise all the rights,

powers and privileges of ownership, including the right to vote on any such stock; that shares of the capital stock of the defendant corporation of the par value of one hundred dollars each, to the extent of 3,954,000 shares were issued and disposed of; that of the stock so issued, a large proportion was used in purchasing a majority of the capital stock of the Northern Pacific Railway Company, and also of the Great Northern Railway Company, by virtue of which the defendant company assumed the management and control of the Railway Companies; that the defendant company purchased 1,537,594 shares of the common stock, and 410,850 shares of the preferred stock of the Northern Pacific Company, paying therefor in cash $43,625,036.50, and 1,768,229 shares of its own stock; that it purchased of the capital stock of the Great Northern Railway Company 1,181,242 shares, paying therefor $1,707,200 in cash and 2,110,576 shares of its own stock; that the defendant issued and sold of its own stock 75,220 shares to the public for cash; that in January, 1902, the preferred stock of the Northern Pacific Railway Company, held by the defendant, was called for payment, by that company, and paid in cash, for which the defendant received $41,035,000 of which it invested $34,709,062.50 in the convertible bonds of the Northern Pacific Company, afterward availing itself of the convertible rights vested in the owner of any such bond, the defendant surrendered said bonds to the Northern Pacific Company, and received from it the equivalent in shares of the common stock of said company issued to redeem the bonds. It is thus disclosed that the capital stock of the defendant company was issued in part for the common stock of the two Railway Companies, which we may assume, for the purposes of this motion, was an exchange of stocks with differences paid in cash; that stock of the defendant company worth at par $7,522,000 was sold in the public market for cash; that a large amount of common stock of the Northern Pacific Company now owned by the defendant, was issued by the Northern Pacific Company directly to it, for the surrender of convertible bonds belonging to the defendant company.

It further appeared that a suit brought by the United States against the defendant company, based upon an alleged violation of the act of Congress, commonly known as the "Anti Trust" act had resulted in a decree, afterward affirmed

by the Supreme Court of the United States, adjudging that the defendant had entered into a combination in restraint of trade and commerce among the several states, which the act of Congress denounced as illegal; that all of the stock of the Northern Pacific Railway Company, and all the stock of the Great Northern Railway Company, claimed to be held and owned by the defendant, was acquired and held by virtue of such illegal combination, and upon such adjudication enjoined the Northern Securities Company, or its representatives, from acquiring or attempting to acquire any further stock in either of said Railway Companies, and prohibiting the defendant from voting, or attempting to vote said stock at any meeting of the stockholders of either of said Railway Companies, and from exercising, or attempting to exercise any control, direction, supervision or influence whatsoever, over the acts and doings of said Railway Companies, or either of them, by virtue of its holding any stock therein, or from voting at any corporate election for directors or officers of either of said companies; and said decree further enjoined the said Railway Companies from paying any dividends to this defendant, on account of any stock which it claimed to hold or own of either of said companies, and prohibited the said Railway Companies, from permitting the defendant to exercise any control over their corporate acts. The said decree adjudges that nothing in it contained, should be construed as prohibiting this defendant from returning and transferring to the stockholders of either of said Railway Companies, any and all shares of stock in either of said companies, which the Northern Securities Company might have theretofore received from said stockholders, in exchange for its stock, or as prohibiting the defendant from making transfer of the stock to such persons as might then be the holder of its own stock, originally issued in exchange or payment for stock acquired by it in the aforesaid Railway Companies.

It further appeared that the continued ownership of said Railway stocks by the defendant company, would not only be useless, but a great disadvantage to the stockholders of the company, and that the directors of the company had decided to reduce its capital stock, and divide the surplus that would arise upon such reduction, between the stockholders, and in order to carry out said determination, on the 22nd day of

March, 1904, adopted certain resolutions for that purpose, those pertinent to this issue, being as follows :

> " *Resolved*, In consideration of the premises, it is " declared necessary and desirable for this Company so " to reduce its present capital stock as will enable it " without delay, in connection with such reduction, to " distribute among its shareholders, the shares of cap- " ital stock of said railroad companies held by it.
>
> " *Resolved*, That the Board of Directors of this com- " pany hereby declare it advisable that Article Fourth " (4th) of this Company's Certificate of Incorporation " be amended so as to read as follows :
>
> " FOURTH, The capital stock of this Company is " hereby reduced to three million nine hundred fifty-four " thousand dollars ($3,954,000) divided into thirty-nine " thousand five hundred and forty (39,540) shares of one " hundred dollars each ($100). Such reduction of capi- " tal stock shall be accomplished by each holder of out- " standing shares of this Company's stock, surrendering " to the Company, for retirement, ninety-nine percentum " (99) of the shares held by him."
>
> " Upon the surrender to this Company by any share- " holder of the entire number of shares, and parts of " shares of this Company's stock, which he is hereby " required to surrender, this Company will assign to " him, for each share so surrendered, thirty-nine dollars " and twenty-seven cents ($39.27) of the stock of the " Northern Pacific Railway Company, and thirty dollars " and seventeen cents ($30.17) of the preferred stock of " the Great Northern Railway Company, and propor- " tional amounts thereof for fractional shares of the " stock of this Company."

And on the same day the said directors called a special meeting of the shareholders of the defendant company, to vote upon said resolutions and upon such other business as might be brought before said meeting. That the requirements of the statute, regarding the holding of the special meeting, have been complied with, is not disputed, but the lawful right of the stockholders to approve, and of the directors to carry out the

distribution of surplus as proposed, is questioned, and the Court is asked to enjoin the stockholders from meeting, and passing upon the resolutions proposed by the directors as aforesaid, and the directors from carrying it out, if approved.

The corporation act of this State very clearly and distinctly defines the method to be pursued by a corporation desiring to reduce its capital stock ; it is not disputed but that the proceedings taken in the present instance, have followed the statutory directions, so that the asking of the Court to enjoin the meeting of the stockholders, is a mere incident to the real question, which is the prohibiting of the directors of this company, from dividing the surplus in the manner proposed, for if the action of the stockholders at the special meeting, should be the approval of the proposed reduction of capital stock, the result would be, if carried out, the creation of a large surplus of assets. Before the Court will allow an injunction order to restrain a corporation from distributing surplus assets, on the prayer of a complaining stockholder, it should be satisfied that the complainant is entitled to the relief he asks on the case presented.

The able and ingenious argument of the complainant's counsel, rested largely upon the contention that the decree of the Supreme Court of the United States, above recited, not only prevents the distribution of the surplus assets, in the manner proposed, but goes further, and requires that the defendant company shall transfer to the original stockholder, or his transferee, the same stock which was delivered in exchange for the defendant's stock. I am very clear that the decree of the Supreme Court will not bear any such construction; it controls the action of these defendants, only so far as the holding of the stock, and the exercise of such powers as the ownership of stock in a corporation usually confers, may be in violation of the act of Congress with regard to Interstate commerce, and that the statement or proviso in the decree that nothing in it contained should interfere with the transfer of the stock to the stockholders of either of the Railway Companies, any stock which the defendant might have received from stockholders in exchange for its stock, is not a direction that it shall transfer it in any particular method or form, but is added to the decree to avoid the possible construction that the stock could not be returned to the original holders if it was wise or possible to do

so. There is no doubt about the character of the original transaction; it was intended to be, and was, a sale of stock to the defendant company, with every *indicia* of ownership and title; the purchaser was not bound to retain one share of the stock, it had the right to sell any or all of it, and invest the proceeds in other securities, and did so in the case of the preferred stock of the Northern Pacific Company; upon such sale and delivery, the stock of the two Railway Companies became the assets of the defendant company, upon which the value of its stock depended. Large quantities of the capital stock of the defendant have been sold in the open market to purchasers who had a right to rely upon the well known character of the assets of this company, as a protection to their investment, and it would not make the slightest difference, whether the stock in one instance was originally issued for cash, and in another, in exchange for the stock of the two Railway Companies, the cash and the stock are the common assets of the company, and each stockholder is entitled to the benefit of all of the assets of the corporation, whose stock they hold, and if a division of the surplus is to be made, from securities held as assets, every stockholder is entitled to have his proportionate share of each class, where there is a possible or probable difference in market value.

The complainant also contends that as the purpose for which the stock was acquired, has been adjudged to be unlawful, the transfer and sale of the stock was void *ab initio*, that no title passed, and upon surrender of the stock of the defendant company, the original holder, or his transferee, is entitled to demand and have the identical stock he sold or transferred to the company returned to him. If this insistment of the complainant is sound, he does not show what property he is entitled to have returned, for all that appears to the Court at present, his stock may belong to the class that was sold for cash, in which case he would have no ground to complain, for he is getting his equitable portion of the assets of the company, be they worth more or less, but in my judgment, he would not be entitled to the relief he seeks, if he had been able to show that his stock was originally issued to one who had turned over to the defendant company, stock in either of the two Railway Companies, for if the original stock was issued for an unlawful purpose, the person who paid the con-

sideration, and who accepted the stock, was one of the conspirators, and can hardly ask the aid of a Court of Equity, to restore to him, property which he contributed to an illegal enterprise—he must abide the consequences of his own act. To permit the originators of an unlawful scheme, or their successors in title, to withdraw from the property of the company, a special class of assets, and leave as security for the unoffending stockholder, such assets as might remain, as a security for his investment, is inequitable. This corporation is not to be dissolved, it holds many valuable securities, other than the stocks of these two Railway Companies and expects to continue business, and might, so far as I can see, sell all of these stocks, the holding of which had become unprofitable, and divide the cash among the stockholders, or invest it in other proper securities. It seems to me, that the only question on this branch of the case is, what is the character of the title by which the defendant corporation holds these stocks. I am satisfied from the evidence before me, that the stocks were sold and conveyed without reservation, to the defendant, and that its directors might sell all of one class of stock, and hold the other, and that each stockholder would then have a joint interest in the stock retained, as well as in the cash. If one class of assets had depreciated in value, and the other had increased in worth, during such ownership, would it be seriously contended that a favored class of stockholders could take the valuable assets, and leave the depreciated to satisfy the other stockholders? I think not. Stockholders are, in a sense, partners, and the property of the firm belongs jointly to all. No trust was created when the stocks were transferred, at least, none was announced to the public when the stock was offered for sale, or shown on this hearing, and a secret trust, if now disclosed, would not be sustained, at least, against such stockholders as are not subject to its protection.

The complainant further argues, that the law under which the defendant was organized, while permitting a reduction of stock, does not provide for a distribution of a portion, and the retention of the balance of the assets as the property of the corporation. The suggestion that a corporation cannot retain a portion of its assets, to represent the capital stock after reduction, is without merit, otherwise every reduction of capital would require a distribution of all

the property of the company, and thereby in effect, work a dissolution of the corporation.

By the reduction of the capital stock of a corporation, not impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction, and unless the rights of creditors will be affected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying on of the business for the best interest of the stockholders, may not require. Strong vs. Brooklyn R. R. Co., 93 N. Y. 426. Williams vs. Western Union Tel. Co. 93 N. Y. 163. Morawetz on Corporations 443. The proposed distribution is not a dividend in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case, the character of the assets make an equitable division easy to accomplish, each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value, if there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean, and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders, require that a division of the stock of the two Railway Companies be made between them, unless prevented by some imperative legal rule; no such rule exists, on the contrary, the power of directors of a corporation to divide property other than money, among the shareholders, is sustained by abundant authority. 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; Ehle vs. Chittenango Bank, 21 N. Y. 548; Leland vs. Hayden, 102 Mass. 542.

Having determined that the stock of the two Railway Companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a

vested interest to the extent of his holdings of the defendant company's stock; that when the capital stock of a corporation is reduced and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company, among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property, so held for distribution, and that the proposed method of division is equitable, it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a Court of Equity. Whether this complainant would be entitled to equitable relief in any phase of the case, is extremely doubtful; I must take the bill of complaint as stating complainant's position correctly, and it is there alleged that notice of the action of the directors on this subject, together with the call for a special meeting for its approval was issued on the 22nd day of March, 1904, and that after that, and on the 28th day of March following, the complainant went into the market and bought five hundred shares of defendant's capital stock; manifestly he bought such stock with knowledge of the proposed action of the directors and stockholders and thereupon immediately filed his bill of complaint in this cause. But one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company, and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company, made necessary by the restrictive order and decree of the United States Court, and to delay the stockholders of the defendant company (many of whom had nothing to do with the origin of the scheme, afterwards declared unlawful) in the receipt of dividends or income from their investment.

The rule to show cause will be discharged.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN ET AL., PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

PROCEEDINGS IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

And afterwards, to wit, on the ninth day of November, A. D. 1903, this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the third day of January, A. D. 1905, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion by Dallas, circuit judge, and Gray, circuit judge, dissenting.

(Opinions already printed.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1904.

NORTHERN SECURITIES COMPANY, *Appellant*, *vs.* EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK.	No. 52.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the district of New Jersey, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs.

(Signed) GEO. M. DALLAS,
Circuit Judge.

PHILADELPHIA, *January* 4, 1905.

UNITED STATES OF AMERICA, *ss.*:

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages (date of argument, majority opinion of the court and dissenting opinion, and decree) to contain a full, true, complete, and faithful copy of the proceedings of this court in the case of The Northern Securities Company, appellant, and Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable

Trust Company of New York, appellees, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-fourth day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk.

No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND NOTICE OF PRESENTATION.

JOHN F. DILLON,
D. T. WATSON,
R. V. LINDABURY,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
BAINBRIDGE COLBY,
Of counsel for petitioners.

January 14, 1905.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

NOTICE OF PETITION FOR CERTIORARI.

Notice is hereby given that under and by virtue of the provisions of section 6 of the Judiciary Act of March 3, 1891, the undersigned, on behalf of the petitioners above named, will present the annexed petition for a writ of certiorari upon the record in the above entitled cause to the Supreme Court of the United States, at the Capitol in the city of Washington, on Monday, the 23d day of January, 1905, at the coming in of the court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, January 14, 1905.

JOHN F. DILLON, WILLIAM D. GUTHRIE,
D. T. WATSON, R. S. LOVETT,
R. V. LINDABURY, MAXWELL EVARTS,
BAINBRIDGE COLBY,

of counsel for petitioners.

TO JOHN G. JOHNSON, JOHN W. GRIGGS, ELIHU ROOT and FRANCIS LYNDE STETSON, ESQS.,

of counsel for respondent.

Due and sufficient service of notice of the submission of the annexed petition is hereby admitted.

JOHN W. GRIGGS,

Counsel for respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners above named, Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, respectfully present this their petition for a writ of certiorari to be directed to the Circuit Court of Appeals for the Third Circuit requiring said court to certify to this court for review and determination the record in that court of the decree and proceedings in the suit in equity now pending in the Circuit Court of the United States for the district of New Jersey brought by said petitioners as complainants against the Northern Securities Company and the Northern Pacific Railway Company as defendants, in which suit a decree has been entered by said Circuit Court of Appeals reversing an interlocutory decree or injunction order of the Circuit Court. The case is one where the judgment of the Circuit Court of Appeals is made final by section 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, and the subject matter of the litigation is about to be dissipated, so that

the petitioners are remediless save by the issue of a writ of certiorari by this Honorable Court.

The present suit arises out of the decision of this court rendered at the last term in the case of *Northern Securities Company* v. *United States*, 193 U. S. 197, hereinafter, for convenience, called the "Government suit," and it was brought to determine the right of possession of certain shares of the capital stock of the Northern Pacific Railway Company delivered to the Northern Securities Company in November, 1901, by the complainants Harriman and Pierce[1] and now held by the Securities Company, being a portion of the same railway shares directly involved in and covered by the decree in said Government suit. Such decree was in all things affirmed by this court, and adjudged as follows (193 U. S. at p. 255; present record, p. 191):

> "That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.
>
> "That *all* of the stock of the Northern Pacific Railway Company and *all* the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, *was acquired and is now held* by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.
>
> "That the Northern Securities Company, its officers,

[1] Messrs. Harriman and Pierce are trustees for the Oregon Short Line Company, which, in November, 1901, was the holder and owner of a majority of the capital stock of the Northern Pacific Railway Company (pp. 4–5, 198). The Equitable Trust Company of New York is the pledgee of the Securities Company's certificates (pp. 6, 39, 200).

agents, servants and employees, be and they are hereby enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies.

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein. . . .

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring *to the stockholders*[1] of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Immediately upon the rendition of such decision by this court, the board of directors of the Northern Securities Company adopted a resolution alleging that the "company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay" and to terminate the company's holding of stock of the Northern Pacific and Great North-

[1] So in original decree, but omitted through mistake in 193 U. S. 256.

ern Railway Companies by distributing such holdings among its stockholders,[1] and thereupon advised the Attorney-General of the United States in writing that the company contemplated "a speedy dissolution, but it is deemed by the directors unwise to bring this about until after it has divested itself of the shares of said Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, among the stockholders."[2] The distribution of the stock of the two railway companies which the directors of the Northern Securities Company thus proposed to make was not to return to the original depositors or their assigns the stock deposited by them or represented by their certificates, as was expressly authorized by the final decree in the Government suit, but upon the basis that, notwithstanding the adjudged illegality of the contract of acquisition and holding of the railway shares and the company's adjudged lack of power to exercise any of the beneficial rights of ownership over them, it had nevertheless become the legal and equitable owner thereof as fully as if such contract had been legal. Under such proposed distribution, every stockholder was to receive a proportionate amount of the stock of each of the two competitive railway companies and not what he originally deposited, and would thus continue to be jointly interested as stockholder in both corporations.

Your petitioners, as original holders of certificates representing $82,491,871 par value of the capital stock of

[1] Record, pp. 10–12.
[2] Record, p. 202.

the Northern Securities Company, promptly objected to such proposed method of distribution, and thereupon, after first applying to the Circuit Court of the United States for the district of Minnesota for leave to intervene in the Government suit,[1] instituted the above mentioned suit in said Circuit Court of New Jersey as complainants for the purpose of having it adjudicated that the proposed plan of distribution was illegal and inequitable. They averred that such plan of distribution would give effect to and consummate the illegal contract of acquisition in violation of their rights. They further averred that, as original depositors of shares of stock of the Northern Pacific Railway Company with the Northern Securities Company upon a contract which had wholly failed of consideration by reason of the illegality of the enterprise and the decree in the Government suit, they were entitled to the return and re-transfer to them of their original property which they were able to trace and identify in the hands of the Northern Securities Company in exchange for, and on the return to the Northern Securities Company of, the certificates of stock issued to the complainants Harriman and Pierce, as trustees, in November, 1901, and the $8,915,629 of cash received by them at the same time.

Your petitioners further averred that they were still the holders of the original and identical certificates issued to them in November, 1901,[2] which they offered to bring into court,[3] that the Securities Company

[1] 128 Fed. Rep. 808.
[2] Record, pp. 5, 14–15.
[3] Record, p. 14.

held the very Northern Pacific shares which had been transferred to it by them or the shares into which they had been converted,[1] that the objects and purposes for which the Northern Securities Company was organized had wholly failed and were being abandoned,[2] that all parties to whom stock of the Northern Securities Company had been issued received it with full knowledge of the objects and purposes for which it was organized,[3] and that it was practicable to trace and identify all the railroad stocks and return to the original depositors or their assigns exactly what each had transferred to or deposited with the Securities Company.[4]

As the Northern Securities Company was threatening immediately to distribute and transfer the 717,320 shares of Northern Pacific stock claimed, traced and identified by the complainants, and as the proposed distribution and transfer would have dissipated the subject-matter of the litigation and denuded the company of ninety-nine per cent. of its assets, and would thus have completely frustrated the object of the suit and have rendered unavailing any final decree that might be rendered in favor of the complainants, an application was made to said Circuit Court of New Jersey for a preliminary injunction to preserve the *status quo* and restrain the defendant Northern Securities Company from disposing of the Northern Pacific stock claimed by the complainants until the cause could proceed to a final hearing on pleadings and proofs. Both of the defend-

[1] Record, p. 6.
[2] Record, pp. 10–12.
[3] Record, p. 4.
[4] Record, p. 13.

ants were duly served.[1] A temporary restraining order was granted by the late District Judge Kirkpatrick, sitting as Circuit Judge, under section 718 of the Revised Statutes.[2] The motion for a preliminary injunction thereafter came on to be heard before District Judge Bradford, sitting as Circuit Judge, and was heard on the complainants' verified second amended bill of complaint and numerous *ex parte* affidavits on their behalf as well as on numerous *ex parte* affidavits on behalf of the defendant Northern Securities Company, which latter affidavits controverted material allegations of the bill and complainants' affidavits. At the time the motion for an injunction was heard and decided, no pleading had been filed on behalf of the defendant Northern Securities Company, and none was served until after the perfecting of the appeal hereinafter mentioned, when an answer was filed in the office of the clerk of the Circuit Court on September 3, 1904, to which a replication was duly filed. The answer and replication, however, were not before the Circuit Court of Appeals, and are not, therefore, in the record now presented.

Your petitioners further show that the Circuit Court granted a preliminary injunction restraining until final hearing the transfer of the Northern Pacific stock claimed and identified by the complainants as originally belonging to them, and held that the defense controverted material allegations of the bill,

[1] Supplemental record, pp. 1, 2.
[2] Record, p. 195.

that the affidavits and exhibits were conflicting on substantial points, that the case was not ready for a final decision, that grave and doubtful questions of law were involved, that the sole object for which the injunction was sought was the maintenance of the *status quo* until the question of right between the parties could be decided on final hearing, that the denial of a preliminary injunction would, if the complainants ultimately prevailed, render barren their victory so far as relief in the suit was concerned, that the affidavits were also conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of the Securities Company could be traced and identified on its books or otherwise, and that it was manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence then before the court. The opinion of Judge Bradford is submitted herewith, and is also printed at length in the record at pages 395–422.

The injunction order granted by the trial court was limited expressly to the Northern Pacific stock claimed and identified by the complainants, and as stated by the learned judge of the Circuit Court in his opinion,[1] the complainants expressly disclaimed all right to any stock of the Great Northern Railway Company which the Northern Securities Company then held. Hence, the effect of the injunction order was confined solely to the 717,320 shares of the capital stock of the Northern Pacific Railway Company representing the original property of

[1] Record, p. 421.

the complainant Oregon Short Line Railroad Company, and left the Northern Securities Company at liberty to dispose of or distribute the remaining Northern Pacific stock, constituting a majority thereof, as well as all its holdings of Great Northern stock, constituting more than ninety-five per cent. thereof.

The complainants, on the granting of the preliminary injunction, gave a bond in the penal sum of $2,000,000[1] to cover all possible damages which the Northern Securities Company might sustain; the sufficiency of the bond was not challenged; the responsibility of the sureties was admitted;[2] and the complainants stood ready and willing and offered in the court below to increase the bond if required.

The defendant Northern Securities Company appealed to the Circuit Court of Appeals for the Third Circuit, and said court reversed the injunction order, holding in effect that, although the Circuit Court did not abuse its discretion in maintaining the *status quo* until a hearing on the merits, nevertheless a complete adjudication on the merits of the entire controversy should then be made by the appellate court, and, proceeding to so adjudicate, the majority of the court held that the Northern Securities Company had become the absolute legal and equitable owner of the railway shares acquired and held by it in pursuance of the illegal combination condemned by the final decree of this court in said Government suit, and that the question of ownership was not involved or decided or even inci-

[1] Record, p. 424.

[2] Record, p. 426.

dentally passed upon by this court in that suit. Circuit Judge Gray dissented on the ground that the Circuit Court had exercised a sound judicial discretion in granting the motion for a preliminary injunction, for the reason that a *prima facie* case had been established at the hearing, which entitled the complainants to the protection of such an injunction and an opportunity to have the controversy heard and determined according to the ordinary practice in equity on pleadings and proofs. Copies of the opinions of the judges of the Circuit Court of Appeals are submitted herewith.

Your petitioners aver that such decision of the Circuit Court of Appeals wholly failed to give any effect to the decision of this court in the Government suit upon the same issue and the same facts; that the proposed form of distribution was illegal and inequitable; that, under the circumstances presented in the record, the case fell within the established rule of courts of equity to preserve and maintain the existing condition of affairs whenever the questions of law or of fact to be ultimately determined are grave or difficult and the injury to the moving party would be immediate, certain and irreparable if the injunction were refused and the subject matter of the litigation dissipated; that the balance of convenience was immeasurably in favor of the granting of the motion in order to prevent the dissipation of the subject matter of the litigation within the rule heretofore uniformly recognized by all courts of equity;[1] that any possible damage to defendant could be covered by a bond, and that it would be in the highest degree unjust and

[1] *Russell* v. *Farley*, 105 U. S. 433, 438.

inequitable to permit the directors of the Northern Securities Company, pending the litigation, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the suit by distributing to third parties the stock involved and claimed by the complainants, and denude the company of ninety-nine per cent. of its assets.

The ruling of the majority of the Circuit Court of Appeals and the reversal of the injunction order in pursuance thereof practically disposed of the entire controversy as was, indeed, intended by the learned majority of the Court of Appeals, and as was expressly recognized in its opinion and in the dissenting opinion, and the decision left the complainants remediless and without a day in court, because, as is undisputed, the Northern Securities Company intends, as soon as the mandate of the Circuit Court of Appeals shall issue, immediately to dissipate the subject-matter of the litigation, to distribute the railroad shares among several thousand stockholders, and to denude itself of ninety-nine per cent. of its assets so as to be wholly unable to comply with any decree in this case if rendered in favor of your petitioners.

Your petitioners urge that the majority of the learned Circuit Court of Appeals erred—

1. In proceeding to a complete adjudication of the entire controversy on *ex parte* affidavits, in view of the admittedly proper exercise of discretion by the trial court.

2. In failing to give due effect to the decision of this

court in the Government suit upon the same question of ownership there presented upon the same proofs.

3. In holding that notwithstanding the Northern Securities Company had acquired and held the Northern Pacific shares in question under and in pursuance of an illegal combination and in violation of an act of Congress, it had nevertheless thereby become the full legal and equitable owner thereof, and was entitled to treat the illegal contract of acquisition as valid and to deal with the property according to the terms of such contract as if it had not been in violation of law.

4. In deciding that the intent of the parties to enter into a contract of purchase and sale was the only question involved in the case, and wholly disregarding the contention of the complainants that upon the discovery of the illegality of the enterprise and the consequent failure and abandonment of its purpose and object as a result of the decree in the Government suit, the vendors would be entitled to rescind the contract.

5. In holding that the plan of distribution was legal and equitable and not in violation of the rights of the complainants.

And your petitioners respectfully submit the following reasons why their petition should be granted and why this court should review the decision of the Circuit Court of Appeals.

I.

Your petitioners show that in the Government suit not only was the subject-matter of the litigation the

same as now involved, *i. e.*, the Northern Pacific shares claimed by your petitioners, but substantially the same facts were before this court from which the learned Court of Appeals now deduces the finding *as matter of law* that the acts of the parties resulted in vesting the absolute legal and equitable title to the railroad shares in the Northern Securities Company. They further show that the proposed plan of distribution is avowed to be "necessary" in order to comply with the decree in the Government suit;[1] that the issues tendered in both suits are in many respects the same; that the present complainants were identified in interest and in privity with the defendants in that suit; and that on the *same* issue in regard to the *same* railroad shares and on the *same* documentary evidence and facts, the court below now holds *as matter of law* that, notwithstanding the decision of this court and the conceded illegality of the contracts, the transaction nevertheless did amount to an absolute and unconditional purchase or investment.

Your petitioners show that the majority of the learned Circuit Court of Appeals, in ruling that the Northern Securities Company had become the absolute legal and equitable owner of the shares of stock of the Northern Pacific Railway Company held by it, declared as follows (opinion, pp. 14, 19):

> "If the question before us had been involved and decided in the suit of the *United States* v. *The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was

[1] Record, pp. 11, 193.

> neither decided nor considered at any stage of that litigation. . . . The present suit is an independent one, and as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative."

Your petitioners respectfully submit that in the Government suit such question of ownership was not only presented for decision by the pleadings and proofs, the assignments of errors and the printed briefs and arguments in this court, as will appear by reference to the record and briefs on file in the office of the clerk of this court,[1] but that the very question was expressly passed upon by this court.

An examination of the record in the Government suit, in comparison with the record in the suit at bar, will show that the very resolution of the board of directors of the Securities Company of November 15, 1901, which is now referred to by the court below as establishing that the railroad shares were absolutely purchased, was submitted and urged in the Government suit as tending to establish the same fact of *absolute ownership*,[2] that the identical statement now contained in the affidavit of Mr. Hill was then testified to, in almost the precise words, by Mr. Clough, general counsel and a director of the Securities Company,[3] and that the testimony of Mr. Harriman, which is now regarded by the court below as establishing a sale and not a bailment, was also before this

[1] *Dimmick* v. *Tompkins*, 194 U. S. 540, 548.

[2] Record, Govt. suit, p. 190; present record, pp. 382–384.

[3] Record, Govt. suit, p. 758; present record, pp. 299, 333.

court in the prior case.[1] But, with all this evidence before this court and speaking of the contention that there had been a purchase or investment by the Securities Company, Mr. Justice Harlan said (193 U. S. at p. 353):

> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.*"

And Mr. Justice Brewer was speaking to the same point when he said (193 U. S. at p. 362):

> "*But no such investment by a single individual of his means is here presented.*"

Nevertheless, the Northern Securities Company, upon the rendition of the decision of this court in the prior suit, immediately again invoked the same facts and the laws of New Jersey and its certificate of incorporation for the purpose of establishing its power to acquire and hold the railroad shares, and proceeded to contend that it was the absolute owner of these stocks and as such owner entitled to distribute them to its stockholders as corporate assets. And the majority of the Circuit Court of Appeals has adopted the very contention on behalf of the Northern Securities Company which was unsuccessfully urged in this court in the Government suit on substantially the same facts, which contention Mr. Justice Harlan characterized as wholly fallacious and as not comporting with the actual trans-

[1] Record, Govt. suit, pp. 623, 901, 905; present record, pp. 248, 289, 293.

action, in which conclusion Mr. Justice Brewer apparently concurred.

Your petitioners further show that the petition of the United States in the Government suit expressly alleged among other things *in substantially the same language as the bill in the case at bar* (present record, p. 3; 193 U. S. 211) that—

> "The Northern Securities Company is a mere depositary, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

This averment was put at issue in the various answers in the Government suit by denials and allegations of absolute ownership (193 U. S. 227–228, 239, 241; present record, pp. 114, 125, 127). And the answer of the Securities Company averred that in acquiring shares of the Great Northern and Northern Pacific Railway Companies, it dealt solely with the separate owners of the shares in their respective individual capacities, and that "all the sales and transfers of the said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person" (193 U. S. 227–228), *being the very same contentions advanced in the case at bar and on substantially the same evidence.*

The briefs in the Government suit on file in the office of the clerk of this court show that the issue as to whether or not the Northern Securities Company had become the absolute owner of the railroad stocks was the most important of all the questions considered, and was

the basis of the discussion of the constitutional point presented. These briefs show that it was insisted in every conceivable form of argument that the Securities Company had derived the power to purchase these stocks from its incorporation under the laws of the state of New Jersey, that it held the stocks under valid contracts of absolute and unconditional purchase and sale, that its possession was that of absolute owner, that the original depositors had no longer any property interest therein, and that Congress had no power to regulate the exercise of the rights of ownership such as voting and collecting dividends. In the principal brief filed on behalf of the Northern Securities Company in this court, the following statements were made (pp. 82, 307):

> "The Securities Co. does not hold its railway shares as trustee, but as absolute owner. This is positively stated by Mr. Kennedy, I, 213; Mr. Morgan, I, 361; Mr. Hill, I, 699; Col. Clough, I, 788, 792, and is alleged as positively and directly in paragraphs VI and VIII of the petition, though in paragraph XI the Securities Co. is put into the before-mentioned inconsistent and incongruous positions of 'depositary, custodian, holder and trustee' of the same shares—as trustee, with the legal title, and custodian, with no title at all. And the decision seems to halt between the statement, in one place, that the Securities Co. is the owner of the shares it has acquired and the statement in another that it is a mere fictitious personage, and that the shares have merely been placed in its name by the real owners. Compare II, 1704-5 with II, 1706-7, 1708, and see pages 12, 13, 17, *supra*.
>
> "Being absolute owner of the shares it has acquired, the Securities Co. is free to sell (and, indeed, as Mr. Hill says—I, 699—'to burn'), all or any of its shares of

either railway company without selling any of its shares of the other. And the same absolute ownership and consequent absolute power of sale was of the essence of the original project of a company to hold only Great Northern stock. . . . The Securities Co. is the absolute owner of the shares held by it. The decision itself says as much (II, 1705). But the decree divests it, if not of the naked ownership, yet of every use and every profit and every incident of ownership. It may not vote the stock, nor exercise any of the powers or rights of ownership nor receive dividends nor dispose of the shares except as permitted in the decree. There is no difference in law between stripping one's property of everything that gives it utility or value and depriving one of the property altogether. It is true there is a permission, if not an invitation to the Securities Co. (an invitation of the royal kind, with all these injunctions in case of non-acceptance) to turn back its railway shares to their former owners in exchange for its own shares held by them—but not for cash; *the Securities Company may not sell the railway shares to others.*"

In the other briefs filed on behalf of the appellants in the Government suit, the claim was repeated again and again that the Northern Securities Company was an absolute *owner*, that the *ownership* of stock could not be regulated or controlled by Congress, and that the Circuit Court erred in not recognizing and giving effect to this *ownership*, to which all the parties in interest had testified.

The principal questions before this court in that suit were, first, whether or not the Securities Company had in legal effect become the absolute owner of the railway stocks, and as such entitled to exercise all the rights of ownership, and, secondly, if so, whether Congress had the constitutional power to prohibit the exercise of such

rights of ownership. The allegation in the Government's bill above quoted was, therefore, clearly a most material allegation, and speaking of it as of the other material allegations of the bill, Mr. Justice Harlan said (193 U. S. 325, 353):

> "*In our judgment, the evidence fully sustains the material allegations of the bill.* . . . Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—*more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. . . .
>
> "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual trans-

action. *There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of *both* these [constituent companies] into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) 'smothering' competition between the lines of two railway carriers."

And Mr. Justice Brewer, addressing himself to the contention that the Northern Securities Company had purchased the railway shares by way of investment and paid therefor with its own stock, and that it had the constitutional right to be protected in the exercise of all

rights appurtenant to such absolute ownership, in his concurring opinion said (p. 362):

> "*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination* to destroy competition and thus unlawfully restrain trade *was carried out.*"

The above quoted extracts from the opinions of Justices Harlan and Brewer, when read in the light of the dissenting opinion, can leave no reasonable doubt that every member of the court understood that the question of *ownership* and the nature of the possession of the Northern Securities Company as

"a holding company" was one of the points presented for decision. The dissent was based, primarily, upon the conclusion of the four dissenting Justices that the transactions were what they purported to be, namely, lawful sales conferring full ownership, and that Congress had no power to regulate such acquisition of property or the exercise of the rights incident to such ownership. Thus, at page 366, Mr. Justice White used the following language:

> "It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads *did not make the Northern Securities Company the real owner of the stock in the railroads*, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

The dissent from this proposition accentuates it as the necessary basis of the decision of the court. The court having decided the first question, namely, that the Securities Company did not become the owner of the railway stocks, it became unnecessary to decide and the court did not decide whether Congress had power to prohibit the exercise of the rights of ownership.

In addition, the answers of the various defendants in the Government suit set up the constitutional right of such stockholders to sell their property as they saw fit, and pleaded that the act of Congress as construed and enforced by the court below was unconstitutional in that "persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest" (transcript, pp. 126, 146, 156, 161, 171, 181; 193 U. S. 241,

246, 254, 255). It was in answer to this plea that Mr. Justice Harlan said that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce" (p. 357). And, as your petitioners respectfully submit, the learned majority in the court below quite misapprehended the point to which this part of Mr. Justice Harlan's opinion was directed.

Moreover, as your petitioners submit, when the decree in the Government suit expressly adjudged that *all* the railroad stock "*claimed to be owned* and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy," etc. (193 U. S. at p. 255), and authorized the *return* and re-transfer of the stock to the original depositors or their assigns, the court in effect held that the United States was right in its contention in bill and argument and that the Securities Company had not become the *absolute owner* of the stocks, as was, on its part, contended. This resulted logically and necessarily from the adjudication that the transaction of acquisition and holding was for an illegal purpose in direct violation of an act of Congress, and that the company might return the stocks to the original owners. When the court decided that the company acquired possession and claimed to own the stocks by virtue of an illegal combination in direct violation of the statute and

authorized the return of the property, it was not called upon to go further and announce that the effect of such an adjudication of illegality was to recognize that the railroad stocks still belonged to the depositors as beneficial equitable owners or to reiterate the settled doctrine of this court that a contract in violation of a statute is wholly void and of no legal effect, that it cannot be the foundation of any right or power, "and that neither what has been done under it, nor the action of the court, can infuse any vitality into it" (118 U. S. 317).

Your petitioners submit that if this court had contemplated that, notwithstanding the finding in the decree in the Government suit that every share of railroad stock had been acquired and was held by virtue of an unlawful combination and under an illegal contract, nevertheless the absolute beneficial ownership had become fully vested in the Securities Company as a corporate asset as fully as if the contract were lawful and that the original depositors or their assigns were not the equitable or beneficial owners thereof, it would not have authorized the return or held that their rights were not affected by the decree. If the original depositors had no property interests other than as stockholders upon the failure of the object and purpose for which they transferred their property—if they were not entitled to the return of the deposited railroad stocks as owners thereof—if the absolute ownership had passed out of them to the Securities Company by virtue of the illegal contract, and the original depositors had nothing left but its certificates of stock, then, surely,

the destruction of the value of the railroad stocks in the hands of the Securities Company necessarily operated to destroy the value of the only interests remaining in the original stockholders. If all the property of a corporation be rendered worthless in its hands, the property interests of its stockholders are certainly destroyed. But if the conclusion of the court was that the absolute ownership had not been acquired by virtue of a transaction in violation of an act of Congress, that the purpose was illegal and the attempt void, and that, upon the utter failure of that purpose, the original depositors or their assigns were entitled to the return of their property, then the meaning and import of the express authorization to *return* and of the declaration that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies," etc. (p. 357), becomes at once plain, logical and consistent. The provision in the decree expressly sanctioning the *return* and re-transfer of the very railroad stocks to the original depositors or their assigns was an adjudication that could have been grounded upon no other basis than that the shares belonged to them as equitable beneficial owners. Mr. Justice White so understood when he said (193 U. S. p. 373):

> "And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, *authorizes* its return to the alleged conspirators, and does not restrain them from exercising the control resulting *from the ownership*."

It is submitted that if, in the Government suit, this court or the Circuit Court of Minnesota had

not recognized that the real beneficial ownership of the railroad stocks was in such original depositors or their assigns, instead of in the Securities Company, it would not have authorized the company to return the stocks to them. How could the court have given such authorization if that was not the logical and legal consequence of its decision? How could any court conceive itself empowered to *authorize* or sanction a return of property to those who were not the owners thereof?

It is submitted that the language used by Mr. Justice Harlan, to that extent certainly concurred in by Mr. Justice Brewer, is utterly inconsistent with any other assumption than that the beneficial or equitable ownership of the railroad stocks remained in the original depositors as the necessary and logical result of the adjudication that the Northern Securities Company had acquired and held property as a mere "holding" company in violation of the act of Congress and could return the stocks to the original stockholders of the respective railway companies, because "no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it" (Mr. Justice Gray in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60).

And your petitioners, therefore, respectfully submit that the learned court below clearly erred in holding that the question of ownership was not even incidentally passed upon by this court in the Government suit.

II.

Your petitioners further show that they established a *prima facie* case, even if the effect of the prior decision of this court in the Government suit be wholly disregarded whether as *res adjudicata* or as a controlling precedent upon the same group of facts.

Their verified bill of complaint alleged that the Northern Securities Company was organized in order to effectuate and accomplish the objects of an illegal combination adjudged to have been in violation of the act of Congress and in pursuance of an agreement among the promoters, including Mr. Hill and Mr. Clough, affiants in the case at bar, (present record, p. 3) viz.—

> "to organize a holding company under the laws of the state of New Jersey, and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

These allegations are in substantially the same language as those contained in the bill of the United States in the Government suit and to be found in the opinion of Mr. Justice Harlan.

Your petitioners earnestly and particularly call the attention of this court to the fact that there was no denial of these verified allegations as to the purposes for which the Northern Securities Company was organized, in any form or manner whatever, although the president, the secretary and the transfer agent, all of whom are also directors of the company, volunteered *ex parte* affidavits. Indeed, the testimony of five directors (one-third of the whole board, and two of them, Mr. Hill and Mr. Clough, the president and general counsel, original promoters and defendants in the Government suit) was submitted in answer to the bill in the case at bar, but they were silent as to the terms of the combination in pursuance of which the company was organized, or as to the purposes and objects for which it was organized, or as to the nature of the intended holding of the railroad shares in the company's possession, and yet the court below entirely disregarded this material and pregnant condition of the record in determining contrary to the same that the Northern Securities Company was a purchaser and not a bailee.

The only proof submitted by the defendant Northern Securities Company on that branch of the case was the testimony of Mr. Clough in the Government suit and the *ex parte* affidavit of Mr. Hill, president of the company, to the effect that no contract, agreement or understanding in regard to the acquisition of the Northern Pacific shares in question was ever made or authorized by the company except as recited in the resolution of the 15th of November, 1901.[1] To repeat, this was

[1] Record, p. 333.

the very same resolution which was before the court in the Government suit, and the statement of Mr. Hill was merely a repetition of what Mr. Clough had testified to in the Government suit.[1] The affidavit of Mr. Hill did not controvert the allegations of the bill as to the terms and substance of the agreement to which he was alleged to have been a party and in pursuance of which the Northern Securities Company was organized.[2]

But, in addition to the failure to deny or controvert these fundamental allegations of the bill, which, upon an application of this kind, is equivalent to an admission of their truth,[3] your petitioners submit that the uncontradicted and uncontroverted proofs before the court below supported the allegations of the bill.

The proofs as to the intention to organize a "holding company" are as follows:

(*a.*) Uncontradicted allegation of verified bill (record, p. 3).

(*b.*) Uncontradicted affidavit of E. H. Harriman (record, p. 199).

(*c.*) Answer of Northern Securities Company in Government suit (193 U. S. at p. 233; present record, pp. 119 *et seq.*).

(*d.*) Answer of James J. Hill *et al.* in Government suit (193 U. S. at p. 241; present record, pp. 140 *et seq.*).

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[1] Present record, p. 299; testimony Clough, record in Govt. suit, p. 788; resolution, *ibid.*, p. 910.

[2] Present record, p. 333.

[3] *Young* v. *Grundy*, 6 Cr. 51; *Agawam Company* v. *Jordan*, 8 Wall. 583, 609; *Brown* v. *Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532; *Christensen* v. *Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61, 70.

(*e.*) Answer of J. P. Morgan *et al.* in Government suit (193 U. S. at p. 251; present record, p. 169).

(*f.*) Testimony of Mr. Hill, Mr. Morgan and Mr. Harriman, in Government suit (pp. 218, 221, 268, 290).

The proofs as to the intention to have the holding company *permanently* hold the shares of the railway companies and control their operation and management and not to act as a mere purchaser or investor were as follows:

(*a.*) Uncontradicted allegation of verified bill (record, p. 3).

(*b.*) Answer of James J. Hill *et al.* in Government suit (193 U. S. 234, 241; present record, pp. 140, 145):

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company.* It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. . . . The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of

the direction of one or both of defendant railway companies and defeat the great enterprise they had undertaken of establishing a large international and interstate traffic."

(*c.*) Answer of J. P. Morgan and Robert Bacon (latter being a director of the Securities Company) in Government suit (193 U. S. 251; present record, p. 169):

"For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with *the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time.* In or about August, 1901, as this plan was approaching maturity, *said parties* FOR SIMILAR REASONS determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire."

(*d.*) The testimony of Mr. Hill, Mr. Kennedy and Mr. Morgan in the Government suit. Thus Mr. Hill testified (present record, pp. 216, 217, 218):

"A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than

before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning *making their holding together permanent*, and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe, discussed the matter with me, going over the entire situation, the relations of the Burlington; the relations growing out of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific, and *suggested whether we should not include in our holding company our holdings in the Northern Pacific.*

Q. *And for the same purpose?*

A. *For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.*

Q. *For the purpose of unifying the interests that you had in the two roads?*

A. *Yes, sir; for the purpose of unifying the interests in each road;* because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of the shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock.

Q. Of the Northern Pacific?

A. Of the Northern Pacific, if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. . . . We wanted to put it in a corporation that was not a railroad company,—a company that would hold it as an investment, and the larger the company the more difficult it would be to secure a majority of it."

Mr. Kennedy testified (p. 219):

"Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

A. Yes, sir.

Q. *Under all circumstances?*

A. *Under all circumstances.*"

Mr. Morgan testified (p. 221):

"Q. And then you had that in your own mind to have a *holding* company for the Northern Pacific?

A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger; that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want it to go on indefnitely, and I thought the best plan was to go to some trust company. *My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

Q. *That is to hold control?*

A. *Hold control of the stock.* JUST TO SURRENDER IT TO THEM AND TAKE THEIR RECEIPT.

Q. For the purpose of keeping control in one place?

A. No; not alone to keep it in one place, but *to keep it so that the policy of the company upon which its future depended could be continued.* We didn't want convulsions going on. You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put that stock so that it could be protected—to maintain the policy of the company as it then existed.*"

Your petitioners submit that this testimony of their adversaries, wholly unexplained and unqualified by the defense, presented a *prima facie* case as to the pur-

poses and objects for which the Northern Securities Company was organized, particularly in view of the uncontradicted allegations of the verified bill. Your petitioners believed and assumed that if they thus submitted substantially the same evidence as was before this court in the Government suit and no qualification or explanation was vouchsafed by the defendants, the trial court would on such a motion regard the opinion of this court upon the identical question and evidence at least sufficient as a precedent to support a *prima facie* case and justify a preliminary injunction until the merits could be investigated on final hearing. And the trial court practically so held, without attempting to prejudge the merits by any expression of opinion until these gentlemen could be cross-examined and the proofs were ready for final submission.

There being no denial of the *fact* that a *holding* company was organized for the purposes testified to by the main promoters and that it was to permanently hold the railroad stocks and not dispose of them as an ordinary investor would be at liberty to do, the only remaining fact upon which the ruling of the majority of the Circuit Court of Appeals can possibly be sustained is that the parties persistently characterized the transaction as a *purchase* instead of a *deposit*.

The transaction in November, 1901, was undoubtedly put in the *form* of a contract of purchase and sale. The facts and surrounding circumstances, however, fixed the legal nature and effect of what the parties did and not the particular form they adopted or the

words they selected as expressing their object, view, or opinion. It may be conceded that Messrs. Hill, Morgan and associates characterized all the transactions as purchases on every occasion and in every record they made on their books, nevertheless, the courts are not blinded by mere forms or names nor thus prevented from dealing with the substance and reality of things. Evidently, Mr. Harriman at the time believed *as a matter of law* that the transaction constituted a sale, and so testified. Undoubtedly, Mr. Hill and Mr. Morgan used the word "purchase" or "exchange" and not "deposit" or "custody." But Mr. Harriman's opinion or testimony on such a point of law no more changed the nature of the transaction than did Mr. Hill's equally positive testimony in the Government suit as to the power of the Securities Company "to burn" the railroad shares (*supra*, p. 18). Indeed, if the form of the transaction—if mere names, or the language of the parties—if the recitals in all the documents could have changed the substance of the transaction, necessarily the result of the Government suit must have been different. But there, as here, and as in every case of this kind, the court has looked through the form and the phrasing of the parties, and has dealt with the substance and reality in seeking to determine the *truth*.

Moreover, *every word of Mr. Harriman's testimony was before this court in the Government suit.* The only new feature is his present affidavit, in which he candidly states that Mr. Morgan had said that the Securities Company would "purchase". A careful exam-

ination of his testimony and affidavit, however, will show that it contains nothing inconsistent with the present position as to the purposes and objects for which the Northern Securities Company was organized. The new affidavit should be read in connection with the verified bill. Mr. Harriman testified that he was acquainted with the basis upon which the company was to be organized (pp. 267, 292), and was generally cognizant of the plan of forming a securities or holding company (pp. 268, 293), and it is fair to assume that such plan was as testified to above. Among other things, he testified (pp. 293, 294):

"Q. The statement was made to me that they would put this Northern Pacific stock into a *holding* company and give us—not this Northern Pacific stock—but that they would *give us in part payment a holding company's stock* on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a *holding* company, or had formed a *holding* company, and would pay us in this stock, and that those were the terms on which it was to be bought.

Q. Did they state to you that if they took in any other stock than what you would surrender to the holding company they would take it on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

A. I don't think that statement was ever made. *It was a simple statement that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.* . . .

> All I remember is just as I have stated: A statement made to me that if this trade went through they would pay us in the shares of a holding company which would issue its stock *in exchange* for Northern Pacific at 115, and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

It is true that Mr. Harriman also testified in the evidence before this court in the Government suit that the transaction was an unconditional purchase and sale, but this was only his opinion and understanding on a question of law and was not at all in conflict or inconsistent with his now stating the facts and letting the courts determine the legal effect. Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts?[1] The proofs show that the words "pay", "payment", "purchase", "change", "exchange", were all used. Nevertheless, had Mr. Morgan's idea of making a trust company the depositary and using its *receipts* been adopted (*supra*, p. 34), instead of organizing a new company and using its certificates, or had individual trustees been selected to perform exactly the same function as the evidence in this record above quoted shows was to be performed by the *holding* company, the parties might well have used the very same words and have said that the trust company or the trustees would issue receipts in "payment" instead of "exchange," or that the trust company or trustees would "pay" depositors in

[1] *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327, 342, 343.

voting trust certificates; and yet the use of one word or phrase or another would not have affected the real nature of the transaction, or have transformed a deposit in trust into an absolute sale, or have operated to vest the absolute legal title in such custodians or depositaries, especially in view of the adjudged illegality of the transaction. This court has often pointed out, that although parties may industriously and repeatedly call a transaction what it is not, even in the most formal instruments, the words as well as the form or the name are indeed of little account and cannot obscure the truth, but that it is the legal effect of the whole transaction which is to be sought for and gathered from the acts of the parties.[1] In contemplation of law, the legal title did not pass and could not pass, whatever the intention of the parties may have been, because the whole scheme and every step in its accomplishment were in violation of a statute and hence null and void.

Your petitioners, likewise, submit that the majority of the court below was in error in assuming that the pledge by your petitioner, the Oregon Short Line Railroad Company, of the share certificates of the Northern Securities Company was in any way material upon the question of the nature and legal effect of the *holding* of the railroad stocks by the latter company. If such share certificates had on their face been in the form of mere receipts showing beneficial interests in a deposit in trust, or had there been voting trust certificates in

[1] *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 269, 280; *McGourkey* v. *The Toledo & Ohio Ry.*, 146 U. S. 536, 569.

the usual form, or trust company's receipts, as Mr. Morgan originally planned (*supra*, p. 34), the pledge by the holder as owner of such receipts or certificates would manifestly not have changed the nature of the contract of holding or tended to convert a bailment into a sale, or estopped pledgor and pledgee as against the issuing company from showing the real transaction. Paraphrasing, with all deference, Mr. Justice Brewer's language, "the organizers might just as well have" issued receipts or voting trust certificates, and the nature of the proposed holding, as contemplated by them, would not have differed in the slightest degree from the form they actually adopted to effect their purpose. Obviously, the Oregon Short Line Company became the holder and owner of the certificates the same as if they had been mere receipts, which it could pledge, transfer and assign without in any way affecting or changing the contract which those certificates or receipts might evidence, as determined by the legal effect of what the parties did and sought to accomplish.

III.

Your petitioners further show that in the court below they contended that even though the contract was on its face one of purchase and sale, nevertheless, upon the ascertainment that the object and consideration of the contract must wholly fail by reason of adjudged illegality and the legal disability of the Northern Securities Company to hold the stocks in the manner and for the objects contemplated by the parties, any depositor was entitled

to rescind and claim his property upon the abandonment of the illegal enterprise by the company. The court below, however, wholly disregarded this contention and did not decide the question thus presented.

In support of this contention, it appeared by the verified bill of complaint that the complainants had acted in good faith in the full belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the railway stocks would not be, in violation of any statute of the United States (p. 5); that it was under such belief that they refrained, pending the final determination of the suit brought by the United States, from taking any steps or instituting any proceedings for the protection of their rights in the premises (p. 5); that every person to whom the stock of the Northern Securities Company was issued, whether for shares of the railway companies or for cash, had full knowledge and information of the purposes for which the company was organized (p. 4); that the books of the Northern Securities Company would show for what purposes or consideration each outstanding certificate of stock had been issued (p. 13); that a large part of the stock of the Northern Securities Company was still held in the hands or on behalf of the original holders who exchanged the same for stock of the railway companies, and that wherever there had been any transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Securities Company so transferred to third parties could be traced and shown in and by the records and books of the company

and thus fully traced and identified (p. 13). Nevertheless, the majority opinion in the court below wholly failed to consider the effect of these allegations and the affidavits in support thereof, although the trial court discussed them and commented on the conflicting affidavits as well as the evasive statements of the defense (p. 421).

Your petitioners earnestly submit that they are seeking to prove these allegations of their verified bill of complaint and thereupon to urge that, under such circumstances, they are entitled to rescind the contract and have a return of their original property, on the ground that the contract has wholly failed of its object, that the illegal enterprise is about to be abandoned by reason of the decree in the Government suit, and that their property is held without consideration. In support of their contention, your petitioners referred the court below among other numerous authorities to the opinion of Mr. Justice Matthews, speaking for this court in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, where the following language was used:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution

or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

Yet the court below gave no consideration whatever to your petitioners' contention upon this and other points, holding, as appears by its opinion, that if the parties originally used the term "purchase" or intended a contract of purchase, whatever else might appear, that ended the controversy, notwithstanding the adjudged illegality of such contract of purchase and failure of consideration, and notwithstanding the consequent legal disability of the Securities Company to perform any of the obligations indisputably assumed by it.

IV.

Your petitioners further show that the proposed plan of distribution is in conflict with public interests and public policy, and that its probable effect will be to circumvent and defeat the intent and spirit of the decree of this court in the Government suit.

It is submitted, as a general proposition of law and public policy, that in the case of illegal trusts and combinations adjudged to be in violation of an act of Congress (particularly where, at the inception of any such enterprise, its legality is at once challenged by the National Government), justice and sound public policy will be promoted by restoring the *status quo*, and not permitting distribution on the basis of alleged rights acquired *as stockholders* under and by virtue of the illegal contract, so as primarily to put an end to the continued violation of the law, and secondarily to prevent any party from profiting or

benefiting by or through an illegal contract. Parties should not be permitted to enter into illegal trusts and combinations and hold property under illegal contracts, and, after their plans are stayed and adjudged illegal, proceed to effectuate the illegal contract of purchase to the extent of vesting title in themselves. Restore the *status quo* is all that the promoters of illegal combinations and trusts should be permitted to do. Such a rule would operate as a salutary restraint, and would deprive parties of any advantage or benefit from the unlawful acts. It would restore to each what he parted with, but deny him the right to any more. It would leave no inducement to transgress the law, and hold out no premium or profit to promoters in the formation of illegal trusts or combinations in defiance of law and inimical to the public welfare. And, as in the case at bar, it would prevent the responsible parties from being indemnified or rewarded for a violation of law.

It is submitted that this question is one of great public interest and far-reaching importance, and one likely to arise and recur constantly in connection with the dissolution of illegal combinations and trusts adjudged to be in violation of the act of Congress.

Your petitioners further show that the evil condition aimed at and sought to be eradicated by the decree in the Government suit, was the holding of the shares of two competitive railway companies "in one ownership." The vice was that such a control and ownership removed all motive, and deprived the public of all benefit, of competition in the management of the railroads. Obviously, also, if one individual or

a combination of individuals acting together are to hold a majority of the stock of two competing railroads as a result of an agreement, all incentive to competition would be removed as long as such holding continued, and any agreement which provided for, or contemplated, or brought about this result would be declared illegal, the same as the present form of combination.

Under the proposed plan of distribution, the stockholders of the Northern Securities Company will receive both kinds of stock, and as long as the majority continue to hold them, there will exist no more incentive to competition than existed while the stocks were held *for them* by the Securities Company. On the other hand, the restoration of the *status quo* would place both railway companies in a position where actual competition would be promoted. Moreover, on the *pro rata* distribution proposed, the control of a majority of the stock of both companies will probably be found vested in the very parties who, prior to the organization of the Securities Company, held Great Northern stock, and who, as Mr. Hill said in his testimony in the Government suit, would stand "without hitching" (record in Government suit, p. 62).[1]

The record shows that in 1901 Mr. Hill and his associates, then largely interested in the Great Northern Company, entered into the combination condemned by the courts for the purpose of suppressing competition between that company and the Northern Pacific Company. The railroad stocks were acquired in pursuance

[1] Record in Gov. suit, p. 62: "I said myself and friends would stand without hitching, and we did."

of that plan, and for no other purpose, and that purpose can only be defeated by completely undoing what was attempted and by separating the ownership and control of the two railways. If the original owners of Great Northern stocks, to whom a majority of the Securities Company's stock was concededly issued (viz., $211,057,600 out of a total issued capital of $395,400,000, pp. 4, 329), are now to receive a clear majority of both the Northern Pacific and the Great Northern stocks, as the plan proposes, Mr. Hill and his associates will accomplish the fundamental and essential feature of their unlawful scheme, for they will be securing and perpetuating the joint ownership, but under another form and name. The holders of a majority of Great Northern stock will then become the holders of a majority of Northern Pacific stock. *And this result, tending patently to prevent all competition, will be brought about through the medium and as a direct result of the illegal contract and in pretended compliance with the decree in the Government suit!* In other words, Mr. Hill will accomplish, through the medium of the present illegal contract, exactly what he was proceeding to do in 1895 until he was frustrated by the decision of this court in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, and exactly what he was proceeding to do in another form by means of the Northern Securities Company until he was frustrated by the decision of this court in the Government suit.

Your petitioners further show that although the stockholders of the Securities Company, who are to receive the railroad stocks when distributed, will be at liberty

to sell, they will appreciate that as long as they continue to hold both kinds of stock, the joint holdings will be much more valuable than any separate holding of only one kind of stock. The railroad stocks together are undoubtedly more valuable than the sum of the value of the separate stocks. The great body of stockholders will consult their pecuniary interests and retain both stocks, and, of course, boards of directors in the same interest will be continued. As Mr. Hill confidently asserts, they will all "stand without hitching," if he can only succeed in getting for them a majority of the stock of both companies. If they sell, the purchasers will want the joint holdings. It is possible to conceive of but two other schemes better calculated to effectuate and continue for many years the joint ownership and control in the same interest, and thus effectually remove all competition, and those are the schemes which were put an end to by the decisions of this court in the *Pearsall* case and in the Government suit.

Although one of the affidavits submitted by the Securities Company avers that Mr. Hill and those who were consulted in the formation of the Securities Company now hold only twenty-five per cent. of its stock (p. 324), the testimony was of an employee and was mere hearsay. Mr. Hill, who volunteered an affidavit, is silent on this point (p. 331). Mr. Clark, another affiant-director, is likewise silent (p. 334). So, also, is Mr. Terhune, another director (p. 341). How much stands in the names of others for the account of the original promoters does not appear. It is a well-known custom to register stock in the name of unknown and

obscure persons. Except by cross-examination of Mr. Hill and his associates, the complainants could not get at the exact truth, and all the facts ought to have been fully disclosed before the case was finally disposed of.

Your petitioners further show that, for all that the proofs disclose, ninety-nine (99) per cent. of the stock originally issued in exchange for Great Northern and Northern Pacific stock is still in the hands of original holders or held for their account. Although numerous transfers are shown, it does not appear that even one per cent. of that stock, which would amount to $4,000,000 par value, has been transferred to third parties ignorant of the illegal purpose. If one per cent., or more or less, has been transferred to third parties, it does not appear how much of that stock has become so commingled on the books of the Northern Securities Company as to be incapable of being traced. The great bulk of the stock has never changed hands, so far as the affidavits disclose.

Your petitioners, therefore, submit that they should have an opportunity to examine and cross-examine witnesses for the purpose of establishing the truth of their allegations and of enabling them to show that the proposed plan, instead of being in compliance with the decree in the Government suit and in itself equitable, is really in effect but a perpetuation of the illegal combination and unfair to your petitioners.

V.

Your petitioners further show that the learned majority of the Circuit Court of Appeals clearly erred in holding that the proposed plan of distribution was equitable because it was ratable, and they submit that if the exact result of such plan be appreciated, its want of equity will be at once manifest.

A majority of the stock of the Northern Securities Company, namely, $211,057,600 par value, was issued to Mr. Hill and the other original holders of Great Northern stock (pp. 4, 329). If the Great Northern stock is returned to them, they will get exactly what they put in, no more and no less, and will not profit or benefit by the illegal combination. If, however, they are to be entitled to over one-half of the Northern Pacific stock, they will secure a profit, *as the direct result of the illegal combination*, of $19,329,321. That is to say, the market value at $170 per share of the $118,124,200 par value Great Northern stock which they transferred is $200,811,140, whilst the market value of the Northern Pacific and Great Northern stock which they would receive on distribution *pro rata* ($82,882,319 par value of Northern Pacific stock at $135 and $63,676,077 par value of Great Northern stock at $170) would be $220,140,461, making a difference or profit of $19,329,321 resulting from the illegal combination, distributed among the promoters and original holders of the Great Northern stock or their assigns. On the other hand, the difference against the complainants, if we consider only the $71,732,062 of Northern

Pacific stock which the complainants have traced, will be $9,117,167.[1] Nevertheless, the Circuit Court of Appeals has now decided that the proposed division of these railway stocks "would effect a *ratable, and, therefore, equitable* division of them."[2]

There should also be appreciated the further fact that the Northern Pacific stock has paid in dividends 14 per cent. since November 18, 1901 (p. 201), that it is now paying at the rate of 7 per cent. per annum (p. 202), and that, so far as appears, the dividends on Northern Securities stock received by complainants are more than covered and offset by what the company has itself received on the Northern Pacific stock (p. 342).

The complainants traced and identified on the motion for an injunction at least $71,732,062 of the Northern Pacific stock which they originally owned or into which it was converted. They were offered, under the proposed plan, only $32,070,612 par value thereof, namely, forty-four per cent. of what they actually traced and identified, and instead of the remaining $39,661,450 of their Northern Pacific stock, they are offered and are to be compelled to take $24,638,919 par value of Great Northern stock. In order to maintain that the majority are to be thus entitled to deprive complainants of nearly sixty per cent. of their property and force them to take Great Northern stock against their will, the majority must necessarily assert some legal or equitable claim. Upon what legal or equitable principles are the holders of a majority of the

[1] Record, pp. 14, 416, 417.

[2] Opinion, p. 14.

Northern Securities Company's stock issued for Great Northern stock entitled to take for themselves nearly sixty per cent. of the Northern Pacific shares originally belonging to the Short Line Company? What legal or equitable right or claim can they possibly assert against the Short Line Company except under and by virtue of the illegal agreement? If they had sued to enforce distribution *pro rata*, could they have maintained their case except by grounding their claim on the illegal contract and insisting that they had acquired rights under and through that contract? Surely, the majority stockholders have no greater legal rights against the complainants than the Securities Company itself has, for they must necessarily claim under and through it.

Your petitioners submit that it is not legal or equitable that they should be compelled, as proposed by the defendant, to take $24,638,919 par value of stock of the Great Northern Railway Company, which they never owned, and thus be forced to become stockholders in that company against their will. They insist that if for any reason whatever the restoration of the *status quo* is impracticable, which they deny, then the only fair, ratable and equitable method, and the only method authorized by the laws of the state of New Jersey, is to sell all the railroad shares held by the Northern Securities Company, or such as may not be traceable, and distribute the proceeds ratably among the stockholders. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63. They assert that the original holders of one company cannot against their will be forced to become stockholders in another company, and that any such scheme is in viola-

tion of the laws of New Jersey, as charged in their bill (p. 12). Unless by virtue of the existence of a statute at the time when the stockholders' rights were acquired or fixed, your petitioners submit that no stockholder in corporation A can be compelled against his assent to become a stockholder in corporation B. Such is the settled law of New Jersey. *Kean* v. *Johnson*, 1 Stockton, 401, 408, 409; *Coler* v. *Tacoma Railway & Power Co.*, 19 Dick. 117, 125, reversed on other points, 54 Atl. Rep. 413 (not yet officially reported).

Your petitioners further show that the affidavits before the court established no possible equity in favor of Mr. Hill and his associates as against the complainants, which would justify a court of equity in handing to the former one-fourth of the Northern Pacific stock claimed in this suit; that no equity can be suggested which would commend Mr. Hill and his associates to a court of equity or entitle them to indemnity at the expense of the complainants, and that if there be parties, more than any others, who ought to be prevented from profiting by the illegal combination condemned by this court, it is Mr. Hill and his associates. Yet, the substance of the defense below was that because some speculators in the market had bought into the situation pending the suit of the Government, and in defiance of the notice then served upon the whole world, some sort of an estoppel had arisen and that Mr. Hill and his associates were to be not merely indemnified but actually rewarded at the expense of the complainants, and to be enabled to force the complainants to give up most of the Northern Pacific stock belonging to

them, and to accept in lieu thereof Great Northern stock against their will.

Your petitioners further show that, as the bill avers, all the original holders of stock of the Northern Securities Company, whether issued in exchange for the railroad stocks or for cash, had full information of the purposes for which the company was organized (p. 4), and that as to this cash stock, it appeared that on January 22, 1903, nine months after the commencement of the Government suit, the board of directors of the Securities Company ratified the sale in the open market of 59,346 shares of its capital stock, and approved a contract with Mr. James J. Hill, its president, by which he had loaned some of his own stock for the purpose of making deliveries and that the board thereupon authorized "the issuance to Mr. Hill of 59,346 shares of the stock of this company to replace the said shares so sold" (p. 393; see also p. 329). It was not until after these sales had been made that the matter was disclosed to the board. But even if the Securities Company had actually sold 75,220 shares of its stock to third parties for cash, there was not the slightest proof that this cash stock could not be traced and identified as fully as if every certificate representing it were still in the hands of Mr. Hill, nor was there any proof that the Securities Company had not sufficient assets to return the full amount of cash and interest to any *bona fide* purchasers from the company for cash. On the contrary, the bill charges specifically that there are ample surplus assets to protect the rights of such

bona fide holders (p. 14), if any there be, and the Securities Company vouchsafed no answer to this positive allegation. The failure of the defendant to furnish the facts which it alone could furnish is commented on in the opinion of the Circuit Court (p. 421), and your petitioners relied upon the elementary rule of evidence that in such a case, it is to be taken as established against the silent defendant that, had disclosure been made, the facts would have been unfavorable to him. The absent proofs, which should be present before a final determination, could come only from the defendant Securities Company and the individuals who control it, and they saw fit not to disclose them.

But your petitioners submit that even if it were not the fact that the assets of the Securities Company remaining after the return to original depositors or their assigns of the deposited railroad stocks were sufficient to enable cash and interest to be repaid for the cash stock, the trial court could require the complainants to do equity and, if necessary, reimburse *bona fide* holders of the cash stock. The Circuit Court in its opinion recognized that this might be necessary (p. 422). The complainants are quite prepared to meet and adjust any equities found in favor of the holders of this cash stock, and in their bill they have offered to do so (p. 14).

Your petitioners respectfully submit that the possible equities of less than two per cent. in interest of the holders of the outstanding stock of the Northern Securities Company (probably less than one-third of one per cent. if we eliminate Mr. Hill's holdings of cash stock),

ought not to be permitted to affect and alter the legal rights of the great body of certificate holders who have no equities as against each other. The possible equities of the cash holders, *yet to be proved*, and in any event representing so small a percentage of the interests involved, ought not to control as to the relative rights and equities of the remaining holders, particularly in the absence of the facts as to the true situation of these cash holders.

Your petitioners further show that it was contended in the courts below that it was impossible to restore the *status quo* because of alleged inextricable confusion and insuperable difficulty in tracing the origin of the outstanding certificates on the books of the Northern Securities Company. As to this, the learned trial court said that the affidavits were conflicting (p. 422) and the learned Court of Appeals has not challenged the correctness of this statement.

But, as is known to every one, stock is only issued in the names of individuals or corporations. There is no such thing in this country as a bearer certificate of stock. Every corporation keeps a stock ledger and a list of stockholders. The laws of New Jersey require this corporation to do so.[1] In addition, a set of books is kept by the transfer agent and another set of books by the registrar of transfers.[2] There are two ledgers of the Securities Company relating separately to the Great Northern and Northern Pacific stock which it acquired and now holds "showing the original de-

[1] An Act concerning Corporations (Revision of 1896), § 33.

[2] Supplemental record, pp. 17–18.

posit of the stock of the said companies."[1] Through these books, every share of stock can be traced back to the original issue, because the books must show in the case of every new certificate exactly what old certificates have been surrendered. A stock ledger is always kept in the names of the individual stockholders. No other method is known to corporate bookkeeping. We have only to be given from the books the names of original holders to enable us to trace every share issued for Northern Pacific stock, and, after eliminating that part of the issue and the stock issued for cash, the remainder will be $211,057,600 issued for Great Northern shares (pp. 4, 329). If this latter has been broken up among ten thousand holders, still the problem would not be complicated thereby, for it is obviously a simple matter to divide the Great Northern stock among such holders of Northern Securities stock at the rate of issue, and thus return exactly what their Northern Securities shares originally represented and now represent—in other words, restore the *status quo* to the original holders or their assigns as authorized by the decree in the Government suit.

Your petitioners show that it was further contended below by the defendant Securities Company as an insuperable obstacle to restoration, that there were cases where the same individual turned in and exchanged both kinds of stock in one lot and received therefor certificates for Northern Securities stock. Mr. Kahn's affidavit, on behalf of complainants, indicated that there was only one such instance, and that related to Mr. Hill's

[1] Record, p. 232.

individual holdings (p. 232). The Securities Company controverted this (p. 341). The affidavits were conflicting. But, if we were to divide among the holders of certificates so issued for holdings of both kinds of stock exactly what was received in exchange for them, we would be restoring the *status quo*, or such commingled assets might be sold and the proceeds divided. This *would not, however, in either event be vesting title derived through the illegal transaction, as is proposed in the plan of pro rata distribution.* It would simply be treating the transferees exactly as we would treat the original party who had turned in both kinds of stock. The assignee would stand *pro tanto* in the shoes of his assignor, who was the original joint holder, as fully as if he had purchased an undivided part of the original joint holding or deposit of both kinds of stock. And the same remark applies to all the cases of commingling and confusion. After identification by those who can trace and show their property, which must represent the great bulk, what remained would necessarily belong to those whose certificates could not be traced, and would be divided among them, as it would be in the ordinary case of the commingling of any kind of property belonging to different owners for which receipts had been issued, *e. g.*, warehouse or grain elevator receipts.

Your petitioners earnestly submit that it would be a travesty of justice to permit any change or commingling by transfers *after the commencement of the Government suit*, and deliberately in the face of that serious litigation, to be a reason for now permitting a different dis-

tribution than if the status, as in the case of complainants, had been maintained in good faith during the pendency of the Government suit, so as not to circumvent or defeat the final decree.

VI.

Your petitioners further show that the learned majority of the Circuit Court of Appeals did not hold that the court of original jurisdiction had abused its discretion, but, on the contrary, the majority opinion admits that there was no such abuse of discretion and that the lower court "was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained."[1] There was no claim that the verified bill of complaint failed to state a cause of action entitling the complainants to equitable relief; no one has yet ventured to suggest that the bill was demurrable; and the Securities Company has since filed an answer. Judge Bradford, sitting as Circuit Judge, held that the bill and affidavits submitted established a sufficient *prima facie* case, and, in the exercise of the discretion vested by law in the court of original jurisdiction, decided to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact presented by the verified bill.[2] The majority of

[1] Opinion, p. 1.

[2] Opinion of Gray, C. J., dissenting, p. 20.

the Circuit Court of Appeals, however, ruled that, although there had been no abuse of discretion, nevertheless the defendant was entitled to invoke an immediate adjudication of the whole controversy on the merits. It is submitted that the majority of the court below erred in their understanding of the practice of courts of equity and of the province of an appellate court in the determination of appeals from injunction orders; that an appeal from such an interlocutory order is not a hearing on the merits but is a review of the exercise of discretion by the lower court, and that the settled rule is not to reverse orders granting preliminary injunctions except in cases of abuse of discretion.

Your petitioners show that since the act of Congress authorizing an appeal from an order granting an injunction (act of March 3, 1891, sec. 7, 26 Stat. 826, 828), the rule uniformly observed by the several Circuit Courts of Appeals has been that they are only justified in reversing orders of the Circuit Courts granting preliminary injunctions when the discretion of the latter has been improperly exercised or abused. In that respect, they have followed the long settled rule of equity procedure as to the province of appellate courts, a rule which has not before been gainsaid in any court of appeals, as will appear from the following cases:

Fourth circuit: *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623, 625; *United States Gramaphone Co.* v. *Seaman*, 113 Fed. Rep. 745, 749.

Fifth circuit: *Railroad Commission of Texas* v. *J. Rosenbaum Grain Co.*, 130 Fed. Rep. 110, 111; *Massie* v. *Buck*, 128

Fed. Rep. 27, 31, 32; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924; *Workingmen's Amalgamated Council* v. *United States*, 57 Fed. Rep. 85, 86.

Sixth circuit: *Louisville Home Teleph. Co.* v. *Cumberland Teleph. & Teleg. Co.*, 111 Fed. Rep. 663, 667; *Loew Filter Co.* v. *German American Filter Co.*, 107 Fed. Rep. 949, 951; *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. Rep, 148, 153; *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. Rep. 357, 359; *Société Anonyme* v. *Allen*, 90 Fed. Rep. 815, 818; *Thompson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 Fed. Rep. 712, 730; *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472, 477; *Thompson* v. *Nelson*, 71 Fed. Rep. 339, 341; *Duplex Printing Press Co.* v. *Campbell Printing Press Co.*, 69 Fed. Rep. 250, 252.

Seventh circuit: *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, 782; *F. C. Austin Mfg. Co.* v. *American Wellworks*, 121 Fed. Rep. 76, 77; *Chickering* v. *Chickering & Sons*, 120 Fed. Rep. 69, 73; *Bartholomew* v. *Union Paper & Bag Co.*, 113 Fed. Rep. 289, 290; *City of Terre Haute* v. *Farmers Loan & Trust Co.*, 99 Fed. Rep. 838, 839; *Bradshaw* v. *Miners Bank*, 77 Fed. Rep. 932, 934.

Eighth Circuit: *Denver & R. G. Co.* v. *United States*, 124 Fed. Rep. 156, 160; *Stearns Roger Mfg. Co.* v. *Brown*, 114 Fed. Rep. 939, 941, 942; *Higginson* v. *Chicago, B. & Q. R. Co.*, 102 Fed. Rep. 197, 199; *Dimick* v. *Shaw*, 94 Fed. Rep. 266, 268; *City of Newton* v. *Levis*, 79 Fed. Rep. 715, 717.

Ninth Circuit: *Empire State, etc., Co.* v. *Bunker Hill, etc., Co.*, 121 Fed. Rep 973, 978; *Murray* v. *Bender*, 109 Fed. Rep. 585, 589; *Pacific Steam Whaling Co.* v. *Alaska Packers Assn.*, 100 Fed. Rep. 462, 463; *Southern Pac. R. Co.* v. *Earl*, 82 Fed. Rep. 690, 692.

Not only was this firmly established rule as to the province of appellate courts disregarded in the case at bar, but a new practice seems to be suggested, namely, that the trial court may properly grant an injunction and preserve the *status quo* without deciding the merits, "with the understanding that the defendant below would be entitled to invoke a complete adjudica-

tion of the entire controversy by " the appellate court.[1] This is not such a case as *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, in which the court was speaking of situations where under no aspect of the bill or any possible amendment or suggested proofs could the complainants recover. The subsequent case of *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494, clearly recognizes that if the bill be good on its face or capable " of remedy by amendment," or if " suggestion be made of further proofs upon the subject," as in the case at bar, the appellate court ought not to dismiss the bill.

It is respectfully submitted that no such procedure is sanctioned by the statute or the settled rules of courts of equity, and that such a rule would give a defendant an unfair and unwarranted advantage and completely overturn the fundamental principles upon which courts have heretofore proceeded in granting preliminary injunctions. As Mr. Chief Justice Fuller said in *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63:

> " The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on a final hearing, very few motions of that sort would be made."

In the case at bar, the complainants earnestly prayed for the opportunity of proving their case as tendered in their verified bill, according to the ordinary procedure of courts of equity, which affords litigants presenting a serious controversy the benefit of their day in

[1] Opinion, p. 2.

court on final hearing. Two judges have held that they presented a *prima facie* case. On a hearing, the complainants would have had the opportunity to cross-examine Mr. James J. Hill and the other officers of the Northern Securities Company who, on the motion, were mere *ex parte* witnesses; they could have shown that the recitals in the resolution of the board of directors of the Securities Company and the persistent use of the word "purchase" did not comport with the legal effect of the transaction; they could have submitted all the circumstances surrounding the organization of the Securities Company and their ability to trace and identify the railroad shares received not only from the complainants but from Messrs. Hill and Morgan and their associates, and they could have established that it would be inequitable to allow Messrs. Hill, Morgan and associates to divide among themselves a large part of the complainants' Northern Pacific stock and perpetuate the combination by holding in "associated" hands a majority of the stock of these two competing railroad companies and thus practically nullify the intent of the decree in the Government suit with which the latter were professing to comply.

Your petitioners respectfully submit that it was unwarranted by any rule of equity procedure to hold that the court of original jurisdiction need not pass upon the merits in such a case and that a defendant, without demurrer or answer, or any other adequate defense than *ex parte* statements, would, in the appellate court, be "entitled to invoke a complete adjudication of the entire controversy." In criticism of this new practice,

Circuit Judge Gray used the following language (opinion, p. 21):

> "That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought for a full hearing and deliberate investigation of what he had stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view of the majority of the court, that it is our duty in the case at bar to do more than conform to what seems to me the established rule of appellate courts, and merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I think that we can conform to this general rule, 'without in effect renouncing the appellate jurisdiction conferred upon us by Congress.'"

This view of the learned dissenting judge as to the province and duty of the appellate tribunal entirely coincides with the views of this court in analogous cases where attempts have heretofore been made, as here, to induce the court to assume the determination of the whole controversy without a proper adjudication by the court of first instance. In the language of Mr.

Chief Justice Taney in *Webster* v. *Cooper*, 10 How. 54, 55:

> "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other."

This language was quoted with approval by the late Mr. Justice Gray in *Jewell* v. *Knight*, 123 U. S. 426, 433. See also *Chicago, Milwaukee, &c., Ry.* v. *Tompkins*, 176 U. S. 167, 179–180.

The Circuit Court of Appeals professed to and did proceed to "a complete adjudication of the entire controversy," and "determined the same upon the merits without further delay." It is respectfully but earnestly submitted that a compulsory hearing of a cause in equity upon the merits, not upon proofs taken in the orderly and usual way but upon *ex parte* affidavits filed by the defendant controverting the allegations of the bill, is too obviously irregular and unjust to be allowed to pass into a precedent, and ought not to be sanctioned.

In the case now at bar, the Circuit Court, although satisfied that a *prima facie* case was presented, made no final decision on the merits. It considered that the cause was not ripe for final decision. It confined itself to determining the question whether an injunction should or should not be granted. Two mem-

bers of the Circuit Court of Appeals, however, proceeded to a complete determination of the controversy on the merits. The third member of the court dissented on the ground that the Circuit Court had properly exercised its discretion. The decision, therefore, of the two judges constituting the majority of the Circuit Court of Appeals, is the first and so far the only decision on the merits; and if this writ of certiorari be denied, the case at bar will be finally disposed of without giving to the complainants the benefit of any action on the merits by the court of original jurisdiction or of any appellate review or the exercise of any appellate jurisdiction. Your petitioners submit that in a cause involving the Interstate commerce clause of the Constitution, the Anti-trust Act of Congress, the meaning and effect of the decision of this court in the Government suit, and the vast interests, public and private, which are involved, it was not fitting or proper that there should have been a final determination of the cause on the present record without a hearing on pleadings and proofs according to the settled procedure of courts of equity.

Conclusion.

Your petitioners humbly conceive that it is eminently fit, proper and just that this Honorable Court should review the action of the Circuit Court of Appeals in the case at bar and itself determine the meaning and effect of its own adjudication, the legal and equitable

rights of the parties upon the dissolution of trusts and combinations adjudged by this court to have been created in violation of an act of Congress, and the province of the several Circuit Courts of Appeals on appeals from interlocutory orders granting injunctions.

The jurisdiction of this court to issue the writ of certiorari in the present case is not open to dispute. Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the power of this court extends to every case pending in a Circuit Court of Appeals and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court, and this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all these courts of appeal. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384; *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

It is submitted that, under the circumstances of the case at bar, a writ of certiorari to review the decree of the Circuit Court of Appeals "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case," and comes within the class of cases contemplated by the court in the opinion delivered by the late Mr. Justice Gray in the former of the above cited cases; and that the questions are also of such importance as to bring the case within the classes mentioned by Mr. Justice Brewer in the latter case.

A certified copy of the entire record of the case in

the Circuit Court of Appeals is presented herewith, as required by rule 37, together with nine printed copies, and a copy of this petition together with due notice of presentation has been served on the counsel for the respondent.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said suit in equity therein entitled Northern Securities Company, appellant, *versus* Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, respondents, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, 26 Stat. 826, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and just and in conformity with the said act, and that the judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners as in duty bound will ever pray, etc.

Dated January 14, 1905.

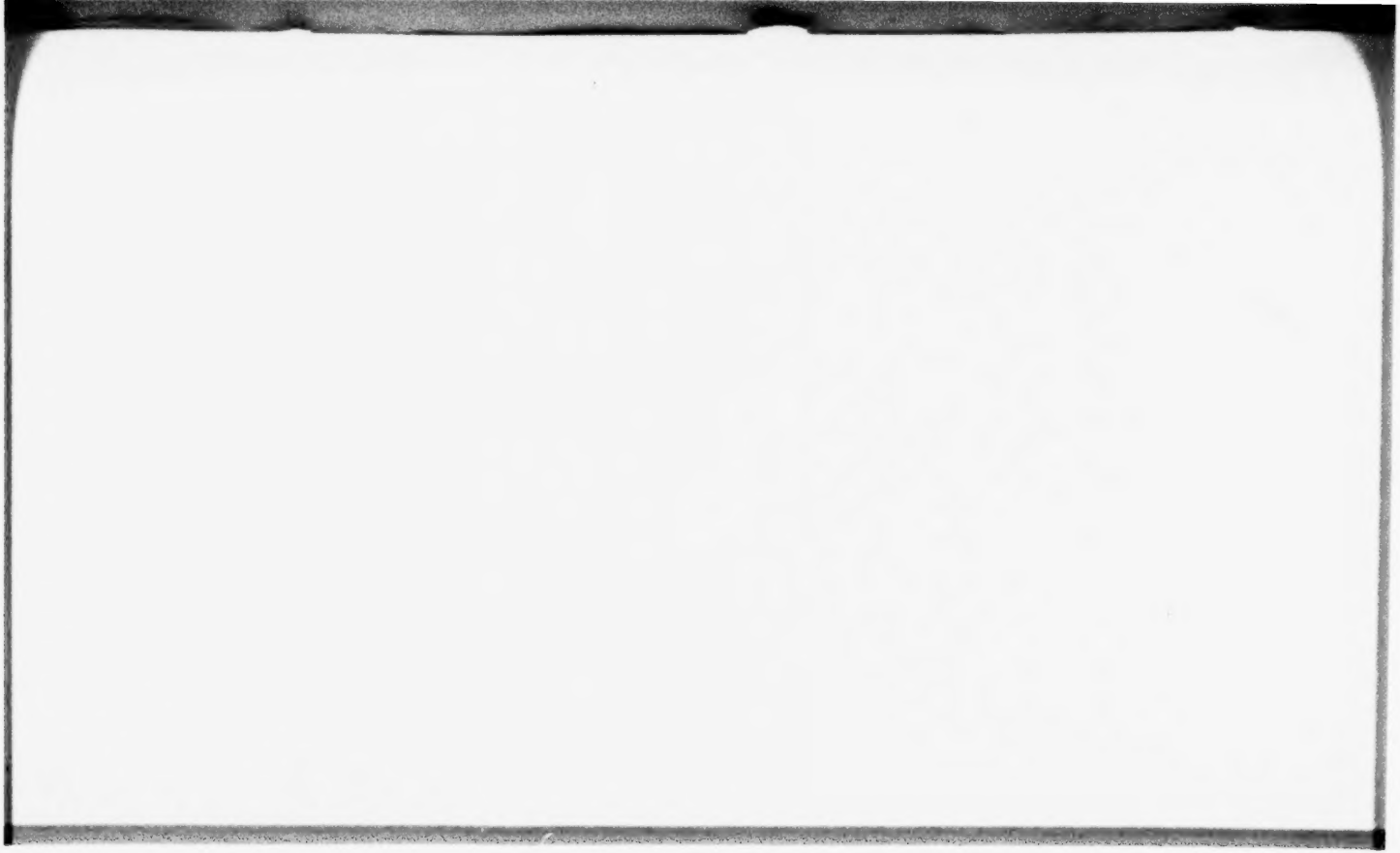
EDWARD H. HARRIMAN, WINSLOW S. PIERCE,
OREGON SHORT LINE RAILROAD COMPANY,
by W. D. CORNISH,
Vice-President,
THE EQUITABLE TRUST COMPANY OF NEW YORK,
by LAWRENCE L. GILLESPIE,
Vice-President,
Petitioners.

Certificate of Counsel.

The undersigned members of the bar of this Honorable Court and of counsel for the petitioners in the courts below, hereby certify that they have examined the foregoing petition, and that in their opinion the same is well founded, and they respectfully submit that the cause is one in which the prayer of the petition should be granted by the court.

John F. Dillon,
D. T. Watson,
R. V. Lindabury,
William D. Guthrie,
R. S. Lovett,
Maxwell Evarts,
Bainbridge Colby,

Of counsel for petitioners.



FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk.

No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(SUPPLEMENTAL TO ARGUMENT IN PETITION).

JOHN F. DILLON,
R. V. LINDABURY,
BAINBRIDGE COLBY,

WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
Of counsel for appellees.

WASHINGTON, January 23, 1905.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The following memorandum is merely supplemental to the arguments submitted in the petition, which it is deemed unnecessary to repeat. It is, however, considered advisable somewhat to amplify the discussion and points and to cite authorities to which the court may desire to be referred. This memorandum also may anticipate and cover suggestions on behalf of the respondent Northern Securities Company and, perhaps, avoid the necessity of applying for leave to file any further brief.

The following are the pages of the petition upon which the various points are presented:

1. Practical effect of the injunction order and balance of convenience (pp. 7–12).
2. The issues, evidence and decision in the Government suit (pp. 13–27).
3. The *prima facie* case presented to the court below upon uncontradicted evidence (pp. 28–40).
4. The contention that even if the question of ownership was not decided by this court in the Government suit, nevertheless, upon the termination and abandonment of the enterprise and the contemplated dissolution of the company, the petitioners were entitled to the return of their property (pp. 40–43).

5. The proposed plan tends to circumvent and evade the decree in the Government suit (pp. 43–48).
6. The inequity of permitting the original depositors of Great Northern stock now to receive, through the instrumentality of the illegal combination, a majority of the capital stock of both of the Railway Companies (pp. 49–58).
7. The practice of the Circuit Court of Appeals in proceeding to a disposition of the whole controversy upon the merits, notwithstanding that there were disputed questions of law and fact and that the court of original jurisdiction did not abuse its discretion (pp. 58–65).

I.

As to jurisdiction.

The jurisdiction of this court to issue the writ of certiorari in the present case is not open to dispute. Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the power of this court extends to every case pending in a Circuit Court of Appeals and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. This power is co-extensive with all possible necessities, and it is sufficient to secure to this court a final control over litigation in all these courts of appeal. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384; *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

The jurisdiction of the circuit court under the act of August 13, 1888, c. 866, § 1, 25 Stat. 433, was not based upon the fact that the case arose under the Constitution or laws of the United States (*Carson* v. *Dunham*, 121 U. S. 421), but was based entirely upon a contro-

versy between citizens of different states. The case therefore, is one which would be finally determined in the Circuit Court of Appeals, and consequently is within the class made subject to review by this court on certiorari.

The verified bill showed the requisite diversity of citizenship. The complainants are all citizens and residents of states (New York and Utah) other than the states of which the defendants are citizens and residents (New Jersey and Wisconsin), and the subject-matter of the controversy is the title, custody and disposition of personal property actually located within the district in the possession of the defendant Northern Securities Company (pp. 2, 6).

The eighth section of the act of Congress of March 3, 1875, 18 Stat. 470, 472, confers upon the circuit courts of the United States jurisdiction to proceed notwithstanding the absence of a non-resident defendant where the necessary diversity of citizenship exists and the suit is brought to enforce a "legal or equitable lien upon or claim to . . . personal property within the district where such suit is brought." The statute provides that if the non-resident defendant be not found within the district, "or shall not voluntarily appear thereto," an order for substituted service may be made. In the case at bar, such an order was made on the 26th day of April, 1904 (supp. trans., pp. 1–2), and the defendant Northern Pacific Company was duly served under such order, as appears by the proofs filed at the time in the clerk's office (*ib.*, p. 2). The certificates of stock in controversy are within the dis-

trict of New Jersey in the possession of the Securities Company, and the claims of the complainants thereto can be determined without affecting any rights of the Northern Pacific Company. The case is clearly a proper one for substituted service under the statute. *Merritt* v. *American Steel Barge Co.*, 79 Fed. Rep. 228, 235; *Ryan* v. *Seaboard Railroad Co.*, 83 Fed. Rep. 889, 890; *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 197; *Puget Sound Nat. Bank* v. *Mather*, 60 Minn. 362, 363. Moreover, it was not suggested to the Circuit Court that the Northern Pacific Company had not been duly served, although counsel declined to appear for it. The denial of the fact of due service on the Northern Pacific Company appeared for the first time on appeal and then only in the assignment of errors in the Circuit Court of Appeals (p. 430).

As to the jurisdiction of a court of equity, it appeared that there was no plain, adequate and complete remedy at law. The bill alleged that all the Northern Pacific stock claimed by the complainants is now registered in the name of the Northern Securities Company and that it holds the certificates in its possession (p. 6). There is no procedure or machinery at law to compel the Securities Company to execute the necessary transfers. A decree of a court of equity acting *in personam* is indispensable for that purpose. A writ of replevin would afford no adequate or complete remedy, for it would leave a resort to equity still necessary to perfect the legal title. The threatened distribution of the complainants' stock among 2,531 persons (p. 329) must necessarily produce irreparable injury to the com-

plainants if they be finally adjudged to be entitled to the stock, and would obviously involve a multiplicity of suits to recover the property.

II.

AS TO THE EFFECT OF THE ST. PAUL DECISION (128 FED. REP. 808.)

The petitioners, before instituting any independent suit, applied to the Circuit Court of Minnesota for leave to intervene at the foot of the decree in the Government suit. They conceived this to be proper in view of the opinion of this court and the express provision in its mandate that the decree "is hereby affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require" (record, p. 236; 193 U. S. 360). The Circuit Court, however, refused to grant leave to intervene notwithstanding the express power "to proceed in the execution of its decree as the circumstances may require," and evidently assumed that nothing further needed to be done so far as the Government was concerned, and that the petitioners should be remitted to a new suit in a proper tribunal, saying (128 Fed. Rep. 808, 813):

> "If it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, *these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and*

equity which any court having general common law and equity powers is competent to enforce."

The court, therefore, clearly did not intend to pass upon or even to consider the controverted questions of fact and law presented by the petition and affidavits. Circuit Judge Dallas says in the opinion of the court below that "the ground of that application was substantially the same as that upon which this bill is founded" (opinion, p. 15). Assuming this to be true for argument's sake, the learned judge quite overlooked the fact that Circuit Judge Thayer, speaking for the Circuit Court composed of *four* Circuit Judges, did not pass upon the questions of fact then presented or decide the merits. On the contrary, the language of Circuit Judge Thayer was as follows (at p. 811):

> "But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be *entitled to litigate*, and with witnesses and evidence after leave to intervene had been granted, and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone."

The refusal of leave to intervene was discretionary and not appealable (*Credits Commutation Co.* v. *United States*, 177 U. S. 311), and in refusing leave the Circuit Court of Minnesota was not attempting and did not intend to prejudge or prejudice the merits of a controversy which it declined to consider or decide. And yet, though that court distinctly and unequivocally declared that the petitioners "would be entitled to litigate and with witnesses and evidence" the questions involved on the merits, and declined to consider the

proofs upon those questions, nevertheless that disposition and *refusal to adjudge* is now urged as a *decision* on the merits. It is most earnestly submitted that the Circuit Court of Minnesota never for a moment conceived it possible that any court would interpret its opinion in such a way as to dispense with any further "litigation with witnesses and evidence" upon the questions which the *four* Circuit Judges then declined to decide. If the Circuit Court at St. Paul had considered the disputed facts, undoubtedly it would have ruled that there were "disputed and debatable questions of fact *which the parties would be entitled to litigate and with witnesses and evidence*," and that until such questions of fact had been investigated and litigated the *status quo* ought to be maintained. It would also have considered the opinion of this court as conclusive upon any material question discussed by it.

Mr. Justice Gray said, speaking for this court in *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. . . . The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate."

It is quite true that the application of the petitioners to the Circuit Court of Minnesota was opposed by the Attorney-General of the United States because, perhaps, he conceived that it would be importing into the Government suit the subject-matter of a private litigation. The Attorney-General, however, it is humbly conceived, may have been in error. It ought surely to be a matter of profound concern to the Government that the directors of the Northern Securities Company were charged on verified petition with acts tending to circumvent and evade the solemn decree of the Supreme Court of the United States. The charge then made under oath was that the promoters of the Northern Securities Company were deliberately attempting to circumvent and evade the decree of this court while professing to be "fully and unreservedly and without delay complying" with it. The four Circuit Judges said that the "parties would be entitled to litigate" this question. Indeed, no question more deeply affecting the public interests could ever have been presented. The charge made and the issue tendered went to the very fundamentals of our system of government: it involved, in a word, the great question whether the managers of these enormous corporations could, in defiance of the law, proceed to render the decree of the Supreme Court of the United States a mere *brutum fulmen*, under cover of which they would nevertheless accomplish their original illegal purposes.

III.

AS TO THE RULE IN REGARD TO APPEALS FROM ORDERS GRANTING PRELIMINARY INJUNCTIONS.

The *four* Circuit Judges in Minnesota concurred in declaring that there were "disputed and debatable questions of fact which the parties would be *entitled to litigate and with witnesses and evidence.*" District Judge Bradford, sitting as Circuit Judge, held that there were controverted questions of fact which ought to be investigated and grave and difficult questions of law to be solved before the rights of the parties should be finally adjudicated. Circuit Judge Gray concurs fully in that view and conceives it unjust to irrevocably dispose of the litigation until there has been such a judicial investigation. We thus have the declaration of *six* judges that the complainants were entitled to litigate the questions presented in good faith by their bill, and the declaration of only two judges to the effect that the complainants are not entitled to litigate those questions, but that the controversy should be disposed of at once without considering more than one of the points presented, and that, too, a point not even mentioned by Judge Thayer or Judge Bradford.

The Circuit Court of New Jersey, after an examination of the affidavits and documents submitted on both sides, held that a *prima facie* case had been made out, and determined to exercise its discretion in favor of granting a preliminary injunction for the purpose of preserving the *status quo* until the question of right between the parties could be decided on final hearing. It seemed to the court that this action would

be eminently proper, fair and just in view of all the circumstances of this case, because the controversy fell within the established rule of courts of equity to preserve and maintain the existing condition of affairs whenever the ultimate questions of law or fact are grave and difficult and the injury to the moving party would be irreparable if the injunction were refused, particularly where a bond would cover all possible damages the defendant might sustain by reason of the injunction. Hence, the court decided that the complainants were entitled to have the controverted questions of fact and law investigated and determined upon pleadings and proofs according to the ordinary procedure of courts of equity and to be accorded their day in court on final hearing for that purpose. It undoubtedly conceived that it would be unjust to the parties and unwarranted by the rules governing the exercise of its discretion to decide the merits upon an incomplete case and *ex parte* affidavits, which might prejudice one side or the other and operate to prejudge a controversy in the absence of all the facts.

The propriety of granting the order might well be rested upon the following lucid statement of the Circuit Court (record, p. 409):

> " The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. *On the face of the bill it is evident* that the final decision necessarily will involve the consideration of *grave, novel and delicate questions of law.* On the presentation of their arguments for and

against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or inconvenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction

usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting."

The Circuit Court did not decide the merits of the case; on the contrary, it carefully refrained from passing upon the questions involved in view of their gravity and of the necessity for first ascertaining the

facts. This course evidently commended itself as being fair and just to the defendant. Nor was the court required under the settled practice of courts of equity to hold that the complainants were clearly entitled to a final decree in their favor, for this would turn every motion for a preliminary injunction into a final hearing and adjudication on the merits. The conclusion reached, manifestly after a painstaking examination of the papers submitted, was that it would be in the highest degree unjust to permit the directors of the Northern Securities Company, Mr. Hill and his associates, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the action by distributing to third parties beyond recovery the stock involved in this suit, and denude the company of ninety-nine per cent. of its assets before the controversy could be investigated according to the ordinary procedure with the right to examine and cross-examine witnesses, which the experience of centuries has shown to be best calculated for the ascertainment of the truth. Such a scattering over the world of the subject matter of a litigation might result in a complete failure of justice. It is, therefore, not at all surprising that *the learned majority of the Circuit Court of Appeals conceded that the court below had not abused its discretion.*

The practice of granting an injunction under such circumstances to stay a threatened disposition of property *pendente lite*, which, if not restrained, would render a final judgment wholly ineffectual, is well settled. In such a case, even though the complainant's right may be doubtful, courts of equity seldom refuse to preserve

the *status quo*, and never where any possible damage to the defendant can reasonably be covered by a bond, and the effect of a refusal would be irretrievable. The complainants, in the case at bar, gave a bond in the penal sum of two million dollars, to cover all possible damages; the sufficiency thereof was not questioned, and the responsibility of the sureties was admitted (pp. 424–426). That bond can be increased if delay or other circumstances shall so require.

In addition to the authorities cited in the opinion of the Circuit Court (pp. 410–413) and in the petition (p. 59) upon the practice in equity to grant a preliminary injunction to maintain the *status quo*, reference may be had to the following cases, although the citation of further authorities ought to be unnecessary in support of a proposition so universally recognized by the courts. *Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 120 Fed. Rep. 981, 984, 985; *Cartersville L. & P. Co.* v. *Mayor, &c., of City of Cartersville*, 114 Fed. Rep. 699, 700; *Utah N. & C. R. Co.* v. *Utah, &c., Ry. Co.*, 110 Fed. Rep. 879, 893; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *United States* v. *Duluth*, 1 Dillon, 469, 474; *Andrae* v. *Redfield*, 12 Blatch. 407, 425; *Charles* v. *City of Marion*, 98 Fed. Rep. 166, 168; *New Memphis Gas & Light Co.* v. *City of Memphis*, 72 Fed. Rep. 952, 953–954; *Jensen* v. *Norton*, 64 Fed. Rep. 662, 664.

As to the balance of convenience and comparative injury, which a court of equity always considers in such cases (*Russell* v. *Farley*, 105 U. S. 433, 438), it is proper to repeat and emphasize the fact that if the

Northern Securities Company distributes the Northern Pacific shares claimed by the complainants as it proposes to do prior to final hearing, and the complainants should ultimately prevail, the final judgment prayed for would be rendered wholly ineffectual and success would be utterly barren.

The argument urged on behalf of the Securities Company in the courts below was that it would work a great hardship to tie up over $300,000,000 of property belonging to over 2,500 stockholders pending the ascertainment of the rights of the complainants in the orderly method usually pursued by courts of justice, and that the delay would embarrass Mr. Hill and his associates and numerous other stockholders anxious to get their *pro rata* share of the assets and to receive income therefrom. No proof was offered showing the existence of any case of particular hardship or showing that the bond given would not cover all possible loss.

It is important to bear in mind, upon this question of comparative inconvenience and injury, that the injunction order simply restrained the transfer and distribution of 717,320 shares of the capital stock of the Northern Pacific Company (p. 423), which is 396,614 shares more than complainants are offered by defendant; and that the order does not prevent the transfer or distribution of the remaining Northern Pacific stock, constituting a majority of the entire outstanding issue (nearly 54 per cent.), nor does it prevent or affect in the slightest degree the distribution of the Great Northern stock held by the Securities Company.

There was no reason, *so far as the order appealed*

from was concerned, why the full amount of Great Northern stock proposed to be distributed among assenting holders, and nearly fifty-five per cent. of all the Northern Pacific stock held by the Northern Securities Company, should not have been at once distributed among the stockholders who were desirous of having a *pro rata* distribution instead of receiving back what their certificates represented. There is no objection to the assenting stockholders of the Securities Company agreeing to any division or distribution among themselves that they may deem proper provided it does not involve taking the Northern Pacific stock belonging to the complainants and distributing it among third parties, and does not tend to evade the decree in the Government suit.

It was also urged that it would be unfair and inequitable to decree restitution as to the complainants and permit distribution *pro rata* as to all the other stockholders. If all the assenting stockholders desire distribution *pro rata* of the railroad stocks in which they are interested and which their certificates represent, what reason is there why they should not have it at once as to the stock they own, namely, all of the Great Northern and fifty-five per cent. of the Northern Pacific stock? Such a distribution among the assenting stockholders according to their wishes would be practically the same as if the stock were now restored to the original depositors or their assigns as authorized by the decree in the Government suit, and thereupon the holders had independently *agreed* among themselves to a distribution *pro rata*,

although such an agreement would be illegal if shown to be a mere cover to perpetuate the joint control and holdings. But, however this may be, the gist of the controversy is not as to the right of assenting stockholders to distribute property which they own in any way they see fit to agree upon, but whether the majority can compel the complainants to surrender their certificates of Northern Securities stock, and take Great Northern shares which they never owned and become stockholders in that company against their will, with consequent possible personal liability, and also compel them to abandon all claim to their Northern Pacific stock as original depositors thereof.

Instead of declaring a dividend of all the stock of each railway company on hand, as is now proposed, there can be a dividend of these shares to the amount of $93,485,281 par value of Great Northern stock and $82,027,338 par value of Northern Pacific stock. This would distribute a majority of both stocks. Such a dividend would enable the assenting stockholders of the Securities Company promptly to receive three-fourths in value of their property, and leave the remainder to be distributed hereafter in case it shall be found that the claim of the complainants is not tenable. This is a perfectly practicable and business-like method, and nothing in the injunction order prevents it. The dividend would be of exactly the same amount now proposed to be distributed in Great Northern stock, namely, $30.17 par value for each share of Northern Securities stock reduced or surrendered (pp. 11, 193),

and more than one-half of the Northern Pacific stock now proposed to be distributed. Each stockholder could then receive a certificate entitling him to a further dividend when this controversy has been finally determined. If the final result were in favor of the complainants, then the reserved twenty per cent. of Great Northern stock would be distributed *pro rata* among the assenting stockholders as a further dividend, and the reserved Northern Pacific stock delivered to the complainants. If, however, the result were in favor of the Securities Company, then the reserved Northern Pacific stock would be distributed *pro rata* among the stockholders, and the reserved Great Northern stock turned over to the Oregon Short Line Company.

In order to demonstrate how easily this can be done, the figures may be tabulated:

Amount of Northern Pacific stock held by Northern Securities Company	$153,759,400
Amount which Oregon Short Line has identified and traced	71,732,062
Leaving for distribution among assenting shareholders	$82,027,338
Amount of stock of Great Northern Railway Company held by Northern Securities Company	$118,124,200
Amount apportionable to Oregon Short Line on proposed distribution *pro rata*	24,638,919
Leaving for immediate distribution among assenting shareholders, in which the complainants have no interest whatever under any theory	$93,485,281

The necessary operation of the preliminary injunction *so far as it injures the defendant*, is only to tie up *pendente lite* $39,661,450 of Northern Pacific stock, in addition to the $32,070,612 par value thereof which the

complainants are offered under the Hill plan of division. This represents only about eleven per cent. of the value of the property of the Securities Company. Six months' dividends at 7 per cent. on this amount would represent $1,388,149, which would only be *delayed* in payment and not otherwise jeopardized, while the bond given by complainants was $2,000,000 (p. 202). The only real damage would be six per cent. on the delayed payment.

IV.

Effect of the decision in the Government suit.

In view of the fact that the present suit indisputably arises out of the condition of affairs created by the decree in the Government suit, and in view of the fact that the proposed plan of distribution is alleged by the directors of the Northern Securities Company to be *necessary* in order to comply with that decree, it seems extraordinary that the Circuit Court of Appeals should have held that such decree nevertheless constituted neither *res adjudicata* nor even a controlling judicial precedent upon any question relating to such distribution. The position of that court seems to be that when the Northern Securities Company is sued by one of its original depositors who was also an original stockholder and *cestui que trust*, it is not estopped from denying the points decided in the prior case, and that any controversy arising on a distribution said to be necessary in order to comply with the decree in the Government suit is to be determined as if such decree had never been rendered.

That the present threatened action of the Securities

Company is claimed by it to be *necessary* in order to comply with the decree in the Government suit was admitted. Thus, the directors of the Securities Company in the resolutions of March 22, 1904, declared that (p. 11)—

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay; . . .
>
> "Resolved, In consideration of the premises it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with said reduction, *to distribute among its shareholders*, the shares of capital stock of said railway companies held by it."

And this was supplemented by the declaration in the circular to the stockholders as follows (p. 193):

> "Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company and *to distribute* to its shareholders the shares of stock of said railway companies now held by it."

The precise question which was presented below was whether the decree in the Government suit was sufficient to sustain the complainants' *prima facie* case on a motion for a preliminary injunction. The subject-matter of the litigation, the railway shares, was the same. The present controversy was the result of the decree in that suit. The effect of the decree was to create the present situation. The defendant was professing to *comply* with that decree, and was asserting that the abandonment of the whole enterprise was rendered *necessary* by that decree. The issues tendered by the

bill of complaint in both cases were in many respects the same. And the present complainants, as stockholders of the Securities Company and as *cestuis que trustent*, were identified in interest with it in the Government suit. As stockholders, they were not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property and sources of income. As depositors, they would be represented by their custodian, agent, or trustee as to its right to hold and the legality of its custodianship. The rule is elementary that all identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit were not *res adjudicata* in the strict technical sense, it undoubtedly should have been regarded as a judicial precedent on the same facts sufficient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep. 663, 664; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924.

It is well settled that a stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. His stock may not be fully paid-up, but nevertheless he is a stockholder so long as he stands registered as such on the books of the company. The real parties in

interest behind the corporations are always the stockholders. Thus, if a corporation has been adjudged insolvent in legal proceedings, this adjudication of its status is binding upon every stockholder, for reasons quite applicable to the question now being considered. In *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 59, Mr. Justice Swayne, delivering the opinion of the court, said:

> "As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510."

See, also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, Fifth ed., sec. 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006, 1007; *Secor* v. *Singleton*, 41 Fed. Rep. 725.

Moreover, the Securities Company, as a custodian or

trustee of the railway shares deposited with it, represented the complainant Oregon Short Line Company as one of the *cestuis que trustent*. It is a familiar rule that in suits respecting trust property, all the *cestuis que trustent* are fully represented by the trustee and bound by the decree. The reason is that, through the trustee, their rights are deemed to have been fully and effectually presented and protected.

As this court said, speaking through Mr. Chief Justice Waite in *Kerrison, Assignee*, v. *Stewart*, 93 U. S. 155, 160:

> "In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

See also *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508, and *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40–41.

But aside from the settled doctrine that a corporation in such a suit represents its stockholders or constituent members and that when it is bound as to a matter affecting its status or condition or powers, they are bound, and aside also from the view that the company was a trustee for the railway stockholders, the Government in its bill of complaint expressly nominated the defendants Morgan, Bacon, Baker and Lamont as representatives of the class to which the complainant Oregon Short Line Railroad Company belongs, namely, those original holders of Northern Pacific stock who

became parties to the illegal combination (transcript, p. 81; 193 U. S. 202).

The procedure of the Government in thus naming part of the class to represent and bind the whole was based upon the settled practice in equity recognized by this court in the case of *Smith* v. *Swormstedt*, 16 How. 288, 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

It is well settled that the extent and effect of the decision of any court, as *res adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the arguments of counsel when-

ever necessary in order to determine exactly what points the court has ruled upon. The long-settled rule is that every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal, or qualification of the decree below. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 690; *In re Sanford Fork and Tool Co., Petitioner*, 160 U. S. 247, 256; *In re Potts, Petitioner*, 166 U. S. 263, 265; *Baker* v. *Cummings*, 181 U. S. 117, 126; *National Foundry Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234.

And, as Mr. Justice Harlan said in the Government suit in reference to propositions concluded by prior decisions of the court under the Sherman Anti-trust Act (193 U. S. 332):

> "They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties."

See also *Railroad Company* v. *Schutte*, 103 U. S. 118, 143.

In the case at bar, notwithstanding the fact that the decree on its face adjudged that *all* of the stock of the Northern Pacific and Great Northern Railway Companies *claimed* to be *owned* and held by the

Securities Company was acquired and was held by virtue of an unlawful combination or conspiracy in violation of an act of Congress (pp. 190–191), it has now been held, as the petition fully shows, that the Northern Pacific stock delivered to the Securities Company by the complainants Harriman and Pierce was acquired and is held under an unconditional and valid contract of purchase and sale. And, for the very purpose of establishing this fact, directly contradicting the decree in the Government suit, the Northern Securities Company submitted to the court below extracts from the testimony in that suit and repeated below the arguments addressed to this court in the prior suit, as is fully shown in the petition filed herewith, and the statement need not be here repeated.

The inquiry is not whether this court could have disposed of the Government suit without ruling upon any other questions than those expressly found or disposed of in the decree of the Circuit Court of Minnesota. Obviously, there could have been a decision affirming without opinion or upon the opinion of the court below, and the court could thus have avoided the express *decision* of any other issue or question involved in the case. But the court did not see fit to adopt that course. It proceeded to consider, discuss and pass upon a number of questions not specifically mentioned in the decree or opinion of the court below although *involved in its ultimate decision*. The inquiry, therefore, is whether the parts of the opinion now challenged as *obiter dicta*, and consequently to be disregarded, were or were not beyond and outside of

the case—were or were not within the issues submitted for decision—were or were not properly presented, fully argued and actually decided. If those parts of the opinion ruled upon material questions within the issues, properly presented and fully argued, they are as conclusive and binding as if the findings were expressly recited in the decree. *Railroad Company* v. *Schutte*, 103 U. S. 118, 143. The petition for a writ of certiorari (pp. 13–40) fully sets forth and shows that the question of ownership and custody was then in issue, was fully argued, and was expressly passed upon by this court.

V.

As to the complainants' right to recover.

The Northern Securities Company was indisputably organized for the purpose of carrying into effect the illegal combination entered into by Messrs. Hill and associates, and the Northern Pacific stock involved in the case at bar is held solely by virtue of such illegal combination, in violation of an act of Congress. The purposes and undertakings of the Securities Company, as the instrument of this illegal combination, were still executory when the decree in the Government suit was rendered, and the directors have now determined to abandon the enterprise and to "fully and unreservedly and without delay" comply with the decree in the Government suit (pp. 11, 193), and the company "contemplates a speedy dissolution" (p. 202).

Stated in its final analysis, the case is one where property is held under and by virtue of an illegal con-

tract in violation of an act of Congress, which the parties entered into in the "full belief" that they were not transgressing the law (record, p. 5), where the end, object and purpose of the contract cannot be continued and the enterprise must be abandoned, and is being abandoned, and where the consideration for the transfer —based upon the assumed power and authority of the corporation to permanently hold—has utterly failed.

Under such circumstances, has the vendor the right to disaffirm the illegal contract and demand the return of his property; or may the corporation treat the illegal contract as valid for the purpose of securing absolute ownership in itself and thus enable it to dispose of the property and enjoy the fruits of the transaction, as fully as if the contract had been lawful and valid and the acquisition and continued holding of the property were not in violation of law, and as if the consideration of the contract had not failed?

In the decree in the Government suit, the court dealt with all the consequences of the illegal contract and expressly authorized the *return* and transfer "*to the stockholders* of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively," of "any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore *received from such stockholders in exchange* for its own stock."[1] The court did not authorize any division *pro rata*, but the return to the stockholders of the railway companies (including necessarily the complainants) of the same railroad stocks "*received*

[1] Record, p. 191.

from such stockholders." The courts had all the facts before them, and the express permission or sanction in the decree is a part of the adjudication by both courts. Permissive in its language, this provision of the decree was nevertheless the *judicial* action of the courts and not a *brutum fulmen* signifying nothing. Both courts evidently deemed it necessary to make some provision upon the subject. It is submitted that the effect of this provision of the decree was to eliminate from controversy in the present suit the contention on the part of the Securities Company that the complainants were not entitled to the return of the stock *received* from them by the Securities Company, "*in exchange* for its own stock," provided such return was practicable, as the petitioners averred and sought to prove.

The general rule governing cases, where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, is stated by Mr. Justice Matthews, speaking for the Supreme Court, in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, as follows:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel

restitution or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

It ought not to be necessary to argue that the present suit is in no sense whatever an action *on* an illegal contract or to enforce an illegal agreement. On the contrary, it is brought on the repudiation thereof by both parties. As Mr. Justice Holmes said, speaking for the court in the recent case of *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "Cases where the action is on the illegal contract do not apply. . . . Here the attempt is to recover outside of it, treating it as set aside. . . . But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract."

In contemplation of law, the original contract, being for an illegal purpose, could not confer rights of ownership; and the corporation had no legal right or power to make any such acquisition for the illegal purposes. The whole transaction was illegal and *ultra vires*. The agreement actually entered into having failed because of illegality and lack of corporate authority, the only contract in the case is the one implied by law to return property transferred by virtue of a contract entered into under a mutual mistake of law for a purpose which has wholly failed and is being abandoned. The law implies that when property is transferred for a purpose which has been terminated, prevented or abandoned, the holder will return the property on demand. It is that implied contract which the complainants seek to enforce, and by virtue of which they seek to recover their property. It is the defendant

Securities Company which, by denying the right to reclaim the property and refusing to return it, is now relying upon the illegal contract and seeking to obtain a benefit thereunder and thus *pro tanto* to give it force and effect.

As Chief Justice Waite said in *Louisiana* v. *Wood*, 102 U. S. 294, 299:

> "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

If, in such a case, the courts were to refuse to permit a restoration of the *status quo*, obviously they would be giving sanction and continued effect to the illegal contract. As Mr. Justice Blatchford said in *Parkersburg* v. *Brown*, 106 U. S. 487, 503:

> "*To deny a remedy to reclaim it, is to give effect to the illegal contract.*"

See also *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181, 185–186; *La Caussade* v. *White*, 7 D. & E. 535.

No precedents in support of the right to recover could be stronger than the series of decisions in the long controversy between the Pullman Palace Car Company and the Central Transportation Company, where, although the contract was illegal and the parties *in pari delicto*, return of the property delivered under an illegal

lease or its value, was ultimately decreed (139 U. S. 24; 65 Fed. Rep. 158; 171 U. S. 138).

The Securities Company, however, contended below that the avowed and conceded illegality of the acquisition of the railroad stocks precluded recovery in the case at bar, and, in effect, that it might retain all the railroad stocks without accountability to any party who was privy to the illegal contract. The case of *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, was cited and relied on as a controlling authority in support of this proposition. The perusal of the opinion in that case will show that the lessee had duly paid rent from time to time for seventeen years and that it was continuing to perform all its obligations under the lease. The lessee had not abandoned or refused to perform the illegal lease, which was for the term of 999 years. The illegality had not been terminated, either voluntarily by abandonment, or involuntarily in obedience to a decree of court. Differentiating the case from such as the case at bar, this court in its opinion distinctly recognized the right to recover upon the abandonment of an unlawful contract and the termination of its illegal purpose. Thus at page 409, Mr. Justice Gray said:

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* vs. *Townsend*, 139 U. S. 67, and cases there cited."

There is nothing in the *Terre Haute* case as authority for the proposition that, upon the abandonment or

termination of an illegal contract,—in that case an illegal lease—the owner of the property was not entitled to its return and could not sue for its recovery. Had the term of the lease in that case expired, or had it been terminated or abandoned, or had the lessee refused to perform, there can be no doubt that the right of the lessor to recover the leased property would have been recognized, as in the *Pullman* cases.

The defense that a lessee could retain the leased property by pleading illegality, after the illegal lease had come to an end on the expiration of the time fixed by the parties, was interposed in the case of *Sittel* v. *Wright*, 122 Fed. Rep. 434, 435, but Sanborn, C. J., speaking for the Circuit Court of Appeals, Eighth Circuit, used the following language:

> "The third paragraph of the defendants' answer, in addition to the allegation that the lease was in violation of the laws of the Indian Territory, alleges the lease was made by an agent of the Choctaw Coal & Railway Company without its authority, and from that fact deduces the extraordinary conclusion that the corporation, or its assignees or lessees, have acquired good right to keep the plaintiff's property. SUCH A DEFENSE DOES NOT MERIT SERIOUS CONSIDERATION."

The same question arose in the case of *Manchester, etc., R. R. Co.* v. *Concord R. R. Co.*, 66 N. H. 100. The plaintiff and defendant railroad companies operated competing lines, and entered into a contract whereby the defendant acquired and operated the properties of the plaintiff together with its own property as one line in violation of an anti-monopoly statute of the state of New Hampshire. The term of the contract having expired, the plaintiff instituted

a suit in equity against the defendant for a return of its properties, for an accounting of the proceeds of the use thereof, and for the determination and adjustment of the respective rights of the parties (similar in this respect to the *Pullman* cases, *supra*). The defendant pleaded in bar the illegality of the transaction under which the property of the plaintiff had been held and operated by it. The plaintiff demurred to this plea, and the demurrer was sustained. The court, by Blodgett, J., after holding that the contract was prohibited and void and no right of action could be founded upon it, said (p. 131):

> "Nevertheless, we do not think the defendants are entitled to retain the money or other property so acquired, and for which they have rendered no corresponding equivalent to the plaintiffs in return, but on the contrary, we are of opinion that it is their duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding."

And again (p. 133):

> "Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associates, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain.'"

This New Hampshire case was cited among others by this court in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, in support of the proposition that—

> "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

It is submitted that, in the nature of things, there is no difference in principle between the termination of an illegal contract by its own limitation and the termination by judicial decree or by repudiation or compulsory abandonment. The essential thing is that the illegality has come to an end.

The Northern Securities Company, it is true, contends that it has not abandoned or terminated or refused to perform the illegal contract and that, therefore, the case does not fall within the exception recognized by Mr. Justice Gray in the *Terre Haute* case. But it is difficult to perceive any merit in this contention in view of the proofs, which establish beyond question that the Securities Company was organized as a *holding* company to *permanently* hold the railroad stocks, that concededly it cannot continue so to do, and that it is about to "divest" itself of the same, and that it "contemplates a speedy dissolution."

The proposed plan of distribution is incontestably an abandonment of the illegal combination. The Securities Company reduces its capital stock exactly to the extent necessary to "divest itself" of all the shares of stock of the railway companies acquired and held by virtue of the illegal contract. It declares its purpose to speedily dissolve because of the decree in the Govern-

ment suit. It proposes to call in and cancel every certificate outstanding which in any way represents its holdings of railway shares and to retain only the assets which were in no way involved in the Government suit. A more complete abandonment or repudiation of the illegal combination and holding and of the purpose for which the stock was transferred cannot be conceived.

What did the directors really mean when they adopted the resolution of March 22, 1904, if they were not about to abandon and terminate the illegal combination? Let us read the resolution they adopted (p. 11):

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay; . . .
>
> "Resolved, In consideration of the premises it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it."

And their circular to the stockholders was to the same effect (p. 193):

> "Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the company and to distribute to its shareholders the shares of stock of said railway companies now held by it."

What did Mr. Hill, as president of the Securities Company, mean by his letter to the Attorney-General if the company did not intend to abandon the illegal combination? His language was as follows (p. 202):

> "The decree of the Circuit Court of Minnesota having been affirmed by the Supreme Court of the

United States, the Northern Securities Company, without question or delay, will comply therewith. In order that there may be no room for misleading or untruthful reports, we deem it advisable to state to you this fact. The Company contemplates a speedy dissolution; but it is deemed by the Directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders.

"I enclose a copy of the resolutions which have been passed by the Board. Without delay, after the stockholders have acted, the capital stock will be so reduced as to permit a distribution of the railway shares amongst the stockholders of the Northern Securities Company in the only way feasible, in the judgment of the Board. The method of distribution proposed by the Board of Directors will accomplish the purpose of the Government, and will preserve the equitable rights of all the stockholders as amongst themselves."

It is submitted as almost preposterous to expect any court to hold, on this showing, that the Northern Securities Company is not about to abandon and terminate the illegal purpose in consummation of which the complainants' stock was held and that it has not practically refused further to continue the unlawful combination. As it is about to abandon and terminate the illegal contract by which it acquired and held the railroad stock, the authorities which permit recovery on the termination or abandonment of such a contract are clearly in point.

VI.

General rule as to illegal contracts of corporations.

The subject of the effect of illegal contracts of corporations, either *ultra vires* in the proper sense or con-

trary to statute or public policy, has been frequently considered by this court. The settled rule is that such a contract is wholly void and of no effect for any purpose, that the objection is not merely that the corporation ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful contract any validity by way of estoppel or otherwise, or be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Penn. Co.* v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S. 290, 310; *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 38; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman Co.* v. *Transportation Co.*, 171 U. S. 138.

It is also the settled doctrine of this court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426), and that "it is vain to contend that any right can be acquired under such a contract" (*Montgomery* v. *United States*, 15 Wall. 395, 399). To same effect see *Desmare* v. *United States*, 93 U. S. 605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouchita Cotton*, 6 Wall. 521, 532.

Speaking of an *ultra vires* contract, Mr. Justice

Miller in the *Pennsylvania Co.* case, *supra*, used the following language (118 U. S. 317):

> "But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

And this language has been repeatedly cited with approval, *e. g.*, in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, at p. 61. See also *Jacksonville, &c., Railway* v. *Hooper*, 160 U. S. 514, at p. 524. In the *Central Transportation Co.* case, the court by Mr. Justice Gray said (139 U. S. 59, 60):

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In *Dwight* v. *Brewster*, 1 Pick. 50, 55, Chief Justice Parker said:

> "The principle settled is that a party to an unlawful contract shall not receive the aid of the law to enforce that contract or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract who becomes possessed of the property of the other party with which he is to do something which the law prohibits can acquire a right to that property. *A contract being void, the property is not changed, if it remains in the hands of him to whom it is committed.*"

This general rule has been applied or recognized in analogous cases arising out of illegal contracts affecting illegal combinations or trusts. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

> "Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. . . . *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

In *State ex rel.* v. *Standard Oil Company*, 49 Ohio St. 137, 183, the Standard Oil Company of Ohio, which had become a party to an agreement to have its stock transferred to trustees for the purpose of effectuating an illegal combination, was ousted of its corporate power to fulfill the agreement. Discussing the nature of the transaction under which the stock had been delivered in exchange for trust certificates, the Supreme Court of Ohio said:

> "In other words, it is to be managed in the interest of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; *for the holders of the trust certificates, received in exchange for their stock transferred to the trustees, remain in law and in equity the real owners of the stock so transferred;* and the averment in the answer that the dividends of the company are paid to the holders of its stock, appearing as

such on its stock-books, is immaterial; since these persons are not the owners, but the trustees of the stock."

And again in conclusion (p. 189):

"And in this connection, it is proper to say, that, in the judgment of the court, if the company through its directors, or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for in the trust agreement, or should hereafter make such transfers; or should pay dividends to them instead of to the real owners of the shares; or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case, it must be regarded and held, as performing the agreement in violation of the judgment of this court."

In *People* v. *Chicago Gas Trust Company*, 130 Illinois, 268, it appeared that the defendant company was organized under the General Incorporation Act of the state of Illinois, which permitted the organization of a corporation "for any lawful purpose." In the certificate of incorporation, the company had stated that one of its objects was "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois. It was held that the incorporation was not for a lawful purpose and that all acts done by it toward the accomplishment of such purpose were illegal and void. Magruder, J., said (p. 292):

"The purpose for which a corporation is formed under the act must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois it was not organized for a lawful purpose, and *all acts done by it toward the accomplishment of such object are illegal and void.*"

In *People* v. *North River Sugar Refining Co.*, 121 N. Y. 582, an illegal combination of several corporations had been effected by the stockholders in form selling their stock to a joint stock association for its share certificates, and the franchise of one of the corporations to exist as such was forfeited for participation in the illegal combination. Such participation consisted in registering the transfer of shares on the corporate books in the names of trustees of the association and in recognizing them as the owners of the stock. Judging the transaction by its real purpose, the court held (p. 611)—

> "that the corporate stockholders parted with the legal title to their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates."

And the court, per Finch, J., said (p. 614):

> "The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name."

And again, meeting the contention that the corporation was bound to recognize the illegal ownership under the sham transfers (p. 620):

> "The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that *the original stockholders remain not only the beneficial, but the legal owners of the stock;* and, if the board of trus-

tees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career."

In *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446, in considering the situation of the parties composing the Sugar Trust after the decision of the Court of Appeals and pending a reorganization, Pratt, J., said (p. 446):

"Now, a most serious question arises, whether or not they have any title, or are anything more than mere custodians of property which belongs to others, to wit, the certificate holders.

"At the present time, I think, they are mere custodians. If any argument is required to establish this proposition, it will be found in the history of the organization of the Sugar Trust."

And again (p. 447):

"We therefore find the defendants in possession of property belonging equitably to others, which came into their hands under an agreement void as to the main purpose for which it was made, and which they cannot legally use for the purposes for which it was placed in their hands; and they are utterly powerless to convey and give a good title or to distribute it to its rightful owners."

In the subsequent case of *Unckles* v. *Colgate*, 148 N. Y. 529, 536, one who had bought trust certificates sued to enforce a claim of right founded thereon and to recover his share of the assets. The court refused to sustain the action as wholly based upon and arising from an illegal transaction; but it distinguished the case before it from one brought by an original depositor in disaffirmance of an illegal agreement and seeking

a restoration of property conveyed and held thereunder.

In *State* v. *Distilling Co.*, 29 Nebraska, 700, there was an information in the nature of a *quo warranto* to oust the Nebraska Distilling Company of its franchise to exist as a corporation because of its having entered into an illegal combination. It had conveyed all its property to a trustee from whom it took a lease for twenty-five years. The stock of the corporation had also been conveyed to trustees, who elected its board of directors and controlled its management, its stockholders receiving trust certificates. A stockholder who had participated in the illegal transaction was permitted to intervene. The court said (p. 719):

> "Any contract entered into with such an object in view is, under the laws of this state, null and void, and the conveyance from the Distilling Company to the trust was in contravention of the authority conferred by the statutes on that company, in excess of the powers granted by its charter, and against public policy and void, *and no title passed by such conveyance.*"

It is, therefore, respectfully submitted that this court and the Circuit Court of Minnesota, in the Government suit, undoubtedly contemplated, in accordance with the well settled rule of law, that the necessary effect of an adjudication that the stock "claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it" in violation of law, coupled with authority to return it to original depositors (p. 191), was that the contract was void for all purposes, that the absolute ownership of the railroad stocks did not pass to the Securities Company but remained in the depositors or their assigns as bene-

ficial and equitable owners, and hence that it could authorize the return of the stocks to such owners,

The cases holding that a *bona fide* purchaser may acquire a good title from one holding possession under an illegal contract are distinguishable, because in such cases the doctrine of estoppel operates to prevent the real owner from asserting *his* title or the right of the custodian as his agent against the innocent third party, and not to affirm any title in the one having such illegal possession. *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, 575, 576; *Anderson* v. *Armstead*, 69 Illinois, 452, 454, 455.

VII.

As to the defense of *in pari delicto*.

The effect of the contention of the defendant Northern Securities Company in the courts below was that because it now holds possession by virtue of an illegal combination among parties *in pari delicto*, the complainants and all other depositors forfeited their property, lost all their legal rights, and could be allowed no standing in any court of law or equity to reclaim their property, and that it might distribute it at will. The defense was advanced in the face of the conceded and indisputable fact that the complainants Harriman and Pierce, who are thus to be outlawed, and the immense property interests represented by them to be forfeited, were not parties to the original combination in pursuance of which the Securities Company was organized (pp. 3, 5, 199), that it was entered into in hostility and antagonism to their interests (pp. 199–201), and that

they acted in good faith and in the full belief that the transaction was legal and that the company had legal power to acquire and hold the railroad stocks for the purposes mentioned (p. 5).

Of course, the Securities Company realized that this argument, in its final analysis, would permit it to retain the railroad stocks in perpetuity free from any accounting to the holders of its certificates, and also enable it, or rather its officers and directors in actual possession of the certificates for the railroad stocks, to secure an unconscionable advantage. It appreciated that the courts had "often stated in similar cases that the defense is a very dishonest one and it lies ill in the mouth of the defendant to allege it."[1] And it, therefore, sought by much euphemism to minimize the character of the plea. In exculpation, the suggestion seemed to be that the defense should be tolerated because the directors did not intend to retain the property for themselves but proposed to distribute it according to their own ideas of law and equity. We may now consider whether any such plea can defeat the complainants' legal rights.

A.

As to good faith and innocent intent.

The allegation of the bill that the complainants Harriman and Pierce, in exchanging the Northern Pacific stock in question for certificates representing shares in the Securities Company, acted "in good faith in the belief that the organization of said Securities Company

[1] *McMullen* v. *Hoffman*, 174 U. S. 639, 669.

was not and the acquisition and holding by it of said railway stocks, as aforesaid, would not be in violation of any statute of the United States" (record, p. 5), was admitted. Indeed, it was indisputable. In the circular of March 22, 1904, issued by the officers and directors of the Securities Company immediately after the decision of this court, it was among other things publicly declared that (p. 193):

> "The Company's acquisition of Northern Pacific and Great Northern shares was made *in the full belief that such purchases were in no wise obnoxious to any law of the United States*—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the Company to hold and vote the shares."

And in the reply brief submitted to the Circuit Court, on behalf of the Securities Company, the following concession was made (p. 3):

> "*There is and can be no doubt that all parties believed that they were doing nothing contrary to law*, and in this particular the complainants are in no better condition than the other organizers of the Securities Company."

The case is, therefore, concededly one where parties acting in good faith transfer property for a purpose which they fully believe to be legal, but which is subsequently adjudged to be illegal. Under such circumstances, where the illegal purpose cannot be continued and must necessarily be abandoned, is it the law that the innocent owner of property so transferred has forfeited his legal rights, that he has become outlawed,

that he cannot maintain an action to recover his property, that the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and that the one in possession is protected by a rule of public policy and a maxim of equity?

As Mr. Justice Holmes said in *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "A person does not become an outlaw and lose all rights by doing an illegal act."

Now, in the case at bar, it is manifest from the present record that all parties acted upon the assumption that the Northern Securities Company could lawfully acquire and permanently hold the stocks of the railway companies; that the point of law was unsettled and doubtful; that there was no illegal or criminal intent by Harriman and Pierce; that there was no consciously wrongful act—no *mens rea*, and that at most there was a mistake as to the application and interpretation of a doubtful statute, the full effect of which had not yet been determined.

The mutual mistake of law in the case at bar is not only admitted, but was one which reasonable men might well make. The language of the statute was most general; its scope and meaning were admittedly uncertain; it was a new experiment in federal legislation of doubtful constitutionality; until interpreted by the courts, no one, even though skilled in the law, could venture to assert with any degree of confidence what was or was not within the scope of the law. A penal statute was passed by Congress in uncertain

and vague language, so that most men could not discern what was intended to be prohibited by its general language. Indeed, it was deliberately contemplated by the Congress itself that the effect of the legislation would remain uncertain until authoritatively construed by the courts. In the final debate in the House of Representatives, after the passage of the bill by the Senate, Mr. Culberson of the Judiciary Committee, who had special charge of the bill on its behalf, among other things said (Congressional Record, 51st. Cong., 1st. sess.; vol. 21, pt. 5, p. 4089):

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, *will not be known until the courts have construed and interpreted this provision.* . . . I wish to be understood, Mr. Speaker, as having stated at the outset that I do not know, *nor can any man know*, just what contracts will be embraced by this section [section 1] of the bill until the courts determine."

To avoid misapprehension, it should be observed that the petitioners are not contending that good faith, innocence of intention to violate a statute, or ignorance of the existence of a statute or its effect, would constitute a defense to any proceeding to enforce the penalty prescribed or the *preventive* remedy provided in the statute. The contention is that when relief is sought from a contract entered into through a mutual mistake as to the application of an admittedly doubtful statute, *which contract is being abandoned*, a different question and different considerations are presented. In such a case, the court is not called upon to enforce any penalty prescribed by the statute. The lawgivers

only provided for a fine and imprisonment of not more than one year and preventive relief in equity (act of Congress of July 2, 1890; 26 Stat. 209). An infraction of its provisions was not made an infamous crime (*Ansbro* v. *United States*, 159 U. S. 695, 696, 697). Although Congress specifically dealt with the subject of forfeiture of property, it limited such forfeiture to property in transit from one state to another in pursuance of a violation of the statute (see § 6, 26 Stat. 210). The court is only now considering whether the circumstances of this particular case are such that a court of justice must superimpose upon the penalties prescribed by the statute the additional punishment of forfeiture of property interests and deny the complainants a hearing in court in face of the *admitted* fact that all parties acted in good faith and with no intention to violate or defy the law.

We conceive that if there be one fundamental distinction which more than any other courts of justice bear constantly in mind, it is the distinction between a deliberate transgression of the law and an unconscious transgression of the law—between harm voluntarily caused and harm involuntarily caused—between crime consciously committed and crime innocently committed—between an illegal act knowingly done and an illegal act done in ignorance of the law—between a flagrant violation of law and morality and an unintentional violation of a doubtful and uncertain statute. Men must, indeed, often be held responsible and punished for the effects and consequences of their innocent acts. Public policy

and the due administration and enforcement of the law may require it; and a clear expression of the legislative will to that end must be enforced. But no jurist has ever recommended in theory and no court has ever sanctioned in practice any rule which would punish a man who, it is *admitted*, acted innocently, in good faith and in the full belief that his acts were legal, as rigidly and harshly as if he had done an evil act knowingly, with deliberate malice, or in conscious or insolent disregard and defiance of the law.

Such a rule would be so obviously unjust that it would be a reproach to any system of government or of jurisprudence.

The rule as to parties *in pari delicto* obviously contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." It cannot be reasonably said that parties are *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous construction of a doubtful statute, often operates to mitigate the punishment and frequently to prevent conviction. See *Queen* v. *Tolson*, 23 Q. B. D. 168, 171–176; *Taylor* v. *Newman*, 4 Best & S. 89, 94; *Regina* v. *Allday*, 8 C. & P. 136, 139; *Rex* v. *Twose*, 14 Cox C. C. 327; *Regina* v. *Sleep*, 8 Cox C. C. 472, 478; *Regina* v. *Tinkler*, 1 F. & F. 513, 514; *Rider* v. *Wood*, 2 E. & E. 338, 343; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62, 68; *United States* v. *Conner*, 3 McLean, 573, 574; *United States* v.

Fearce, 2 McLean, 14, 18; *Halstead* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125, 126 (cited approvingly in *Stone* v. *United States*, 167 U. S. 178, 188, and *Hedden* v. *Iselin*, 31 Fed. Rep. 266, 269); *State* v. *Sheeley*, 15 Iowa, 404, 407–408; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.) 268, 272; *State* v. *House*, 71 N. C. 518, 520–521; *Dotson* v. *State*, 6 Coldw. (Tenn.) 545, 549.

It would be carrying the punishment beyond what any legislator would impose if it were now to be held that one party to a contract, which was subsequently held to be in violation of a statute, rendered himself not only liable to the punishment prescribed by the law-makers but in addition forfeited all his legal rights, however innocent he might have been of unlawful intent, and that the party in possession of property transferred under a mutual mistake of law, could retain it free from any accountability whatever, and thus enrich himself at the expense of an innocent man acting in good faith.

The question whether the rule applicable to parties *in pari delicto* applies where the parties acted in good faith and under a mutual mistake as to the law, has arisen in the federal courts in a number of cases, *e. g.*, *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158.

In *Spring Co.* v. *Knowlton* this court said (p. 60):

> "The law of New York does not in express terms forbid a corporation from issuing certificates for full-

paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy."

In *Pullman Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158, affirmed 171 U. S. 138, the opinion of the Circuit Court for the Eastern District of Pennsylvania, delivered by District Judge Butler and concurred in by Circuit Judge Dallas, contains the following statement (p. 164):

"Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace Car Company involves moral turpitude as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful. The statute of 1870 was supposed to confer full authority to make it. The state had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the court disagreed on the subject. It is a question of interpretation. In the court's view the lease was *ultra vires* and void; in the counsel's it was authorized

and lawful. True, it violated a rule of public policy, but this was only because the court construed the statute more narrowly than the legal advisers of the parties had done. The legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. All that can justly be said, therefore, is that the parties misconstrued their authority, and that the lease is consequently *ultra vires*."

In *City of Detroit* v. *Detroit City Ry. Co.*, Circuit Judge Taft, discussing the principle as to parties *in pari delicto* and reviewing the *Terre Haute* case (145 U. S. 393), used the following language (60 Fed. Rep. 163):

"It might well have been added that the principle invoked by defendants has application only where a court of equity is asked to aid a wrongdoer, as, for example, one who has entered into, and partially or wholly executed, a contract which is *ultra vires* because its execution is an offense against the law, or a plain contravention of public policy (*Thomas* v. *Richmond*, 12 Wall. 349; *St Louis, V. & T. H. R. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U. S. 393, 395; 12 Sup. Ct. 953), or one who has made and entered upon the execution of an *ultra vires* contract with the deliberate intention of evading the known limitations of the law (*Common Council* v. *Schlich*, 81 Mich. 405; 45 N. W. 994). It does not apply to a case like the present, where parties in entire good faith, with no intent to violate law or public policy, but by reason of a common mistake of law, make a contract, a stipulation of which is not binding to its full extent,—not because it is immoral or unlawful or against public policy, but simply for want of statutory power in the stipulating party. In such a case, to use the language of Mr. Justice Mathews, 'the policy of the law extends no further than merely to defeat what it does not permit, and imposes on the

parties no penalty' (*Chapman* v. *County of Douglas*, 107 U. S. 348, 356; 2 Sup. Ct. 62)."

The decree in this case was reversed on appeal (64 Fed. Rep. 628), but upon a ground which "did not affect the proposition here stated." *Louisville Trust Co.* v. *City of Cincinnati*, 73 Fed. Rep. 716, 732.

It is true that in *St. Louis Railroad* v. *Terre Haute Railroad* it was alleged "that at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so" (p. 397). In that case, however, whatever might be said as to the power of the plaintiff, there was not the slightest uncertainty about the statutes in so far as the defendant railroad company was concerned, and the effect of the enactments was manifest. The question as to the power of the plaintiff to lease its road was not decided, and consequently ignorance or mistake in regard thereto became immaterial, the court by Mr. Justice Gray saying (p. 404): "It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff." There was no reasonable basis for misapprehension or mistake as to the law affecting the defendant lessee. Mr. Justice Gray, therefore, stated (p. 404) that "the contract in question was *clearly* beyond the corporate powers of the defendant," and that the invalidity of the lease "was apparent on its face . . . of which the plaintiff was bound to take notice" (p. 408). And it was held that after seventeen years of operation under the lease and payment of the stipulated consideration from time

to time and as the lessee was continuing to pay and had "taken no steps to rescind or repudiate the contract" (p. 408), the assistance of a court of equity to set the lease aside ought not to be afforded. There was no question presented for decision as to the effect of a mutual and *admitted* mistake of law made by the parties in respect of a statute of uncertain meaning and scope, nor as to the right of a party to reclaim property parted with under a contract founded on such mistake which had failed of consideration by reason of its abandonment by the other party. As to such a case, Mr. Justice Gray qualified the decision by saying (at p. 409):

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited."

The court thus clearly recognized that even in that case, if the lessee had "abandoned or refused to perform the unlawful contract," a failure of consideration would have resulted and recovery would have been allowed, as in the subsequent *Pullman* case.

It is objected, however, to the right of recovery under these circumstances, that courts of equity are not warranted in granting relief from a mistake of law, because everybody is conclusively presumed to know the law. The general rule need not be challenged that a mere mistake of law, stripped of all other circumstances and considerations, will not alone afford a ground for relief,

but it has been established by innumerable decisions that relief will be granted from the consequences of a mistake of law, whenever the mutual mistake is clearly proved or *admitted* and by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. Such is the doctrine of the English cases extending back to the time of Lord Mansfield. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824, 825; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285, 286–287; *Earl of Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 234; *In re Saxon Life Assur. Soc.*, 2 J. & H. 408, 412; *Jones* v. *Clifford*, L. R. 3 Ch. D. 779, 792; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381–382.

It is also established as the law in this country, and the right to relief from the consequences of a mistake of law under the principles above stated has been fully recognized by this court in *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90–91; and *Hunt* v. *Rousmaniere*, 8 Wheat. 174, 215; 1 Peters, 1, 17. See also *State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sebastian County*, 49 Arkansas, 24, 34, 36; *Northrop* v. *Graves*, 19 Connecticut, 548, 554, 560; *Stedwill* v. *Anderson*, 21 Connecticut, 139, 144; *Underwood* v. *Brockman*, 4 Dana, 309, 317; *Ray* v. *Bank of Kentucky*, 3 B. Mon. 510, 514; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Massachusetts, 45, 48; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.) 455, 461–462; *Morti-*

mer v. *Pritchard*, Bailey Eq. (S. C.) 505, 507; *Mackay* v. *Smith*, 27 Washington, 442.

B.

AS TO THE DISTINCTION BETWEEN *malum prohibitum* AND *malum in se.*

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. The idea that it was material has, in the language of Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412, "long since been exploded." The courts have refused, directly or indirectly, to recognize an unlawful contract or to give it validity and effect for any purpose. No rights can accrue from the doing of an act or agreeing to do an act prohibited by law whether or not that act be inherently moral or immoral. It is enough that the law forbids it. Obviously, any statute which prohibited acts not *mala in se* would be frequently circumvented and in many instances readily defied and nullified, if courts were at liberty to enforce contracts in violation of the prohibition because they considered the acts merely *mala prohibita.*

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. In such a case,

the duty of the courts, constantly exercised, is to inquire into the nature of the prohibited act. The object of this inquiry is to determine relative delinquency and whether the party suing is culpable or blameless—whether deserving of punishment or not—or, as it is termed in the homely language of the old maxim, whether he comes into court with clean hands. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act, or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. In so doing, the illegal contract has not been sanctioned or enforced in any degree whatever; neither party has been allowed to profit or benefit from it; the court has simply restored property to its rightful owner and thus deprived the illegal contract of all force and effect. The fundamental difference between *malum prohibitum* and *malum in se* is distinctly recognized by this court in the recent case of *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R. R.*, decided January 5, 1905, as yet unreported.

In the case at bar, it is difficult to perceive how the defendant Securities Company can consistently urge that the transaction involved moral turpitude and was

therefore *malum in se*, in view of the conceded fact and its own declaration that the parties acted in good faith and in the *full belief* that they were not violating the law. The transaction clearly was not forbidden by the common law. *In re Greene*, 51 Fed. Rep. 104, 111; *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 619, 626–627; [1892] A. C. 25, 39, 43, 46–47, 51, 57; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 334–335; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 572–573. It was also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51, Dill on Corp., pp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524–525. Except for the provisions of the anti-trust statute, there could have been no contention that the transaction was criminal in any sense, and the punishment provided by that act does not make a violation of its provisions an infamous crime (*Ansbro* v. *United States*, 159 U. S. 695, 697). Therefore, the transaction was at most merely *malum prohibitum*. A transaction which is merely *malum prohibitum* and entered into without any wrongful intention cannot involve moral turpitude.

The distinction between *malum prohibitum* and *malum in se*, when the action is brought to recover property or money after the illegal transaction has come to an end or has been put at an end by the parties or by the courts, has been often judicially recognized.

Thus, in *Spring Co.* v. *Knowlton*, 103 U. S. 49, where the court sustained a recovery of money paid in part

performance of an illegal contract for the issuance of stock beyond the corporate authority, which the parties subsequently abandoned upon discovery of its illegality, Mr. Justice Woods, who delivered the opinion of the court, said (p. 57):

> "It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract."

In *M'Cutcheon* v. *Merz Capsule Co.* (C. C. A., 8th Cir.), 71 Fed. Rep. 787, 796, Lurton, Circuit Judge, said:

> "The case of *Spring Co.* v. *Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted, and he be desirous of rescinding it, provided the contract was not one *malum in se*."

In *Parkersburg* v. *Brown*, 106 U. S. 487, it was held that bonds issued for money by a municipality for the illegal purpose of aiding a private enterprise contrary to the constitution, were void, but that the holders of such bonds, succeeding to the rights of those who purchased them, were entitled to recover from the municipality the amounts so paid. Mr. Justice Blatchford, who delivered the opinion of the court, said (p. 503):

> "The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal

offender. In such a case the party receiving may be made to refund to the person from which it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181."

In *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75, it was held that property coming into possession of a national bank under a contract in violation of an act of Congress, could be recovered by the other party upon restoration to the bank of the consideration. Mr. Justice Harlan, who delivered the opinion of the court, quoted with approval the above extract from the opinion in *Parkersburg* v. *Brown*.

In *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24, 60, the court held void and non-enforceable a contract of lease in violation of the statutory powers of the corporations plaintiff and defendant, but recognized the right of recovery in such a case of property conveyed under a contract thus put an end to, on principles of natural justice, the contract being "unlawful and void not because it is in itself immoral, but because the corporation by the law of its creation, is incapable of making it."

Subsequently, in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158, 161, Judges Butler and Dallas held that the contract did not involve moral turpitude, although it had been held to violate public policy, because it consisted of an "*unintentional* wrong, or improper act *innocent* in purpose," and that, therefore, the plaintiff was entitled to disaffirm the illegal contract and recover its property which had been transferred to the defendant

in pursuance thereof, after its repudiation by the defendant. That decision was affirmed in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 151, where the court, by Mr. Justice Peckham, said:

> "The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover."

See also, *Tappenden* v. *Randall*, 2 B. & P. 467, 470–472; *Ex parte Bulmer*, 13 Vesey, 313, 315–316; *White* v. *Franklin Bank*, 22 Pick. 181; *Lowell* v. *Boston & Lowell R. R. Corp.*, 23 Pick. (Mass.) 24, 32; *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316, 327, 328; *Hanauer* v. *Doane*, 12 Wall. 342, 348; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373, 378.

C.

The fact that the petitioners, complainants below, refrained from filing a bill until after affirmance of the decree in the Government suit does not charge them with laches. The question of law was doubtful and in litigation. They were justified in waiting until the final adjudication. Good faith required this. If the contract was valid and legal, which they believed, as is conceded, they would necessarily have to abide by the contract and permit the Securities Company to continue to hold the Northern Pacific stock and distribute the dividends. Even if the com-

plainants would have been entitled to rescind and compel restitution without any repudiation or abandonment of the contract on the part of the Securities Company, the pendency of the Government suit since early in 1902 constituted a full excuse for delay, and precludes the defense of laches. *Grand Trunk Railway Co.* v. *Wade*, 140 U. S. 65, 69–70; *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 182–183; *Cox* v. *Stokes*, 156 N. Y. 491, 511–513. Moreover, it is important to appreciate that, under the doctrine of the *Terre Haute* and *Pullman* cases, the right to sue in disaffirmance for a restoration did not accrue until the illegal combination was put at an end in the Government suit, and the directors took steps towards an abandonment of the scheme and a dissolution of the company.

The contention of the Securities Company in the courts below, in effect, was that it could continue the objects of the illegal combination in perpetuity if it saw fit, in addition to appropriating the complainants' property, and that it was *protected* in so doing by the rule applicable to parties to an executed contract who are *in pari delicto*. The position of the appellant, as stated in its own reply brief in the Circuit Court (p. 23), was as follows:

> "The Securities Company was not put beyond the protection of all the rules of law, or of the particular rule that its right to retain possession of property acquired, though under an illegal agreement, must be respected by parties *in pari delicto*."

D.

The Northern Securities Company further contended below that the illegal contract had been executed, and that this precluded any relief to the petitioners as complainants.

This was but a repetition of its contention in the Government suit, namely, that the combination had accomplished its object and that the transactions had become executed before the commencement of that suit, and hence that a court of equity could not enjoin or prevent what had already been done and consummated. The question was then squarely presented both to the Circuit Court of Minnesota and to this court. Both courts rejected the suggestion as wholly untenable, if not absurd. Disposing of the point in the language of the court below, Mr. Justice Harlan said (193 U. S. 357):

> "It was completely answered by that court when it said: 'Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it.'"

If the transaction between the Northern Securities Company and its original depositors consisted only of the transfer and delivery of the shares as a mere investment under an unqualified contract of purchase and sale, it was complete and executed the moment the exchange

was made, and if that were all that either party contemplated, the contract would have been a valid contract of purchase and sale and would have been fully executed. But, as Mr. Justice Harlan said (193 U. S. 353–354): "This view is wholly fallacious, and does not comport with the actual transaction. . . . If it was, in form, such a transaction, it was not, in fact, one of that kind." Or, as Mr. Justice Brewer put it (at p. 362): "But no such investment by a single individual of his means is here presented." The undertaking and promise of the Securities Company, which embodied the real purpose of the whole transaction, were to hold the shares in one ownership for the future and thereby control the management of the two railway companies. This was clearly implied although not declared from the housetops. The testimony of the promoters quoted in the petition filed herewith leaves no doubt as to this. In order to effectuate this intention of the parties according to the true nature and substance of the transaction, the Securities Company was to permanently hold as custodian and to perform certain duties in the future, and that undertaking was clearly executory. The illegal purpose was to continue indefinitely. We should have to close our eyes to the real transaction if it were now to be accepted as true, as all know it is not, that the Securities Company bought the stocks as mere ordinary investments under unconditional contracts, with the intention not of holding, but of selling or disposing of the same in the market.

To show the fallacy of the plea of the Securities Company that the illegal combination had become

executed, it may be asked: when did it become finally executed and no longer executory? Not when Mr. Hill and associates agreed to combine their holdings as a defensive measure against the interests represented by Mr. Harriman, although that was illegal; not when they endeavored to cement the combination and to effectuate their illegal purpose by organizing the Securities Company and placing the railway stock in its hands, although that was also illegal; not when they practically told Mr. Harriman that the Northern Pacific stock held by the Oregon Short Line would be unsalable and of very little value if it was not put into the combination (p. 199), although that was in further pursuance of the illegal purpose, and in order to coerce acquiescence and silence opposition. The illegal thing was not alone the organization of the corporation nor yet the transfer to or deposit with it of the stocks of the two railway companies. These were but the methods employed to establish and effectuate the illegal purpose and to equip the corporation with the power of carrying out the illegal objects in mind. Having acquired the shares of the two competing railways, the corporation was required to continue to hold them "in perpetuity" and "in one ownership," and to use them in order to execute the purposes of the combination. These are the things that the Securities Company was expected to do in execution and performance of the illegal purposes. These are the things which were implied from the acts and doings of the parties, although they may have studiously omitted to publish their purposes or to declare them in documents or

in board resolutions. These are the things that the Securities Company would be still doing and would continue to do in the future, during the life of its perpetual charter, if the Government had not intervened. These are the things this court decided the Securities Company could not be permitted to continue to do in violation of the statute. And the final thing which the decree in this suit will prevent them from continuing to do, is the *holding* "indefinitely" of the railroad stocks, as they now insist they have the right to do and are *protected* in doing by a legal maxim.

It is also a universally recognized exception to the rule concerning parties *in pari delicto*, that the courts will permit the recovery of property delivered and held under an illegal contract which has been put an end to *in fieri*, when the public interests will be advanced thereby. In the case at bar, the public policy evidenced by the act of Congress in question requires that the Securities Company shall not be permitted to retain in its possession "*in one ownership*" the railway shares, and that it shall not continue to hold the same. If this be so, then the rule denying relief to parties *in pari delicto* does not apply, for the superior interest or concern of the public is to break up such combinations and not to permit them to continue in any form. *Starke's exrs.* v. *Littlepage*, 4 Rand. (Va.), 368, 372; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corporations, § 6410; 2 Pomeroy's Equity, § 941; Story's Equity Jurisprudence, § 298.

The illegal combination involved in the case at bar was not between private individuals with respect

to a matter that affected their own interests only. It was not a transaction in which there was nothing more than the delivery by one individual of his private property to another in pursuance of some unlawful object, such as a gambling transaction, etc., respecting which the public had no interest further than the enforcement of general penal laws. The subject-matter of the transaction was two great railway systems in the operation and management of which the public is concerned and interested. The immediate property dealt with is the stock—practically all the shares—of those companies. The Attorney-General, suing in behalf of the United States, sought the dissolution of the common control and management of these two great highways which resulted from the holding by the Securities Company of the stock. The court deprived the Securities Company of its power to vote upon the stock and to receive dividends upon it, and by stripping the illegal holding of its fruits rendered the stock of no value in the hands of the Securities Company and thus practically required it to dispose of the stock and forced it to abandon the illegal purpose. And it is indisputably to the public interest that the actual holding or pooling should not continue.

E.

Moreover, the relation of the Northern Securities Company to the unlawful combination was such that it cannot plead illegality of the purpose for which it holds the railroad stocks in order to enable it to retain possession. Courts of justice will not permit a mere custodian,

depositary, trustee, or agent to take advantage of the alleged illegality of the transaction, but will compel him to return or account for the property to the owners.

Thus in *Kinsman* v. *Parkhurst*, 18 How. 289, 293, the court said:

> "Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him."

In *Brooks* v. *Martin*, 2 Wall. 70, 80, Mr. Justice Miller said:

> "There were then in the hands of defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

To the same effect, citing *Brooks* v. *Martin*, see *Pointer* v. *Smith*, 7 Heisk. (Tenn.), 137, 144. See also *Manchester, etc. R. R. Co.* v. *Concord R. R. Co.*, 66

N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.), 317, 319–321.

In *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500, the court said:

> "*The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them.* Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin."

In *Block* v. *Darling*, 140 U. S. 234, the plaintiff sued to recover money deposited by him with the defendant, and it was held that the defendant could not be permitted to show as a defense that the money was placed on secret deposit for the purpose of defrauding creditors of the depositor. Mr. Justice Harlan, who delivered the opinion of the court, said (p. 239):

> "The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be

inconsistent with the spirit and policy of the law. *Spring Co.* v. *Knowlton*, 103 U. S. 49, 58, and authorities there cited."

There is also a striking similarity between the case at bar and those cases where money or property has been deposited with a depositary, stakeholder, trustee, or agent, with authority to apply it to an illegal purpose, and the property remains in the hands of such depositary, stakeholder, trustee, or agent after the illegal purpose has come to an end, either by reason of enforced abandonment, voluntary repudiation by mutual consent, or failure to dispose of the property or money in consummation of the illegal purpose. In all such cases, it has been held that the maxim concerning parties *in pari delicto* does not apply at all, that the property or money belongs to the depositor and is held by the other without consideration, and that it best comports with sound principles of public policy as well as natural justice to compel restitution. See *Dwight* v. *Brewster*, 1 Pick. 50, 55; *Sampson* v. *Shaw*, 101 Massachusetts, 145, 151; *Clarke* v. *Brown*, 77 Georgia, 606, 610; *Shannon* v. *Baumer*, 10 Iowa, 210, 211; *Taylor* v. *Bowers*, 1 Q. B. D. 291, 295, 300, 301; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 57; *In re Cronmire, ex parte Waud*, [1898] 2 Q. B. 383, 391, 395, 397.

VIII.

AS TO THE CONVERSION OF THE NORTHERN PACIFIC PREFERRED STOCK INTO COMMON STOCK.

The verified bill of complaint alleged (pp. 4–6) that the petitioners Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, had

delivered to the Northern Securities Company on November 18, 1901, $78,108,000, par value, of the capital stock of the Northern Pacific Railway Company, being a majority of the outstanding capital stock, of which stock so delivered by said petitioners $41,085,000, par value, was preferred stock, and $37,023,000, par value, was common stock; that it was agreed between Harriman and Pierce and the defendant Northern Securities Company that such $41,085,000 of preferred stock should be converted into common stock; that subsequently at least $34,709,062 thereof was so converted into common stock of the same par value; that said common stock originally owned by said petitioners, namely, $37,023,000, and $34,709,062 of the converted stock had been registered in the name of the Northern Securities Company, and that the Northern Securities Company held within the jurisdiction of the court certificates registered in its own name upon the books of the Northern Pacific Railway Company for all of said stock, making in the aggregate $71,732,000 thereof.[1]

The general rule is well settled that where specific property belonging to another is changed by a custodian, bailee, trustee, or agent into other property or funds, the original owner is entitled to follow it "as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them."

[1] Record, p. 6.

National Bank v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

If, therefore, at least $34,709,062 par value of the preferred stock of the Northern Pacific Company was converted into common stock, and Mr. Harriman swears that such was the agreement (pp. 198, 201), your petitioner, the Short Line Company, was entitled to follow and recover the new common stock as fully as it would be entitled to reclaim the old preferred stock if it still existed in its original form.

It was, however, contended by the defendant that, as matter of fact, there was no such conversion, and that the issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, although shown to have taken place all on the same day as part of one transaction (pp. 224–226), were to be regarded as separate and isolated transactions through which the Short Line Company could not follow its property. In other words, the argument in effect was that the machinery used and the steps taken changed the real nature of the transaction, and annulled the agreement to convert, and that in truth and substance there was no actual conversion but the payment and retirement of the preferred stock and an independent and disconnected subscription for and issue of bonds convertible into new common stock and a subsequent independent conversion of such bonds into such common stock. This view ought to be sufficiently negatived by the opinion of the Circuit Court of

Appeals for the Eighth Circuit in the recent case of *Weidenfeld* v. *Northern Pacific Railway Company*, 129 Fed. Rep. 305, 309, where the court, speaking of this very transaction, said:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a large sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company.* Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. *The issue of the convertible certificates was but a temporary expedient in the process of conversion.*"

Conclusion.

For the reasons stated above and in the petition filed herewith, it is respectfully submitted that a writ of certiorari should issue in this case and that this court should consider and settle the important questions presented.

Washington, D. C., January 23, 1905.

John F. Dillon,
R. V. Lindabury,
Bainbridge Colby,
William D. Guthrie,
R. S. Lovett,
Maxwell Evarts,
Of counsel for petitioners.

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No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

OPINIONS OF CIRCUIT COURT AND CIRCUIT COURT OF APPEALS.

In the Circuit Court of the United States

FOR THE DISTRICT OF NEW JERSEY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK, Complainants, v. NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, Defendants.	In Equity.

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in United States *v.* Northern Securities Co. *et al.*, 120 Fed. 721, and the affirmatory decree of the Supreme Court of the United States in the same case. 193 U. S. 197. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker

and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti Trust Act. 26 Stat. 209. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations," shall be deemed guilty of a misdemeanor, "punishable in like manner and to the like extent as offences under the first section." Section 3 declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, "punishable in like manner and to the like extent as offences under the preceding section." Section 4 provides, among other things, that the several circuit courts of the United States shall have "juris-

diction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants, Hill, Clough, James and Kennedy, and certain other persons whose names were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned or controlled a majority of the capital stock of the Northern Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest on and prior to November 13, 1901, entered into an unlawful combination and conspiracy "to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to

monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and the Northern Securities Company substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for affecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities

Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation, and the defendants were thereby attempting to monopolize, and had monopolized, such interests and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern

Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," and a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway

companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein;" and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the United States March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the court below, among other things, said:

> "No valid objection can be made to the decree below, in form or in substance. * * * The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interest and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance.

Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares of the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company," and "has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of

the shares of such railway company held by this company," and that "there are now outstanding 3,954,000 shares of its own capital stock," and that it "desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it "necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

> "FOURTH.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided inte thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance,

among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the Northern Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill, Morgan, Clough, James, Kennedy, Bacon, Baker and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company agreed to organize a holding company under the laws of New Jersey and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of

such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in

exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a majority of the capital stock of each of the railway companies had been or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an inrerest therein of $82,491,871, par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Companies certificates for $37,023,000 par value of the common stock and

$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce, was part of the original issue of stock by that company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the act-

ual custody of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be coverted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, coverted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in United States *v.* Northern Securities Company *et al.*, 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities

Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act; that it acquired no title thereto and cannot transfer any rights in respect thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, *pro rata* among its own stockholders, but not to return and re-transfer to the stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent. by a vote of more

than seventy five per cent. in interest of its stockholders, and by a like vote the proposed plan of *pro rata* distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and *ultra vires* the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies *pro rata* among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific

Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution *pro rata* in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are entitled exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such *pro rata* distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the *pro rata* share of the stock of the two railway companies which they would receive upon such *pro rata* distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the

common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration to the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their right and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and restrained from parting with, disposing

of, transferring, assigning or distributing any part of the stock of the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistance urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles

of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the

showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In Russell *v.* Farley, 105 U. S. 433, 438, the court through Mr. Justice Bradley said:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party."

In City of Newton *v.* Levis, 79 Fed. 715, the circuit court of appeals for the eighth circuit, through Judge Sanborn, said:

> "The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal if whether or not the court below erred in the exercise of that discretion,

under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. * * * The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience of the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," &c.

In Glascott *v.* Lang, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a

case which makes the transaction a proper subject of investigation in a court of equity."

In Hadden *v.* Dooley, 74 Fed. 429, 431, the circuit court of appeals for the second circuit, through Judge Shipman, said:

> "When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merits of accuracy."

In Great Western R. Co *v.* Birmingham, &c., R. Co., 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

> "It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. * * * It is true that the court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In Shrewsbury & Chester R. Co. *v.* Shrewsbury R. Co., 1 Sim., N. S., *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

> "When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. * * * Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. * * * Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction

over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. Denver & R. G. R. Co. *v.* United States, 124 Fed. 156. Allison *v.* Corson, 88 Fed. 581. Buskirk *v.* King, 72 Fed. 22. Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693. Southern Pac. Co. *v* Earl, 82 Fed. 690. New Memphis Gas & Light Co. *v.* Memphis, 72 Fed. 952. Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245. Georgia *v.* Brailsford, 2 Dall. 402.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary and extra judicial arrangement. But this court has power to require of the complainants as condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed *pro rata* among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of

$71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A *pro rata* distribution under the proposed plan of the $39,661,450 par value of stock of the latter company included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits

that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value, was taken by the Northern Securities Company at an agreed real valuation of $115 for each $100 at par without distinction between common and preferred stock. The plan of *pro rata* distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for each $100 par value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan the holders of the remaining one-hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive $24,638,919 par value of the preferred stock of the Great Northern Railway Company and $32,070,612 par value of the common stock of the Northern Pacific Railway Company.

The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the Holder of $37,023,000 par value of the common stock, became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy five eightieths of its par value in the new common stock. There is evidence furnished by the affidavits and exhibits that the Northern Securities Company exercised this right and received of such new common stock $34,709,062 at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of the common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this

balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, $4,062,000, fairly may be treated as an offset to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000, amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the *pro rata* plan, leaving $8,803,166 in their favor, less the amount of their share of the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629 paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the latter company. The affidavits and exhibits furnished evidence of some weight that the above mentioned par value of $6 375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely $34,709,062 par value

was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount, leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

"1901.

Novbr. 18th.

INVESTMENT ACCOUNT NO. 1.
TO CAPITAL STOCK a/c.

For 410,850 shs. N. P. Pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day.....	8,915,629
Balance paid in stock.....	$32,169,371

say 321,693 shs. & $71 scrip issued as fully paid up stock at par."

Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value of its preferred stock on the seventy-five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part,

directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits and exhibits fail to disclose, and counsel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company, was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,192,371 par value or a real present value of $93,409,701. The deduction from the latter amount of the $83,181,488 which the complainants would receive under the proposed *pro rata* distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy-five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050 representing the real value of $37,023,000 par value of the old common stock would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the

property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the par value of $100 each. The proposed *pro rata* plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and "proportional amounts thereof for fractional shares of the stock of this company." $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And $30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety-nine one hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one-hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other

than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one-hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one-twelfth of $11,117,104; less than one-eleventh of $10,228,213; less than one-ninth of $8,803,166; and less than one-eighth of $7,513,922. It is unnecessary, and would be tedious to discuss in this connection, and on the present application the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit, it should be borne in mind that the right of the complainants

to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the first named company was organized, and the affidavits are conflicting

on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in Denver & R. G. R. Co. *v.* United States, 124 Fed. 156, 161, as follows:

> "The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the

fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

EDWARD G. BRADFORD, *J.*

July 15, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

NORTHERN SECURITIES COMPANY

v.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge:

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But

now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 123 Fed. Rep. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is some strong reason for it." *Massie* v. *Buck*, 128 Fed. Rep. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is

as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

> "(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.
>
> (2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.
>
> (3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

"AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... .....Shares

NORTHERN SECURITIES COMPANY

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies that ..... is the registered holder of ..... Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by

duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this ..... day of ....., A. D. 190...

.....
President.

.....,
Treasurer.

Countersigned this .... day of ...., A. D. 190...

.....,
Transfer Agent.

Countersigned and Registered this ..... day of ....., A. D. 190...

MANHATTAN TRUST COMPANY,
Registrar of Transfers.

By .....,
Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. The object of this bill was to restrain the violation of the Act of Congress of July 2, 1890, 26 Stat. c. 647, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; and the suit which it originated was so proceeded

with that in April, 1903, the said Circuit Court adjudged and decreed—

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the North-

ern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. . . . "

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197), and thereupon, viz., on March 22, 1904, the Board of Directors of the Securities Company adopted the following preamble and resolutions:

"WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, In a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company held by this Company; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, This Company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

RESOLVED, In consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it,

without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

RESOLVED, That the Board of Directors of this Company hereby declares it advisable that Article (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH.—The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares and parts of shares of this Company stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof, for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the num-

ber of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the Company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants allege " that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled,

will be lost to your orators." The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the

fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the com-

mon stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that

"they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree that it should not con-

tinue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2,500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States* v. *The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act." 193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added

clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are:

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but, in denying it, the court said:

> "The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement

is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. . . . It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that, in view of all the circumstances,

might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the Government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. "The Circuit Court has done only what the actual situation demanded. Its decree has done

nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357. We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed. As was stated by the learned judges who made it—

> "When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless com-

> modity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusion reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

GRAY, J., dissenting:

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the

bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree as prayed for, in favor of complainants. Nothing but a clear conviction that complainants' bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court

should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the

sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

Filed January 3, 1905.

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No. 512.

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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

No. OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Petitioners,

vs.

NORTHERN SECURITIES COMPANY, Appellants below and Respondents.

Brief in Support of Petition for Writ of Certiorari.

D. T. WATSON,
Attorney for Petitioners.

Smith Bros. Co., Franklin Print, 625 Grant Street, Pittsburg, Pa.

The purpose of this Brief is to show that the Court of Appeals (Judges Acheson and Dallas assenting and Gray dissenting) erred in—

(1) Holding that this Court did *not* in the case of the Northern Securities Company vs. the United States, 193 U. S. 197, either decide or incidentally pass upon the question—
Was the Northern Securities Company the purchaser and real substantial owner of the stocks of the Northern Pacific and Great Northern Railroad Companies, or did it hold them merely as custodian?

(2) Holding that a proposed *pro rata* distribution by the Northern Securities Company of said railroad stocks among all its stockholders necessarily based by that Court on the Securities Company being the real substantial owner of the same is not inconsistent with the findings of fact and decree of this Court in the above cited case.

(3) Holding that on an appeal from an interlocutory order granting a preliminary injunction where the hearing below was on bill and *ex parte* affidavits, it could (as it did) practically finally decide the case by a finding of facts contrary to the averments of our bill, disregarding other important questions of fact and of law, and though it held the Circuit Court had not abused its discretion, nevertheless reversing its order.

To this we add as we did below—

(IV) Your petitioners are in their own right, as parties by representation in said case, entitled to set up and plead the findings of facts and conclusions and decree of this Court in that case as conclusive between themselves and the Northern Securities Company in this case.

IN THE

Supreme Court of the United States.

No. **OCTOBER TERM, 1905.**

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Petitioners,

vs.

NORTHERN SECURITIES COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, Appellants below and Respondents.

In the Matter of the Petition of Edward H. Harriman, Winslow S. Pierce, The Oregon Short Line Railroad Company and the Equitable Trust Company of New York, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

We assert and aver our ability to prove that this court in the case of *The United States vs. The Northern Securities Company*, 193 U. S. 197, hereinafter called the Government Case, among other things decided—

(1)—That the Northern Securities Company was *not* the real purchaser or absolute owner of the stocks of the Northern Pacific and Great Northern Railroad Companies, (including the stock of your petitioners,) but took them as mere custodian for the railway stockholders.

(2)—That the Northern Securities Company was created by, and became the mere agent of, Messrs. Hill, Morgan and others, who organized a combination against commerce which this court decided to be illegal, and all said railroad stocks were assigned to it in furtherance of, and as a means necessary to, carry out the purposes of the combination.

(3) Your decree, read in the light of your opinion, followed logically your finding of facts. It deprived the Northern Securities Company of the right to vote or collect dividends on said stock, and tied up and rendered unmarketable said stocks in the possession of the Northern Securities Company, and then in furtherance of the power you declared you possessed to make any order necessary to dissolve the combination, you, by your decree, provided for the undoing of what had been done and authorized the return to the separate persons of the identical stock which each had assigned to the Northern Securities Company, and thus you decreed one, and only one mode of disposing of said railroad stocks. This mode was necessarily exclusive of any other, and especially of the one now proposed, for the one now proposed necessarily affirms that the Northern Securities Company was the real purchaser and absolute owner of the railroad stocks, and without this affirmance it could not make the distribution.

The Court of Appeals, (Judges Acheson and Dallas assenting, Gray dissenting,) decided this case wholly uninfluenced by, and contrary to this prior decision and decree of this court in that Government case. Their decision was in effect and was intended to be final. The Court, Judge Dallas, said that

> "Whether the injunction should stand or be dissolved ought in our judgment to be determined upon the merits and without further delay. * * *

* * We think that reason and justice demand that such an adjudication shall not further be postponed."

They thereupon proceeded to, and did dispose of what they thought were the merits of the controversy, though they overlooked material questions of fact and of law in the case.

Instead of following that decision and decree of this court, the Court of Appeals held, and on the same evidence, which was before this Court (see our petition), that the Northern Securities Company was the real purchaser and substantial owner of the said stocks; that it therefore might make a distribution of the same different from, and inconsistent with, the one authorized by this court, and necessarily based upon a disregard of your decree and finding of facts:

That we do not overstate the situation, we show by the following language of the majority opinion:

Judge Dallas said:

"If the question before us had been involved and "decided in the suit of the *United States vs. The* "*Northern Securities Company*, or if it had been passed "upon,

though but incidentally,

"by the Supreme Court of the United States in dispos- "ing of the appeal in that case, we of course would "not regard it as an open one. But it was neither "decided nor considered at any stage of that litiga- "tion."

* * * * *

"The present suit is an *independent one*, and as its "subject matter is distinctly different from that of the "suit in which the United States was complainant, the "duty of this Court *to independently consider* it has "seemed to us to be both plain and imperative,

If the court erred, in so disregarding the opinion and decree of this court, we are entitled, we respectfully urge, to such action by this court as will enforce your own opinion and decree. Even if there was a question as to the meaning of your opinion and decree, we respectfully urge we are entitled to have *this* court pass upon and determine that question *itself:* we are especially entitled to a supervision by this court, because the Court of Appeals declined to be controlled by the plain language used by this court in reaching and stating its conclusions. We respectfully insist that once this court has acted the lower court can only follow what this court has decided, and that your opinion and decrees are not to be modified or minimized by the lower court.

We were by representation parties to the Government Case; were bound by, and are entitled to the benefits of your opinion and decree whenever in any subsequent litigation the same question arises between those who were parties to that case. In the case at bar one of the same questions passed upon in that case does arise and between two of the same persons, *i. e.*, the Northern Securities Company and your petitioners. We are legally and equitably entitled as of and in our own right to set up and plead and insist upon the finality of that decree.

The present proposed distribution sanctioned by the Court of Appeals affirms the legality of the acquisition by the Northern Securities Company of all this railroad stock, the very claim which the Northern Securities Company unsuccessfully made in this Court in the Government case. The proposed distributees of the Northern Securities Company will acquire a title solely through the Northern Securities Company to these railroad stocks, and that title, the Court of Appeals has held, will be good, though it was acquired in pursuance of, and to carry out, a combination to restrain trade and commerce which this Court denounced as illegal; this distribution will vest

the control of the stocks of the two railroad companies in the hands of the stockholders of the Northern Securities Company and will create, if not continue, a situation by which the control of both these competitive roads is put into the hands of the same persons to prevent which the Government suit was instituted.

Instead of disaffirming and dissolving the combination by the undoing of what was done, and returning to the persons the identical stock which each had assigned to the Northern Securities Company, it *affirms* that portion and the most material portion of the combination, *i. e.* its acquisition of the railroad stocks, and does this, we respectfully urge, in plain disregard of your opinion and decree.

The Court of Appeals also, we submit, contrary to the decisions of this court, on an appeal from an interlocutory decree granting a preliminary injunction where the hearing in the Circuit Court was on Bill and *ex parte* affidavits, practically finally decided the case and thus deprived us of our right to go to the final hearing and cross examine witnesses and compel the attendance of hostile witnesses, though there were disputed questions of fact in the case.

To reach their conclusion the Court of Appeals passed upon questions of fact and found them contrary to the allegations of the bill which had been neither answered nor demurred to: though the Court of Appeals found the discretion of the circuit judge in granting the injunction had not been abused, yet it reversed his order and practically finally disposed of the case, as if it were a court of original and not one of appellate jurisdiction: the conclusions in the court below are reached only by two judges, Circuit Judge Acheson and Circuit Judge Dallas, while Circuit Judge Gray dissents from this action, District Judge Bradford who sat

and heard the motion, granted the injunction and justified his action by a lengthy opinion, and the late District Judge Kirkpatrick heard the application originally and granted the injunction though without argument.

[This difference of itself seems to be proper ground for a *certiorari*. *Forsythe vs. Hammond*, 166 U. S. 512.]

FIRST. When this court affirmed the St. Louis decree in the case of the *Northern Securities Company vs. The United States*, 193 U. S., 197, (hereinafter called the Government Case), that decree became the decree of this court and was to be and is to be read only in the light of the opinion of this court, and if a controversy arises as to its meaning, this court alone can and must settle the same.

In *Durant vs. Essex County*, 101 U. S., 555, you said:

"On a mandate from this court affirming a decree the Circuit Court can only require our order and proceed with the execution of its own decree as affirmed. *It has no power to rescind or modify what we have established.* Our judgment by a divided court is just as as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below.

After the appeal had been taken the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down."

In *Sandford Fork & Tool Co.*, Petitioner 160, U. S. 247:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is

considered as finally settled. The Circuit Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. That Court cannot *vary it* or *examine it for any other purpose* than execution, or give *any other* or *further relief* or review it even for apparent error upon any matter decided on appeal; or *intermeddle* with it further than to settle so much as has been remanded. * * * * *The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and* * * * * *it is for this Court to construe its own mandate and to act accordingly.*"

This was cited and approved *In re Potts*, 166 U. S. 265.

If there be a controversy over the meaning of your mandate and decree that is to be settled by the opinion

"delivered by this court at the time of rendering its decree,"

If your mandate and decree needs construction, it must be

"for this court to construe its own mandate."

If the plain meaning of the plain words used by this court are to be departed from, it cannot be that any authority less than this court can authorize that

To permit a construction by the lower Court which disregards and renders nugatory the plain language of your opinion, which finds the essential facts in controversy directly contrary to the finding of this court, and then approves of a mode of action by the defendant in disregard of, and different from that pointed out by you, is to substitute the judgment of the lower court for your own and destroy the supremacy of this, the highest court in the land.

As was said in *Durant vs. Essex County*, 101 U. S. 555, the Circuit Court

"* * * has no power to rescind or modify what we have established,"

not even if as you said *supra*, there is

"apparent error"

in our decision.

SECOND. This court in the Government case did on issue plainly joined, plainly decide, (and below we use the words of this court) that the title which the Northern Securities Company took to *all* the stocks, including your petitioners', which it acquired of the Northern Pacific and Great Northern Railroad Companies, was

"not as a real purchaser or absolute owner, but simply as custodian.

"There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

The opinion of this court (Mr. Justice Harlan) is quite at length and necessarily covered many questions, but it distinctly and at length discussed and decided the question, Was the Northern Securities Company a real purchaser of, and did it acquire a substantial *bona fide* title to, the stocks of the Northern Pacific and Great Northern Railroad Companies?

Not pretending to quote at great length from that opinion, we refer to those portions which the more strikingly show how this court decided that question:

Mr. Justice Harlan said:

(Pages 325, 325.)

"*Summarizing the principal facts*, it is indisputable upon this record that under the leadership of the

defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized.

"as the *holding corporation* through which the scheme should be executed; and under that scheme such *holding* corporation has become the holder—*more properly speaking, the custodian*—

"of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation.

(Page 333.)

"It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a State corporation, even if such corporation is engaged in inter state and international commerce;

"that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution;

"that, so far as the power of Congress is concerned, citizens of State corporations may dispose of their property and invest their money in any way they choose;

"and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized.

"*It is unnecessary in this case to consider such abstract, general questions. The Court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.*

* * * * * *

(Page 335.)

"What the Government particularly complains of, indeed, all that it complains of here is the existence *of a combination* among the stockholders of competing railroad companies which in violation of the Act of Congress, restrains interstate and international commerce *through the agency of a common corporate trustee* designated to act for both companies in repressing free competition between them."

* * * * *

(Page 346.)

"But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that Company in its capacity as a *holding corporation and trustee* from carrying out the *purpose of a combination* formed in restraint of interstate commerce.

"The Securities Company is itself a part of the present combination; its head and front; *its trustee.*

* * * * * *

(Pages 353, 354.)

It is said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies

> "imported simply an investment in the stock of other corporations, a purchase of that stock, which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress.
>
> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was, *not, in fact*, one of that kind.
>
> "However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.
>
> "*In his testimony he was asked, 'Why put the stock of both these (constituent companies) into one holding company?' He frankly answered. In the first place, this holding company was simply a question of custodian because it had no other alliance.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as*

custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, * * *

Mr. Justice Brewer showed his concurrence in this finding of the fact by agreeing to the decree and by saying that the Northern Securities Company

"was a mere instrumentality by which separate railroad properties were combined under one control.

- - The transfer of the stocks to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain commerce was carried out."

Mr. Justice White certainly understood the case involved the determination of the question, was the Northern Securities Company the real purchaser of the railroad stocks, for he said :

"It is said first that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

(III) This Court followed this finding of fact by reciting the words of the decree (see pages 354, 355, 356):

You then said: (356.)

"No valid objection can be made to the decree below in form or substance." * * *

(357, 358.)

"*The decree if executed will destroy not the property interests of the original stockholders of the con-*

stituent Companies, but the powers of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which if done would restrain inter state and inter national commerce."

And you concluded your opinion as follows:

(360). "The judgment of the Court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the executing of its decree as the circumstances may require."

You thus deduced and followed the logical and necessary results from your finding of facts.

If it was true as you found it was:

That the Northern Securities Company was *not* the real purchaser of the railroad stocks, but merely and only the agent of the railway shareholders, their trustee, their custodian, to take and permanently hold these stocks and thus in a common interest manage both railroads: That

"All of the stock of the Northern Pacific Railroad "Company and all the stock of the Great Northern "Railway Company now *claimed* to be held and owned "by the defendant the Northern Securities Company "was acquired and is now held by it in virtue of such "combination or conspiracy in restraint of trade and com- "merce among the several states."

That you then virtually tied up and rendered useless in the possession of the Northern Securities Company all of said railroad stocks by depriving them of the voting power and the power of drawing dividends and thus the Northern Securities Co. became literally the mere holder of the same but without the rights of an owner of the same:

You then had before you a condition where these huge blocks of railroad stocks were worthless in the treasury of the Securities Company.

You had already in your opinion decided:

(346) "In short, the Court may make any order neces-
"sary to bring about the *dissolution* or suppres-
"sion of an illegal combination that restrains
"interstate commerce."

And that

(360) "the Court, in virtue of a well settled rule gov-
erning proceedings in equity, may mould its
decree so as to accomplish practical results—
such results as law and justice demand."

And you then—authorized the undoing of what had been done—struck the final blow at the combination—utterly dissolved it and broke it up by disintegration and resolved it into its original elements.

And you pointedly and exclusively pointed out the sole way that (the entire dissolution) could be accomplished by the Securities Co. returning to the original assignors the railroad stocks they assigned to it.

You permitted no other way—

This was the sole way you pointed out.

Under your findings of fact hereinbefore recited you could not have authorized a way which would be based upon and resulted from the proposition, (and which necessarily required such basis), *i. e.*,

That the Northern Securities Company *was* the purchaser and thus the real unconditioned owner of the railroad stocks.

By authorizing as you did that these railroad stocks might be returned to the original assignors you thereby necessarily determined that these original assignors were in equity and good faith the owners of such shares, and that the mere holding of a certificate in the Northern Securities Company did *not* give its holder any interest in any other railroad stock than he or his assignor had assigned.

In authorizing this particular way you of necessity denied any other way—especially any other way which was based upon a contradiction of the facts you had found.

With extreme care in your opinion and decree you always—always—and as to all parts disaffirmed the unlawful combination and all its acts.

None of them was or could be legal. They were all tainted with the illegal purpose.

You were careful not to authorize that which would affirm the validity of any act by the combination; and this extended to and embraced the acquisition by the Northern Securities Co. of all the railroad stocks. In your view such acquisition was illegal. The law denounced it. You necessarily held, and you held it both as a question of fact and of law, that a good title with the elements of ownership did not pass to the Securities Co.

You could not and did not either directly or by indirection sanction or even "wink at" any plan of dissolving the Northern Securities Co. which necessarily assumed that the Northern Securities Co. acquired a real substantial title as purchaser to said railroad stocks.

(IV.) *What did this Court decide in the Government case?* It may be succintly stated as follows:

(1) You outlined the combination against commerce; found that it suggested, organized and assigned to the Northern Securities Co. the railroad stocks (including that of your petitioners) and thus enabled it to destroy competition and you denounced it as illegal.

(2) You hold that all of said railroad stocks
"Now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or con-

spiracy in restraint of trade and commerce among the States."

(3) That the mode—indeed the only mode—in which the combination was carried out was the acquisition by the Northern Securities Co. of the railroad stocks. How that Company acquired these stocks and what its title to these stocks was the pleadings raised and this Court at length discussed and decided. It was raised in the pleadings in the government case and was hotly controverted and argued in this Court. It was in this Court decided to be a material, indeed a controlling question duly put in issue.

(4) The Northern Securities Co. here asserted that it was the *bona fide* purchaser for value and took an absolute title to these railroad stocks and this the Government denied.

This Court (*see our quotations ante*) held the Northern Securities Co. was not the *purchaser* of the railroad stocks and did not become the absolute owner thereof:

In part your words were:

"There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

Referring to Mr. Morgan's testimony, you said:

"That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies."

(5) Seeing this situation and having determined your own power to make any order necessary to accomplish the dissolution of this combination you then added to your decree:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock of either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This is the one and only one method you authorized for the distribution by the Northern Securities Co. of this railroad stock.

It was the natural and ordinary method and comported with your own findings of fact and did exact justice to all parties—*i. e.*—gave back to each that which he had put in. Entirely dissolved and destroyed the unlawful combination by disintegrating and separating the two railroad stocks which had been put into the possession of one Company. In no way did you sanction the proposition that the Securities Co. *lawfully* acquired the railroad stocks. You had determined to the contrary and to that you adhered. You authorized the Northern Securities Co. to reassign the identical railroad stocks, either Northern Pacific or Great Northern, to the

identical persons who assigned the same to the Securities Co. or to the assignee of such person. Thereby these persons did not *acquire title* from the Securities Co., but as the *cesteri que trustents* they were then the real beneficial owners and the decree allowing the reassigning merely struck down what had been done as part of the conspiracy, *i. e.*, placing the stocks in its hands as custodian, and relieved the stock when handed back to its original assignors from the disabilities it incurred in the hands of the Securities Co., *i. e.*, the denial of the right to vote and collect dividends.

(6)—You then said that

> "The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which, if done, would restrain inter-state and inter-national commerce."

If the Northern Securities Company had been the real, absolute owner, as is now claimed, of the railroad stocks, then the decree of the court in the Government case depriving it of the rights of ownership in the stock, *i. e*, to vote or collect dividends on the same, would have

"destroyed"

property interests.

Because the Northern Securities Company was not such real, absolute owner, but simply the holder for an illegal purpose, the decree when executed would not

> "destroy the property interests of the original stockholders of the constituent companies,"

because it took from the agent merely the right to vote and collect dividends, which powers it illegally had assumed to accomplish an illegal purpose, and restored them to the original owners of the railroad stocks.

(7)—You then made the following order:

> "The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require."

Why was this liberty to the Circuit Court given

> "to proceed in the execution of the decree,"

if, as it is now claimed, the decree is wholly prohibitory and executes itself?

That this court contemplated at least the possibility of the necessity of the Circuit Court making orders to enforce the decree as a whole is obvious, and it is respectfully submitted that this emphasizes what is to be gathered from the opinion and the entire decree of this court, and that is,

> That under the decree of this court, read in the light of the opinion of this court, there is but one possible way consistent with that decree and opinion for the Northern Securities Company to distribute its railroad stocks, and that is by a re-assignment of the same to the original persons or their assignees who assigned the respective railroad stocks to the Northern Securities Company.

If it be asked why this court did not make mandatory that portion of the decree in reference to the return of the railroad stocks, the answer is obvious: Why should it make it mandatory?

(V.) The Northern Securities Co., avowing in words its intention to follow and obey this decision and decree of this Court in the Government case, by its deeds, proposes to distribute its stocks—not by returning them to the original assignors as this Court alone authorized—but by distributing them pro rata among all the stockholders of the

Northern Securities Co., on the theory that the Securities Co. was the purchaser and owner of all said railroad stocks.

This suit was then brought in the Circuit Court of New Jersey to prevent such distribution and compel the assignment to Complainants of all the Northern Pacific stock it had assigned to the Securities Co.

The Circuit Court on Complainant's motion granted a preliminary injunction until final hearing, on the Bill and Exparte affidavits pro and con and after argument and from this interlocutory decree the Northern Securities Co., appealed to the Circuit Court of Appeals.

That Court, turning to our disadvantage the preliminary into a final hearing, held that the main question in this case was:

> Did the Northern Securities Co. acquire the stock by purchase and own it outright, or did it hold it as custodian or trustee?

And the Court of Appeals then said:

> "If the question before us had been involved and decided in the suit of the *United States vs. the Northern Securities Company*, or if it had been passed upon
>
> *though but incidentally*
>
> by the Supreme Court of the United States in disposing of the appeal in that case, we, of course, would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation."

On the same testimony before *this* court in the Government case, including Mr. Harriman (see petition) the Court of Appeals then proceeds to find and did find that the Northern Securities Company was a purchaser for value and absolute owner of all said rail-

road stocks, directly to the contrary of the findings of this court as hereinbefore shown.

In answer to our urging that even if the Court of Appeals doubted whether the decision of this court was *res adjudicata* settling the present controversy, still undoubtedly this court had on the same testimony expressed an opinion and respect for this court should at least prevent the Court of Appeals from brushing aside on a preliminary motion and in a manner fatal to us this august authority upon which we then thought and now think we could and can confidently rely. The Court of Appeals said:

> "The facts which have been mentioned negative the "contention that the question here in dispute was adju- "dicated in the Government suit, and the further con- "tention that it was at least authoritatively dealt with in "the principal opinion rendered upon the appeal in that "case is, we think, likewise fallacious. *Some phrases* "*in that* opinion, if considered separately and without "reference to the precise subject which was under inves- "tigation, may seem to sanction the interpretation which "the appellees have sought to put upon it; but when it "is read as a whole, it becomes quite evident that it was "not intended to resolve any question other than that "which was before the court."

Here you have this result:

This Court decided in the government case that the question whether the Northern Securities Co. was the *bona fide* purchaser of the identical railroad stocks involved in this case and absolutely owned them was an important question for its decision.

Mr. Justice Harlan delivering the opinion of the Court so said as we have shown by our citations supra.

Mr. Justice Brewer in effect so says.

Mr. Justice White speaking for himself and the Chief Justice and Mr. Justice Peckham in effect so stated.

The Court of Appeals by a mere majority opinion brushes aside the decision of this court by simply saying that though some of your language might seem to say so, you did not mean it; that even "*incidentally*" you did not pass upon that question.

The Court of Appeals did not even refer the question to you of what you meant. It determines you meant much less than, and therefore contrary to, what you said.

This court said when such a position arises, *i. e.* that there is any doubt of what you meant by your decree, that it must of necessity pass upon it *itself.*

This is what we ask.

What this Court did in its own language say.

And how the Court of Appeals construes it is shown by parallel columns.

Supreme Court of United States.	**Circuit Court of Appeals.**
"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported	"If the question before us had been involved and decided in the suit of the *United States vs. The Northern Securities Company*, or if it had been passed upon, though but *incidentally*, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation."
"simply an investment in the stock of other corporations, a purchase of that stock,—which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. *This view is wholly fallacious and does not comport with the actual trans-*	

actions. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. *If it was in form such a transaction, it was not in fact one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Pacific Railroad Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between these companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished and as to what was actually accomplished by the combination in question, it was the defendant Morgan. In his testimony he was asked—

'Why put the stock of both these (constituent companies) into one holding company?'

"He frankly answered:
'In the first place this holding company was simply a question of custodian because it had no other alliances.'

"That disclosed the actual nature of the transaction which was only to organize the Northern Securities Company as a holding company in whose hands *not* as a real purchaser or absolute owner, but *simply* as custodian were to be placed the stocks of the constituent companies, — such custodian to represent the combination formed between the shareholders of the constituent companies."

(VI) The Court of Appeals further held that :

"The present suit is an independent one, and as "its subject matter is distinctly different from that of "the suit in which the United States was complainant, "the duty of this court to independently consider it has "seemed to us to be both plain and imperative."

Here the Court of Appeals states its "duty" is "plain and imperative" to independently consider"

the present case, i. e. that is wholly uninfluenced by the decision and decree of this Court in this Government case.

And it reached that conclusion because

"The present suit is an independent one"

and

"its subject-matter distinctly different"

from that in the Government suit.

We assume (see *supra*) the Court means "cause of action" by the expression

"subject matter."

We urgently insist this was plainly erroneous; that the question of what title the Securities Company acquired in the stocks was, especially in this Court a material and hotly controverted one and was necessarily involved in that case; not the sole question, but a material one.

Yet, let us assume that the Court of Appeals is correct, and that the

"subject matter"

of the present suit was

"distinctly different"

from that in the Government Case:

What follows:

That the Court of Appeals may wholly disegard the findings of fact and conclusions of law in the Government Case:

In the Government case, as we have shown *ante*, this Court did pass upon the question involved in this case and did so because it was a material issue in that case. (See *ante*).

Your petitioners were parties by representation in the Government case, as was the Northern Securities Co. (See *supra*).

Are not the

"right, question or fact,"

and the

"matters in issue"

and the

"points controverted"

in the Government case finally determined, as between petitioners and the Northern Securities Co. by the decision in that case, even though the cause of action or "subject matter" of the present suit are different?

In *Southern Pacific Railroad Company vs. U. S.*, 168 U. S. 1., one of the syllabi of the case is as follows:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disturbed in a subsequent suit between the same parties or their privies; and even if the second suit is for a *different cause of action* the right, question or fact once so determined must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

In *Cromwell vs. County of Sac*, 94 U. S. 352, the Court thus elaborated this doctrine:

> "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect is an estoppel in another action between the same parties upon a *different claim or cause of action.*
>
> "In the former case, the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claims or demand in controversy, concluding parties and those in

privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence.

"But where the second action between the same parties is upon a *different claim* or *demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Where there are several grounds of recovery or defense on which the decree may have been rested, said decree will be conclusive on the specific finding or ground on which the Court decided the case.

Russell vs. Place, 94 U. S. 606.
De Sollar vs. Hanscome, 158 U. S. 216, 221.
Flint Natl. Bank vs. City of Covington, 129 Fed, Rep. 798.
Hawes vs. Water Co., 5 Sawyer, 287.

The conclusions of this Court in the Government case were as conclusive between the co-defendants—the stockholders of, and the Northern Securities Company itself, as if these stockholders had individually been parties plaintiff or defendant to the litigation.

In *Corcoran against the Chesapeake Canal Company*, 94 United States 741-744, this court said,

"It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the Court and passed upon by its decree. * * * *

It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. * * * *

But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee, vs. Stewart, et al.*, 93 U. S. 155, and the authorities there collected."

In *Herman on Estoppel and Res Adjudicata*, the law is thus stated, pp. 154-165;

> "Every person whom the parties plaintiff and defendant represent in the suit are bound as privies by the judgment. A corporation represents and binds the stockholders in all matters within the limits of its corporate power * * *Among the fundamental powers of a corporation are those of bringing and defending suits affecting the rights and obligations of the corporation, in which it represents and binds the stockholders as fully as in the making of contracts.* In any ordinary action or suit agaist the corporation to establish and recover a debt the stockholders are neither necessary or proper parties; they are represented by the corporation; *and if they in their individual capacities are allowed to intervene at all, it can only be in the name of the corporation.* * * * *Hence, whatever, concludes or affects a corporation, binds and concludes all of its stockholders who compose the corporation*, and therefore a judgment against a corporation, unless it was procured by fraud and collusion, is conclusive upon the stockholders, as well as against the corporation and its property."

Secor vs. Singleton, 41 Fed. Rep. 725.
Great Western Tel. Co. vs. Purdy, 162 U. S. 329.
Hawkins vs. Glenn, 131 U. S. 318.

The Court does not define the expression

"subject matter."

We presume it to mean that the purpose and object of the two suits were different. The Government case was to destroy an unlawful combination against commerce, while the present suit is to assert ownership to certain Northern Pacific stock.

If it meant to again assert that the question of the nature of the ownership by the Securities Company was not there considered we have already answered it *ante*.

The identical stock here in controversy—its ownership by the Northern Securities Company—the fact that it, with all the other railroad stocks transferred were the *very means* by which the combination was carried out, and without which stocks the combination could not have been successful, (and therefore were of necessity considered), and that the nature of the title which the Northern Securities Company acquired to the stock was put in issue by the pleadings will be admitted by any one familiar with the Government case—will be proven to any one by reading the pleadings and opinions in that case.

VII. The Court of Appeals also held that the decree of this Court in the Government Case was wholly prohibitory. That it carried out itself without further order, and that a distribution by the Northern Securities Company of the Railroad stocks in a manner distinctly different from the distribution authorized by this Court was not objectionable, though such distribution could not be made unless based upon an absolute ownership by the Securities Company of the railroad stocks, which ownership this Court distinctly denied.

We have practically commented on this hereinbefore, and only add that even if the Court of Appeals be right in this assertion (which we deny), still we were of right entitled to set up the opinion and decree and findings of fact by this court in the Government suit, as conclusive in the litigation at bar. Whether the decree was prohibitory or not is immaterial so far as that question is concerned.

(VIII) In the Government case the issue was sharply made by the bill and answers and especially insisted upon and argued in this court as to whether the Northern Securities Company was a purchaser and became the real, substantial owner of the railroad stocks, or merely a custodian for the railway stockholders, and one of the prayers of the bill was for a decree for the return of the stocks to the persons who assigned them to the Securities Company.

The bill in the Government case *inter alia* alleged, Paragraph XI:

(XI.) "*No consideration whatever has existed, or* will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company other than the issue of the stock of the Northern Securities Company to them in exchange thereof for the purpose, after the manner and upon the basis aforesaid.

"*The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depository, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders of the pool.*"

The answers were substantially the same, and in answer to Paragraph XI they each denied it and the Northern Securities in addition alleged it was the real owner and purchaser for value of the Stocks.

The answer further alleged the scheme of the Northern Securities Company, was valid and not within the Sherman Act, and the answer further pleaded that to hold the contrary was to demonstrate that the act was unconstitutional, among other reasons, because no one could be deprived of his right to sell his property as he desired or with his money purchase such other property as he coveted.

The prayers of the Bill *inter alia* were:

That the Northern Securities Company and its officers, stockholders and directors

> "be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, (whether by proxy or otherwise) or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued."

* * * * * * * *

> "FOURTH. That the individual defendants named and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each respectively perpetu-

ally enjoined from in any manner voting, holding or acting as the owner of any of the stock of the Northern Securites Company issued in exchange for the stock of either of the said railway companies unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept therefor the stock of the defendant railway company in exchange for which the same was issued."

FIFTH. To restrain all the defendants

"and their associate stockholders"

from any further combination or conspiracy.

Prayer for general relief.

Opinion of this Court as to issues Raised.

That this court thought that the question of the nature of the title which the Northern Securities Company acquired to the railroad stocks was a material question raised by the pleadings is evident from the several opinions filed in the case.

Mr. Justice Harlan, speaking for the court, and with whom concurred Mr. Justice Brown, Mr. Justice McKenna and Mr. Justice Day, so thought and said. (See our citation *ante*).

Mr. Justice Brewer, from his language on pp. 361 and 362, evidently so thought.

Mr. Justice White, speaking for himself and the Chief Justice, and Mr. Justice Peckham and Mr. Justice Holmes evidently so thought, because on p. 366 Mr. Justice White said as follows:

"Two questions arise: Does the Anti-Trust Act when rightly interpreted apply to the acquisition of ownership by the Northern Securities Company of the stock in the two railroads; and second: if it does, had Congress the power to regulate or control such acquisition and ownership."

"It is said, First, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stocks in the railroads."

(IX.) *There was no urgency or peculiar complication of circumstances that necessitated a speedy final decree in this case, but on the contrary, the complications in the case would seem to require that it should have gone to a final hearing in the ordinary way.*

The only reason the Court of Appeals (Judge Dallas) gives for departing from the ordinary practice in equity cases is that

"the injunction complained of precludes the enjoyment of rights of ownership in property of great value."

The only thing then that it does *preclude* is

"the enjoyment of rights of ownership in property;" and it precludes this only until there can be a final hearing, and the speed with which that final hearing can be had is under the control of the court.

When it is remembered that the security of the property is not at stake; that there is no danger of the destruc-

tion of the property; that the injury from the preclusion of the enjoyment of ownership is protected by a bond of $2,000,000.00; that the disposition of all of the property, the Great Northern and Northern Pacific stocks, *except* the identical Northern Pacific stock which we claim is within the control of the Court, as well as the dividends therefrom and the voting power thereon, it is difficult to see why such preclusion from ownership denies us the rights of the ordinary suitor to go to a final hearing. It would rather seem that the great value of the property in dispute should assure us of that right instead of denying it to us.

(X.) When May the Circuit Court of Appeals on an Appeal from an interlocutory decree enter a final one?

You have considered the question in the following cases:

Smith vs. Vulcan Iron Works, 165 U. S. 524.
Maast, Foos & Co. vs. Stover Mfg. Co., 177 U. S. 494.
Britt vs. Peckham Motor Co., 189 U. S. 58.

From them are to be deduced the following conclusions:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

"when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Court of Appeals on appeals from preliminary decrees to enter final decrees are limited to cases where—

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed.

(b) If a question of fact is involved, the Complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits *the complainant was entitled to cross examine the party who made them.*

(c)—Unless the case, as stated in the bill, is

"obviously devoid of equity"

and such defect

"be incapable of remedy by amendment"

as where the case stated does not give jurisdiction to the court in which the bill is filed, or where the relief asked is obviously such as the court cannot grant, and it is apparent the defect cannot be cured by amendment.

(d). In patent cases where the validity of the patent is necessarily raised and involved and a decision against its validity is final, the entry of a final decree seems obvious.

(e). The power to enter such final decree is exceptional and unusual and should be exercised with great caution, and only in cases free from doubt, and where it is plain and certain that there is no

"reasonable *possibility*"

of the complainants' recovering on the whole or any part of their claim.

(f). The practice puts the complainant at a disadvantage. Heretofore in other than patent cases he did not on a motion for a preliminary injunction ordinarily develop his entire proof. This was often impossible and often inexpedient, and sometimes beyond his reach, as when he relied on the books and papers in the hands of the opposite party, or on across examination of defendants' witnesses.

If he is in the Court of Appeals to go really to final hearing, he is practically denied his preliminary motion which is often absolutely essential to his relief, as where in this case the subject matter of the litigation will be hopelessly scattered and the complainant practically remediless.

As Chief Justice Fuller said *ante:*

> "If complainants in every case must understand that a motion for preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made."

So far as we have been able to find there is not a single case holding where the Bill stated a cause of action and the defendant did not demur but disputed the averments of fact, that the Court of Appeals may, on an appeal from an interlocutory decree where the motion was for a preliminary injunction, and the hearing was on Bill and *ex parte* affidavits, dispose of the case on the merits and enter practically a final decree.

(XI.) The present case was not one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a preliminary injunction, could enter what is practically a final decree, and finally dispose of the case on the merits.

It is not disputed that the bill stated a case for equitable relief. This is demonstrated by the fact that the defendent did not demur to the bill, and after the appeal was taken in this case filed an answer to the same.

The motion in the Circuit Court was for a preliminary injunction and was heard on the bill and *ex parte* affidavits. The opinion of Judge Bradford, who granted the preliminary injunction merely stayed the distribution until final hearing, is referred to.

The action of the Court of Appeals was in effect final. It will permit, the court admits, the dissipation of the stock in suit by its division among, say twenty-five hundred persons, so that if your petitioners were finally held to be entitled to recover, their victory would be a barren one.

The decision avers on its face that it is and is intended to be a determination on the merits and a complete adjudication on the essential questions of law and of fact involved in the case. It renders hopeless any further proceedings in the Circuit Court by proofs or arguments to sustain your petitioners' case.

The Circuit Judge held that the case was one which should go to a final hearing, where both of the parties to the controversy would have an opportunity to cross-examine the adversary's witnesses, to compel the attendance of hostile witnesses and the production of all books and papers that may throw light upon the case, and the intelligent consideration by the Court, in disposing of the question of fact, of all the circumstances surrounding the transaction. The right to do these things was denied to your petitioners by the decision of the Circuit Court of Appeals.

That decision disposed of the question of fact, wholly ignoring the circumstances under which the Northern Securities Company acquired the Northern Pacific stock of your petitioners: wholly disregarded the purposes for which all of the railroad stocks were acquired by the Northern Se-

curities Company: wholly disregarded the purposes for which the Northern Securities Company was organized, and the combination against trade and commerce, of which it was the head and front. Most of these facts were admitted on the hearing for preliminary injunction, but were entirely disregarded by the Court of Appeals in passing upon the question of fact as to the nature of the title the Northern Securities Company acquired to the railroad stocks, though,in our judgment and heretofore in the judgment of this Court, they had a most material and important bearing.

We insist that the Court of Appeals erred in entering what was practically a final decree in this case, because

(a) There were seriously disputed and substantial questions of fact;

(b) There were seriously disputed and substantial questions of law;

(c) The Northern Securities Company had not demurred to the bill of the petitioners and the hearing in the Circuit Court on the motion for preliminary injunction was on bill and *ex parte* affidavits and before an answer had been filed. And the Court of Appeals found the facts *directly contrary* to the averments of the Bill.

(d) The Circuit Court in issuing the preliminary injunction, did not exceed its discretion and this the Circuit Court of Appeals admitted in its opinion, though it misunderstood the purpose for which the injunction was issued, saying that the injunction was issued with the understanding that the Circuit Court of Appeals would on a hearing from the interlocutory decree in the case, enter what was practi-

cally a final decree in the case, though of this intention by the Circuit Judge the opinion of the Circuit Court contains no evidence, but, we respectfully submit, points to the contrary.

(e) The Court of Appeals erred in its disposition both of the questions of fact and the questions of law in the case; and

(f) The Court of Appeals overlooked material questions of fact which were involved in the case, and the determination of which in favor of your petitioners would have entitled them to equitable relief.

Questions of Fact and of Law.

Among the questions of fact and law insisted upon in the Court of Appeals and which arise on this record, are the following:

Among the questions of fact in the case were these:

(1) Was the Northern Securities Company the owner with the right to sell, of the Northern Pacific stock owned by the Oregon Short Line Railroad Company, or, did it acquire the said Northern Pacific stock in pursuance of and in furtherance of the unlawful combination against trade and commerce (and in conflict with the Sherman Law,) by which unlawful combination it was sought to gain and place in the possession of the Northern Securities Company, the agent of the unlawful combination, the control of the Northern Pacific and Great Northern Railroad Companies, and thus restrict trade and commerce, and that *thereafter* the Northern Secu-

rities Company held such railroad stocks really only as trustee and custodian?

We alleged that the Northern Securities Company was not a real owner.

(2) What were the terms of the contract under which the Northern Securities Company acquired the Northern Pacific stock from the Oregon Short Line? Were they similar to the terms of the contracts under which the Securities Company acquired its other Great Northern and Northern Pacific stock, or did they differ.

Was the Northern Pacific stock assigned by the Oregon Short Line in furtherance of the combination to further which the Securities Company was formed to enable the combination the more certainly to control two parallel and competing railroads engaged in inter-state commerce, and with this stock in connection with that of Great Northern *permanently* hold and manage the two railroads in one interest and thus prevent competition between them; and was this to be carried out by a collection of dividends from both roads and a distribution of these dividends among the stockholders of the Northern Securities Company, without regard to who assigned the respective railroad stocks to the Securities Company?

Was a *permanent* holding and thus control of the two railroad companies by the Securities Company the main consideration to petitioners for assignment of its Northern Pacific stock to the Securities Company?

As we show in our petition, the bill alleged that it was, and of this there was no contradiction by the defendants, unless indirectly so by Mr. Hill's affidavit; and in support of the bill, we add the affidavits of Mr. Harriman, the two affidavits of the bill and extracts from the testimony of

Messrs. Hill, Morgan, Clough and others, as set forth in our petition.

(3). Is it true, as averred by the petitioners, that the original parties forming the combination, (Morgan, Hill & Company) still control the Northern Securities Company and own a majority of its stocks? Did these parties, originally in control of the officers and Board of Directors of the Northern Pacific Railroad Company, inequitably and unlawfully, through that control, threaten the Oregon Short Line to retire the Northern Pacific preferred stock, of which the Oregon Short Line was the owner of a majority, in such manner that the Oregon Short Line would be deprived of the same and be compelled to take par, though it was selling in the market at a much greater rate, and Morgan, Hill & Company, as the owners of a majority of the common stock of the Northern Pacific Railroad, be greatly benefitted by being the sole subscribers to the new common stock which the Northern Pacific, under the management of Morgan, Hill & Company, determined to issue at par for the purpose of retiring the preferred stock? And is it true that at the time when the Northern Securities Company was formed by Morgan, Hill and others, and at and before the time when the Oregon Short Line assigned its Northern Pacific stock to the Northern Securities Company that it was induced to do so by the threats of Morgan, Hill & Company to carry out this scheme of retiring the preferred stock of the Northern Pacific, and with the inducement to the Oregon Short Line that by the assignment of its preferred stock in the Northern Pacific and its common stock in the same to the Northern Securities Company that company would with this stock have a majority and control of not only the Great Northern, but the Northern Pacific, and would permanently hold said stocks and manage and control both roads, and divide indifferently the dividends from the two among the holders of the stock

of the Northern Securities Company. (See affidavits of Harriman and extract from Hill, Clough, *et al.*, in our petition.) Did Morgan, Hill and others unfarily value and too high their Great Northern stock and unfairly value and too low our Northern Pacific stock as a basis of exchange for Northern Securities stock? If the facts be as stated and as we allege, then Morgan, Hill & Company now in control of the Northern Securities Company and operating in the name of that company cannot, to the disadvantage of the Oregon Short Line, make a present distribution of its Northern Pacific stock in such way that Morgan, Hill & Company will be greatly benefitted at the expense of the Oregon Short Line and the Oregon Short Line will be compelled to take the Great Northern stock of Morgan, Hill & Company at a high value and Morgan, Hill & Company will take the Northern Pacific stock of the Oregon Short Line at a low value. And this conclusion follows irrespective of the title which the Northern Securities Company took to said Northern Pacific stock, whether as purchaser or custodian.

On these facts, then at least as against Morgan, Hill & Company and so far as their interest in the same goes, we are entitled to our Northern Pacific stock even if there be, which we deny, other Northern Securities Company stockholders whose equities are superior to ours.

We alleged these facts and this result.

(4) Is it true that the railroad stocks originally assigned to the Securities Company are still held by it, and that the certificates of stock of the Northern Securities Company issued for the railroad stocks so assigned can be traced through and into the hands of the assignees, so that a return of the original railroad stocks can be accurately and definitely made?

Petitioners allege that this can be done.

Questions of Law.

(1) As a question of law (likely to frequently arise before this Court in the adjudication as to trusts), what title did the Northern Securities Company take to the Northern Pacific and Great Northern Railroad stocks assigned to it which this Court has held were so assigned in furtherance of a combination against trade and commerce, and contrary to the provisions of the Sherman Act?

Did the Northern Securities Company, though acquiring the stocks in an illegal manner and for an illegal purpose, take a good indefeasible title as purchaser to said stocks as if it acquired them lawfully in the open market.

(2) Did this court, in the case of the *Northern Securities Company against the United States*, 193 U. S. 197, decide that the Northern Securities Company in acquiring the railroad stocks in the Northern Pacific and the Great Northern Railroad, including the stock of the petitioners, only acquire a title as custodian or trustee thereof, and did not become by such acquisition the real substantial unconditional owner?

If it did the Circuit Court of Appeals in the majority opinion admits that its present decision is wrong.

(3) Did this court in the said Government suit above cited, tie up in the hands of the Northern Securities Company the railroad stocks of the Northern Pacific and the Great Northern so that the same could not be sold in the market, they being deprived of the right of collecting dividends or voting the same, and did this court then decree one and only one mode of the Northern Securities Company disposing of that stock, to wit, the return and re-assignment of

the same to the persons who originally assigned said stocks to the Northern Securities Company?

If it did, as we allege, then confessedly the decision of the court below must be wrong, for it approves another and wholly different distribution.

(4) May the Circuit Court of Appeals on an appeal from an interlocutory decree where the case in the Circuit Court went to hearing on a bill and *ex parte* affidavits, and the defendant did not demur to the bill, and the Circuit Court granted a preliminary injunction, on an appeal from such interlocutory decree, decide as if it was a court of original jurisdiction, disregard the discretion which was admittedly properly exercised by the court below, enter what is practically a final decree in the case, and this when there are disputed questions of fact and of law, part of which questions of fact and of law the Circuit Court does not even mention in its opinion?

(5) Has the doctrine of *in pari delicto* anything to do with the decision of the question involved in this case?

Both in the Circuit Court and the Circuit Court of Appeals it was most elaborately argued that it had, and a brief covering several hundred pages was filed in each court on that question alone. We claim that it has nothing whatever to do with the case, and that that was decided and disposed of in the decree of this court in the Government case.

(6) Have the petitioners, as parties to the litigation in the Government case, a right independent of the action of the Attorney General or of the United States Government to insist upon the finality of the findings and decree in that case on all questions of fact and of law that arise in the case at bar?

We assert that they have.

Answer of the Court of Appeals.

Answer to the Questions of Fact.

(1) It answered that the Northern Securities Company was the bona fide purchaser and the absolute owner of the Great Northern and Nothern Pacific railroad stocks.

In doing so it did not take into consideration or give any weight to the circumstances surrounding the acquisition: the purpose for which the stocks were acquired: the fact that the Northern Securities Company had not a real, independent existence but was merely the representative of the railway stockholders: it overlooked the extracts from the testimony of Messrs. Hill, Clough and others (see our petition): it stated results from the testimony of Mr. Harriman which overlooked other portions of his testimony, and disregarded the circumstances under which that testimony was given, and the fair meaning of the words used by him; it made the question of fact turn upon the *words* and not upon the real substantial fact and thus it give a semblance of purchase where in reality there was no real sale or real purchase; it overlooked and never considered whether it was possible in the transfer of stocks to one of several of the combination to accomplish an illegal purpose, that the agent of the combination acquired a good independent title as purchaser; it never even referred to the opinion of this Court as to the circumstances under which and the purposes for which the Northern Securities Company acquired the railroad stocks; because the word *purchaser* was used it relied upon this mere form, and wholly overlooked the substance, as shown by all the surrounding circumstances.

(2) The only answer to the second proposition was the finding of an unqualified contract of sale, and the statement in the opinion as follows:

"Undoubtedly, it was anticipated by the complainants, as well as by all concerned, that the rights ordinaily incident to the ownership of stock including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. An expectation is not a contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration."

The Court reached this conclusion by overlooking the positive averments of our bill, sworn to, and which were not contradicted unless indirectly by Mr. Hill's affidavit, and also overlooked the proofs we submitted in support of the averments as to permanent holdings, to-wit: the affidavit of Mr. Harriman and extracts from the testimony of Messrs. Hill, Morgan, Clough and others, as set forth in our petition.

(3) This question of fact the Court never even noticed in its opinion. It was a material one upon which we were entitled to relief even if the Securities Co. was a purchaser.

(4) This question of fact was not noticed in the opinion, though it is agreed that it was a subsidiary question and not necessary to be noticed in the manner in which the Court below decided the case.

Answer to Questions of Law.

(1) The Court did not discuss or consider or seem to think that this question was raised in the case. It decided the case as if the Northern Securities Company had been organized for a lawful purpose, acquired the stock for a lawful purpose, and there never had been a unlawful combination of which it was the trustee.

(2) It held that this Court had not even

"incidentally"

considered the question.

(3) It held that the portion of your decree referring to the return by the Northern Securities Company to the original assignors of the railroad stocks assigned was permissive only and was entirely consistent with another mode of distribution, which other mode was a denial of the facts on which this Court reached the conclusion and made the decree that it did.

(4) It answered this point in the affirmative.

(5) It did not consider necessary to pass upon this question.

(6) It did not consider this question, though it probably assumes in the opinion that your petitioners had the right to set up the opinion and decree of this court *if* you had passed upon the same.

Oversight of Court of Appeals.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Thus the Court of Appeals held,

> "The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its Board of Directors at a meeting *at which Mr. Harriman was present* as a member of the Board, and the only authority conferred was "to purchase said stock * * * at an aggregate price of $91,407,500 payable as to $82,491,871 thereof in the full paid and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase" and not a bailment or trust".

The Court fell into error. Mr. Harriman was not present at the meeting of November 15, 1901, when this resolution was passed, as will be apparent by an examination of a certified copy of it on page 382 of the record. Mr. Harriman was present at the meeting of the Board of Directors on November 19, 1901, when it is said the minutes of November 15th were read and adopted, but what, if any, action was taken by him at the time is not stated.

The Court said that the circumstances following the resolution demonstrated the transaction to be a purchase, and then added this:

> "The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purpose of other property and for corporate purposes."

The Court here again fell into error. Paragraph VI. which was referred to, page 4, relates to the receipt of money by the Northern Securities Company and not by the Oregon Short Line Railroad Company.

(XIII) *The Court of Appeals misapprehended the opinion and decree of the Circuit Court (Judge Bradford) in that the Court of Appeals determined that Judge Bradford did not grant a preliminary injunction to hold the STATUS QUO until all the testimony and proofs could be put in and a final hearing could be had, but granted it ONLY UNTIL the Circuit Court of Appeals on an appeal from an interlocutory decree granting the preliminary injunction, could finally pass upon and determine the case.*

In the opinion Judge Dallas said:

> "It appears from the opinion of the learned Judge of the court below that in granting this injunction he was *materially influenced* by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be

withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, be determined upon the merits and without further delay, *Western Union Telegraph Co. vs. Pennsylvania Railroad Company*, 123 Fed. Rep., 33, 36. There have been cases, it is true, in which it has been held that where the court in the first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court 'unless there is some strong reason for it.' *Massey vs. Buck*, 128 Fed. Rep. 27.

"But to the circumstances of this case those rulings are inapposite.

"Attentive reading of the opinion of the learned Judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie upon the denial of the injunction as 'of controlling importance,' and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court. * * * "

If this opinion of the Court is correct, why Judge Bradford filed the elaborate opinion he did—why he considered the facts and the questions of law and went so fully into the authorities, is inexplicable.

An examination of Judge Bradford's opinion we now propose to make, and thus show the misapprehension of the same given in majority opinion of the Circuit Court of Appeals.

The opinion of Judge Bradford begins at page 395 of the record and extends to page 423, and how it is possible to say that Judge Bradford granted the preliminary injunction,

> "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy in this Court"

and that he was wholly controlled in the granting of the injunction by the fact that an appeal could not be taken by the complainants in the bill if the injunction was refused, is certainly not found in *words* in the opinion of Judge Bradford. On the contrary, that opinion seems undoubtedly to have been based upon the fact that Judge Bradford believed there were serious and doubtful questions in dispute, both of law and of fact, and that it was his duty as a chancellor to hold the *status quo* until the case could be disposed of on final hearing.

Among other things, he says, after a full recital of the averments of the bill, as follows:

> "The defense controverts material allegations in the bill, some of which embody averments of fact and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the Bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction, counsel on both sides have, with strong insistence, urged, and with elaboration and signal ability discussed a number of legal propositions, important and farreaching in their scope and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly *three days* pressed them with a zeal and with manifest reliance upon their soundness and materiality."

Again discussing the question of the convenience and inconvenience and the cases where injunction should be issued, the court said, p. 414:

"But this court has power to require of the complainants as a condition precedent to the issue of the injunction, a bond in such form and amount as fully to indemnify all persons who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned."

"A *pro rata* distribution under the proposed plan of the $39,661,450.00 par value of stock of the latter company (Northern Pacific) included in the amount now sued for among all stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty, entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder and embarass, and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the stock in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution through the creation of new equities on the part of such purchasers.

"In view of the character of the questions involved in this case it would be highly inequitable that the complainants should in advance of any final decision on the merits be put in such a position as to be precluded either wholly or in a large measure from the realization and enjoyment of the fruits which should be

theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor. * * *"

Judge Bradford, now referring to a number of questions in the case, said:

"It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the Court. *They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master.*"

* * * * * *

"'The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact ultimately determined are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted.'"

Judge Bradford so far has not even mentioned the question that the complainants could not appeal if an injunction were refused—has not even mentioned it, much less relied upon it.

So far the case has been put that it was the duty of the Judge to grant the injunction because there were grave and doubtful questions of fact and of law, and it was a case where in the accustomed mode, evidence should be taken before a master.

Just at the end of his opinion Judge Bradford did add this:

"An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. *While this consideration is entitled to no weight* where, on the application for an injunction, if it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where on such application there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound, judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals."

To say that Judge Bradford merely granted this preliminary injunction

"with the understanding that"

it tied up the case until the Circuit Court of Appeals on an appeal from his decree would render practically a final judgment, is, we submit, not proven. It overlooks the extracts we have cited; it is inconsistent with his own language; it is not justified by the opinion, and with great respect it is said it is on a par with the declaration of the Court of Appeals that the decision of the Supreme Court of the United States in the Government Case, 193 U. S. 197, did not even **"incidentally"** consider the question involved in the present controversy, *i. e.*, the title of the Northern Securities Company to the stocks of the Northern Pacific Railway Company.

FEB 24 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS AND COMPLAINANTS.

WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
JOHN F. DILLON,
D. T. WATSON,
R. V. LINDABURY,
BAINBRIDGE COLBY,
Of counsel for petitioners and complainants.

WASHINGTON, February 20, 1905.

[19,612.]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS AND COMPLAINANTS.

STATEMENT.

This hearing is on writ of certiorari to the Circuit Court of Appeals for the Third Circuit bringing up for review an order of that court reversing an interlocutory decree of the Circuit Court for the District of New Jersey, which granted a preliminary injunction restraining the defendant Northern Securities Company, until the determination of the suit, from transferring, assigning, distributing or otherwise disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company claimed by the complainants.

The controversy arises out of the decision of this court rendered at the last term in the case of *Northern Securities Co.* v. *United States*, 193 U. S. 197, hereinafter called the "Government suit," and out of action threatened by the Securities Company and alleged by it to be necessary in order to comply with the final decree in that suit. The present suit was brought to

obtain the possession and transfer to the complainants of certain shares of the capital stock of the Northern Pacific Railway Company delivered to the Northern Securities Company in November, 1901, by the complainants Harriman and Pierce[1] and now held by the Securities Company, being a portion of the same railway shares directly involved in and covered by the decree in the Government suit. The decree, as rendered by the Circuit Court for the District of Minnesota in the Government suit, and in all things affirmed by this court, adjudged as follows (193 U. S. at pp. 255–257; record, pp. 150–151):

> "That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal.
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> "That *all* of the stock of the Northern Pacific Railway Company and *all* the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, *was acquired and is now held* by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.
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> "That the Northern Securities Company, its officers, agents, servants and employees, be and they are hereby enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies.
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> "That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or

[1] Messrs. Harriman and Pierce are trustees for the Oregon Short Line Railroad Company, which, in November, 1901, was the holder and owner of a majority of the capital stock of the Northern Pacific Railway Company (record, pp. 4–5, 157). The Equitable Trust Company of New York is the pledgee of the Securities Company's certificates (pp. 5, 29, 159).

may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein. . . .

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the *stockholders of the*[1] Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Immediately upon the rendition of the decision of this court in the Government suit, the board of directors of the Northern Securities Company adopted resolutions declaring that the "company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay" and to terminate the company's holding of stock of the Northern Pacific and Great Northern Railway Companies by distributing such holdings among its stockholders (record, pp. 9–10), and thereupon formally notified the Attorney-General of the United States that the com-

[1] So in original decree (present record, pp. 151, 367; 120 Fed. Rep. 721, 732; 128 Fed. Rep. 808, 811), but the words "stockholders of the" were omitted from the record in the Government suit (p. 1715) and from the report in 193 U. S. 256, 355.

pany contemplated "a speedy dissolution; but it is deemed by the directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders" (record, p. 160). The distribution of the stock of the two railway companies, which the directors of the Northern Securities Company proposed to make, was not to return to the original depositors or their assigns the stock deposited by them or represented by their certificates, as was expressly authorized by the final decree in the Government suit, but was upon the theory that, notwithstanding the adjudged illegality of the contract whereby the Securities Company acquired and held the railway shares and the company's adjudged lack of power to exercise any of the most ordinary rights of ownership over them, nevertheless it had become the legal and equitable owner thereof as fully as if such contract had been legal and within the corporate powers, and that consequently every stockholder of the Securities Company should receive a proportionate amount of the stock of each of the two competitive railway companies and not what he originally deposited. Each stockholder of the Securities Company would thus continue to be jointly interested as a stockholder in both railway companies.

The complainants, as original holders of certificates representing $82,491,871 par value of the capital stock of the Northern Securities Company, promptly objected to such proposed method of distribution as illegal, and thereupon, after first applying to the Circuit Court of the United States for the District of

Minnesota for leave to intervene in the Government suit, which application was denied, instituted the present suit in the Circuit Court in New Jersey against the Northern Securities Company and the Northern Pacific Railway Company, for the purpose of obtaining an adjudication that the proposed plan of distribution was illegal, and that complainants, as original depositors and stockholders of the Northern Pacific Company, were entitled to have restored to them the shares of Northern Pacific stock which they had delivered to the Northern Securities Company.

The verified bill of complaint sets forth the requisite diversity of citizenship of the parties (record, pp. 1–2) and the presence within the jurisdiction of the court of the personal property involved in the controversy (p. 6); and the facts disclosed in the verified bill and supported by the accompanying affidavits were substantially as follows:

In November, 1901, the capital stock of the Northern Pacific Railway Company, a Wisconsin corporation, was $155,000,000 par value, all outstanding, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, which preferred stock was subsequently converted into common stock so as to make the capital stock of the Northern Pacific Company $155,000,000 of one class, called common stock (p. 2). The capital stock of the Great Northern Railway Company, a Minnesota corporation, was $125,000,000 par value, of which $123,000,000 par value was and is outstanding (p. 2). These two railway companies, at all the times mentioned in the bill, owned and operated and still own and operate systems of railway substantially parallel from

Lake Superior to Puget Sound, and are in a position to compete with each other in the transportation of persons and property among the several states along their respective routes and between such states and foreign countries (record, p. 2).

The bill further alleges that on or about the 13th of November, 1901, the defendant Northern Securities Company was organized under the laws of the state of New Jersey with an authorized capital stock of $400,000,000 divided into 4,000,000 shares of the par value of $100 each, and with a provision in its certificate of incorporation that its duration should be perpetual (p. 16). Although in form incorporated and organized according to and nominally for objects authorized by the laws of the state of New Jersey, the company, as has since been disclosed and adjudged, was in fact incorporated and organized in pursuance of a combination in restraint of trade and commerce in violation of the act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, 26 Stat. 209, and as an instrument or agency in order to effectuate and accomplish the objects of the combination. This combination, to which none of the complainants were parties (p. 157), had been entered into prior to November 13, 1901, by Messrs. James J. Hill, J. Pierpont Morgan and others owning or controlling a majority of the capital stock of the Great Northern Company and a majority of the *common* stock of the Northern Pacific Company, as a hostile measure against the interests represented by the complainants (pp. 96–97, 111, 157–159, 171–175). Mr. Hill and his associates agreed among themselves that a holding company should be organized

under the laws of the state of New Jersey, that said holding company should permanently hold a majority of the shares of the capital stock of both of the railway companies and control their operation and management in perpetuity, that the then existing holders of railway shares should deposit the same with said holding company and receive in exchange therefor share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that such holding should be on behalf of the existing stockholders of the railway companies or their assigns (record, pp. 3, 111, 115, 133, 157–159, 171–173, 174, 175). Thereupon the Northern Securities Company was organized as the holding company, and it forthwith agreed to acquire and hold the railway shares as such custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the agreed basis (pp. 3–4).

In pursuance of said agreement, the Northern Securities Company from time to time issued $176,822,900 par value of its stock in exchange for $153,759,400 par value (*i. e.*, over 99 per cent.) of Northern Pacific stock, and $211,057,600 par value of its stock in exchange for $118,124,200 par value (*i. e.*, over 96 per cent.) of Great Northern stock, and $7,522,000 of its stock for cash, and this cash is alleged by the company to have been used in the purchase of other property and for corporate purposes (pp. 268–269). The total issued and outstanding capital stock is $395,402,500 divided into 3,954,025 shares of the par value of $100 each (p. 269). The Securities Company caused the certificates of the railway shares received from complainants

to be transferred to it and registered in its own name or the names of its agents, and it has ever since November, 1901, held and now holds the same so registered (record, p. 4). It is alleged in the bill that all persons to whom the stock of the Northern Securities Company was issued, whether for railway shares or for cash, had full knowledge and information of the purposes for which the company was organized and of the fact that stock of each of said railway companies was to be or had been deposited with said company as custodian or depositary in pursuance of said agreement (p. 4). It is undisputed that this combination was entered into in direct hostility to the interests represented by the complainants and as a defensive measure against them, and that its purpose was to force and coerce them to surrender their control of the Northern Pacific Railway Company's stock (pp. 96–97, 111–112, 115, 157, 158, 175).

Prior to the incorporation of the Northern Securities Company, the complainant Oregon Short Line Railroad Company had acquired and owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Company, represented by certificates registered in the names of the complainants Harriman and Pierce, who had no personal interest therein, and such holding constituted a clear majority of the capital stock of the Northern Pacific Company. The Oregon Company has due legislative and charter authority to acquire and hold such stock as that of a connecting railroad (p. 156). After the incorporation of the Securities Company had been resolved upon, Messrs. Harriman and Pierce and the Oregon Short Line Company

agreed with the promoters and incorporators of the Northern Securities Company to transfer to and deposit with said Securities Company, under the terms and conditions aforesaid, the shares of the Northern Pacific Company to the aggregate par value of $78,108,000 so owned by the Oregon Short Line Company, and to receive in exchange therefor certificates of the Northern Securities Company representing $82,491,871 par value of its stock and $8,915,629 in cash (record, pp. 5, 158, 361). The reasons which constrained them to submit are stated in Mr. Harriman's affidavit (pp. 157, 158). It was in pursuance of this agreement that Messrs. Harriman and Pierce, acting for the Oregon Short Line Company, on the 18th of November, 1901, delivered to said Securities Company to be held as aforesaid certificates for said common and preferred stock of the Northern Pacific Company so owned by the Oregon Short Line Company and received in exchange therefor said Northern Securities stock representing an interest of $82,491,871 par value and said cash (pp. 5, 158, 361). This stock was part of the original issue of stock by said Securities Company (pp. 5, 177–178). Harriman and Pierce are now and since November 18, 1901, have been the registered owners and holders of said $82,491,871 par value of Northern Securities stock, and such holding by them is and at all times has been as trustees for the use and benefit of the Oregon Short Line Company, which is the beneficial owner thereof (pp. 5, 159).

The bill further alleges that the exchange by the complainants was made in good faith in the belief that the organization of the Northern Securities Company, however hostile to their interests, was not, and that the ac-

quisition and holding by it of the railway stocks as aforesaid would not be, in violation of any statute of the United States, and that it was under such belief that they refrained, pending the final determination of the suit brought by the United States, from taking any steps or instituting any proceedings for the protection of their rights in the premises (record, p. 5). The truth of this was conceded below. At the time of the exchange, on November 18, 1901, it was agreed between Messrs. Harriman and Pierce and the defendant Northern Securities Company that the $41,085,000 par value of Northern Pacific preferred stock should be converted into common stock (pp. 6, 159, 361), and said preferred stock was subsequently during the month of December, 1901, so converted into common stock of the same par value, and certificates for $34,709,062 par value of common stock registered in the name of the Securities Company were shown to have been substituted in lieu and place of the certificates for preferred stock received from Harriman and Pierce (pp. 178–179), which the Northern Securities Company now holds within the jurisdiction of the court (p. 6). As to the remaining $6,375,938 of preferred stock, the complainants were unable to show actual conversion, although they claim and expect to show on final hearing that it, too, was actually converted (p. 159).

On July 17, 1902, the Oregon Short Line Company pledged $82,491,000 par value of said Northern Securities stock with the Equitable Trust Company of New York as trustee for an issue of bonds of an equivalent face value, and such bonds had been issued and were outstanding at the time of the commencement of this suit under a deed of trust, of which a copy is annexed

to the bill of complaint (record, p. 19 *et seq.*). The Securities Company's stock, however, so issued to Harriman and Pierce on November 18, 1901, remained and is still registered in their names, and they are therefore still the record owners thereof, although the certificates duly endorsed were actually in the custody of the complainant the Equitable Trust Company of New York, as pledgee as aforesaid, and were alleged to be and are now available for tender, return or restoration (p. 5).

The bill then further avers that on March 10, 1902, the Attorney-General of the United States filed in the Circuit Court of the United States for the District of Minnesota a petition or bill of complaint in the name and on behalf of the United States of America against the Northern Securities Company and the Northern Pacific and Great Northern Railway Companies, and against Messrs. James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, in and by which bill of complaint it was, among other things, alleged that the defendants in that suit had, in the organization of the Northern Securities Company, entered into an unlawful combination in violation of the provisions of the Anti-Trust Act, and it was prayed that the combination be adjudged and decreed unlawful, and that the defendant Northern Securities Company be adjudged to hold all and singular the shares of stock of the railway companies in pursuance of such unlawful combination or conspiracy. None of the present complainants were named as defendants in the Government suit, evidently because they were not parties to the original illegal combination (pp. 157, 169–176). The

particular nature of the suit so instituted by the United States and of the issues joined and of the relief prayed is then set forth at length, and a complete and true copy of the record is attached as an exhibit to the bill of complaint (record, p. 62 *et seq.*). This, according to settled rules of practice, brought the whole record before the court for the purpose of determining the legal effect of the judgment and the questions adjudicated.[1] It is then alleged that such proceedings were had in the said Government suit that a final decree was entered in the Circuit Court of the United States for the District of Minnesota on April 9, 1903, in favor of the complainant, United States of America, against the defendants in that suit, as set forth above at pages 2 and 3 (pp. 8, 151). A copy of the decree of the Circuit Court of the United States for the District of Minnesota is annexed to the bill as an exhibit (p. 150). The bill further sets forth the proceedings by way of appeal from the Circuit Court for the District of Minnesota to this court, the decision by this court affirming the decree, and the issue of its mandate (pp. 8–9). The effect of the decree of April 9, 1903, as affirmed by this court, is alleged to have been to adjudge that the Northern Securities Company acquired and held possession of the railway stocks in violation of an act of Congress, that it

[1] *Putnam* v. *Day*, 22 Wall. 60, 66; *American Bell Tel. Co.* v. *Southern Tel. Co.*, 34 Fed. Rep. 803, 804 (by Brewer, Cir. J.); *Electrolibration Co.* v. *Jackson*, 52 Fed. Rep. 773, 776; Story's Equity Pleadings, §§ 241, 266; Daniell's Chancery Practice (6th Am. ed.), 367. See also *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243; *John D. Park & Sons Co.* v. *Bruen*, 133 Fed. Rep. 807, 808; *Emma Silver Min'g. Co.* v. *Emma Silver Min'g. Co.*, 1 Fed. Rep. 39, 40.

acquired no title thereto and could not transfer any rights in respect thereof, that it was not a purchaser or owner but simply a custodian thereof, and that the legal and equitable owners of the railway shares were the several parties who originally exchanged the same for stock of the Northern Securities Company (record, p. 9).

The present bill further alleges that immediately upon the rendition of the decision by the Supreme Court of the United States, the defendant Northern Securities Company, by action of its board of directors, determined to fully and unreservedly abandon and terminate the illegal combination and its holding of said railroad stocks, and to that end to reduce its capital stock by ninety-nine per cent. and to distribute and divide the stock of each of said railway companies held by it *pro rata* among its stockholders, but not to return and retransfer to the stockholders of the railway companies or their assigns any shares of stock in either of the railway companies which it had received from them in exchange for its own stock (p. 9). In order to consummate said purpose, the Securities Company adopted certain preambles and resolutions, which, among other things, recite, as aforesaid, that "this company desires and intends to comply with the decree in the said [Government] suit, fully and unreservedly, and without delay" (p. 9), and that "in consideration of the premises, it is *declared necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it" (pp. 10, 364). It is then declared that the plan, as outlined in the resolution, will enable the Securities Company

to dispose of every share of railway stock, and that it will then retain only such property as was "in no way involved in the [Government] suit" (record, p. 153). In pursuance of such resolution, a meeting of the stockholders was called for the purpose of voting on the reduction of the capital stock and the plan proposed by the directors; and for that purpose a circular was issued by the president and secretary of the Securities Company, by order of the board of directors (exh. E to bill, p. 152), which, among other things, stated that the stock of the Securities Company had been issued "solely for the shares of the Northern Pacific and Great Northern Railway Companies, and other properties purchased by it," that "in forming the company and disposing of its shares, no commissions were paid, nor has the company incurred any expenses save those necessary for obtaining its charter and for the economical conduct of its affairs," that "the company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States," and that the directors "have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company, and to distribute to its shareholders the shares of stock of said railway companies now held by it" (pp. 152–153).

The bill further alleges that the books of account and stock ledgers kept by the Securities Company and the records of its transfer agent and registrar of transfers show for what consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of said Northern Pacific or of said Great

Northern Company, that a large part of the stock of the Securities Company issued originally in exchange for stock of the said railway companies, is now held in the name or on behalf of the original holders, who exchanged the same for stock of said railway companies, that wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Securities Company, so transferred to third parties, can be traced and shown in and by said records, and that the stock of the railway companies can be delivered to said assigns in exchange for their holdings of Securities stock (record, p. 11); *and these allegations are supported by the complainants' affidavits* (pp. 182 *et seq.*, 371).

The bill then alleges that notwithstanding these facts, the Securities Company threatens and intends immediately to distribute the shares of stock of each of said railway companies *pro rata* among its stockholders in disregard of the complainants' rights, and that, if it be not enjoined from so doing, such distribution will be made forthwith and the stock of the Northern Pacific Company belonging to the complainants and to which they are entitled will be lost to them, and that they will thereby suffer injury which cannot be compensated in damages, because shares of the Northern Pacific Company to which the complainants are entitled are registered on the books of the Northern Pacific Company in the name of the Securities Company, and said shares or any like amount of shares could not be purchased in any market or from any person whomsoever (p. 11–12). It is further shown that such threatened action would involve great loss of annual income to the complainants amounting to over $1,000,000, and an actual loss in

value of over $10,000,000 resulting from the difference in value between what complainants would receive on a distribution *pro rata* and what they would receive if the *status quo* were restored (record, pp. 12, 337, 341).

It also appears that the complainants are ready, able and willing, and offer, to return and deliver all of the certificates of shares of the capital stock of the Securities Company so received by them and the whole or such part of the sum of $8,915,629 in cash so paid to them as may be just, or such further or other sum as the court may fix, upon the return to them of the common stock of the Northern Pacific Company which they delivered to the Securities Company and the common stock of said Northern Pacific Company into which the complainants' preferred stock was converted as aforesaid. The complainants offered to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court should direct, and in all respects to do and perform equity and right in the premises (p. 12).

The bill further alleges in regard to the proposed plan of distribution *pro rata* (p. 11):

> "That the said plan of distribution is unauthorized by law, illegal and *ultra vires* the Northern Securities Company and in violation of the rights and equities of [the complainants], and in violation of the laws of the United States and of the State of New Jersey."

It is further alleged in the bill that after the restoration and return to the original depositors or their assigns of all and singular the shares of stock of the railway companies held by the Securities Company under and by virtue of the illegal combination, there will still remain in the treasury of the defendant more than sufficient assets and funds with which to pay

and return any and all of the $7,522,000 par value of stock of the defendant issued as aforesaid for cash, or to compensate any such holders fully if compensation be adjudged (record, p. 12; see also comment of Judge Bradford at p. 342 as to the failure of defendant to disclose all the facts).

The bill thereupon prays that it be decreed that the proposed plan of distribution is illegal and in violation of the rights and equities of the complainants, that they are entitled to the return and retransfer by the Securities Company of the shares of common stock so delivered by Messrs. Harriman and Pierce in 1901, and of the shares of common stock into which the preferred stock then delivered was converted, in exchange for the original certificates of the Securities Company so issued and now held by the complainants and such sum in cash as may be just, and that the Securities Company may be ordered to endorse the certificates and deliver the same to the complainant the Equitable Trust Company. It is further prayed that the Securities Company and its officers may be enjoined from in any manner parting with the common stock of the Northern Pacific Company claimed by the complainants during the pendency of the suit (p. 13).

All the allegations of the bill, so far as they relate to the acts and deeds of the complainants Harriman, Pierce and the Oregon Short Line Company are positively sworn to (pp. 14, 155). The material allegations of the bill were supported by the record in the Government suit, and by affidavits and exhibits submitted on behalf of the complainants. The defendant Securities Company did not answer or demur on or prior to the hearing, but submitted *ex parte* affidavits. Most

of the material allegations in the bill and moving affidavits, however, were *uncontradicted*, particularly those relating to the Northern Securities Company itself. It elected to leave many of the most material allegations as to itself and its assets and books and records wholly unchallenged and to withhold any pleading indicating the existence or nature of any defense. It is proper to add that since the granting of the preliminary injunction and the taking of the appeal, the defendant Securities Company filed an answer to the bill, which has been printed for the convenience of the court, although, strictly speaking, it cannot be availed of in this court to affect the appeal from the order now under review, as it was not before the courts below, and the Circuit Court had to decide the motion without any pleading whatever on the part of the Securities Company.

The president, the secretary and the transfer agent of the Securities Company, all of whom are also directors of the company (record, p. 152), made affidavits in regard to a few of the allegations of the bill, but refrained from noticing other and more important allegations relating to the company itself. These allegations were left to be denied only in the briefs of counsel. The affidavit of Mr. Hill, the president of the company and a director, will be found at page 270, and is most perfunctory. Mr. Nichols, the secretary and a director, makes five affidavits, but does not in any of them notice many of the specific allegations of the bill relating to his company, and those that he does notice, he deals with mostly in general and vague terms (pp. 189, 244, 263, 277, 278). Mr. Terhune, the transfer agent of the company and

also a director, joins Mr. Nichols in an affidavit (record, p. 277), but he too remains absolutely silent as to the important allegations in the verified bill touching the condition of the books of the Securities Company, its assets, the purposes for which it was organized, and other material and vital allegations peculiarly within the knowledge of a transfer agent. Mr. Clark, another director, makes an affidavit, and is likewise silent as to nearly all of the allegations of the bill (p. 272), and the defendant also submits testimony given by Mr. Clough, another director and the general counsel of the company, who testified in the Government suit (p. 241). Thus the testimony of five directors—one-third of the whole board (p. 152)—was laid before the court, but not one of them vouchsafes to answer or to contradict the allegations of the verified bill in so far as they relate to the corporation of which they are directors, the purposes for which it was organized, the property it holds, the facts appearing upon its books, its purpose to abandon the illegal combination, and the sufficiency of its assets to meet all claims of *bona fide* holders of stock issued for cash, etc., and yet these were all matters peculiarly within their personal knowledge as promoters, officers and directors.

As early as the February term, 1810, in *Young* v. *Grundy*, 6 Cranch, 51, Chief Justice Marshall said:

> "If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction they are to be taken as true."

But, in the case at bar, we have no answer and no disclosure of any defense. When we bear in mind that this suit was begun on the 20th of April, 1904, that it was pending many weeks before it was argued, and that

the second amended bill was filed six weeks before the decision below granting the motion for an injunction and ten weeks before the entry of the order of the Circuit Court, how convincing becomes the language of Mr. Justice Blatchford, then District Judge, in the case of *Brown* v. *The Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532:

> "No one of these averments is denied or controverted. On the contrary, by the making of the affidavit which has been made by four of the defendants upon one point, every intendment must be taken most strongly against the parties, as an admission of all the matters stated in the bill which the affidavit does not controvert, although the statement in the bill of these allegations, and the absence of any denial of them, would be sufficient of itself. . . .
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> "In this case, no want of time to meet the charges of the bill has been set up; no application to postpone the motion has been made; the parties have been represented by able counsel, in a hearing of some six hours, while the allegation in the bill is admitted, that the defendants intend to procure an injunction of the description alleged in the bill, without giving the plaintiffs or Brown Brothers & Co. any opportunity of being heard. As I before remarked, four of the defendants have made an affidavit upon one minor point, and have denied nothing else. They must, therefore, be held to admit everything which they do not deny."

And the Circuit Court in this case, in commenting on the withholding of information, well said (record, p. 342):

> "As between the complainants applying for a preliminary injunction and the Northern Securities Company resisting the application partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share, under the proposed plan, clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it.

> It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference."

The brief on behalf of the Northern Securities Company in the Circuit Court, in arguing "that there is no contradiction of evidence upon any material point," proceeded to state that "every allegation of the bill is admitted except paragraphs III, V, VI, VII, VIII, IX, XI, XIII, XIV, XV, XVI, XVII, XVIII, and XIX" (pp. 3, 33); in other words, defendant in its brief admitted *every* allegation except those contained in *fourteen* paragraphs out of *nineteen.* The Securities Company thereupon contended that if its affidavits were accepted and complainants' verified bill, affidavits and exhibits and the record in the Government suit wholly rejected, there was "no conflict of evidence" (p. 33), and that the case was very simple.

In the first place, it will be observed that there was no pleading before the courts below to show in any way what was or was not admitted or denied. The affidavits submitted by appellant only bore upon a few points. It is surely unauthorized and unprecedented for a defendant, *who has failed to plead in any way to a verified bill of complaint*, to ask the benefit of a full denial of most of the material allegations of the bill. The established practice called upon the officers and directors of the company to answer fully and candidly. They could not properly single out for denial a few allegations, and pay no attention to the remaining material allegations concerning their company. Had they denied these allegations below, presumably further proof might have been submitted. They saw fit, however, to controvert a few allegations and to stand mute

as to others, knowing full well that the consequences of silence were that the allegations would be taken as admitted and confessed for the purposes of the motion.

The ability of the complainants to restore the Northern Securities stock received by them was challenged in the court below by reason of the mortgage to the Equitable Trust Company (record, pp. 19–61). The bill alleges as a fact the ability of complainants to tender the original certificates themselves (p. 12); and this is sworn to by Mr. Pierce and Mr. Harriman (pp. 15, 155) and is not denied. The bill further alleges that the complainants "hereby offer to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court shall direct and in all respects to do and perform equity and right in the premises" (p. 12). Obviously, whenever there shall be the slightest reasonable doubt as to whether or not the complainants will be able on final hearing to tender and produce the certificates in question, an order may be made by the court requiring the deposit of the certificates to abide the result of the suit.

But it was not necessary that the complainants should be in a position to make their tender good at the time of the filing of the bill; for it will answer every purpose if they are in a position to do so whenever the Securities Company intimates a desire to accept the tender, or the court calls upon them to deposit the stock. This is a well-established rule in equity. Thus in the case of *Bruce* v. *Tilson*, 25 N. Y. 194, 198, Allen, J., speaking for the Court of Appeals of New York, said:

> "A party filing a bill for a specific performance upon an offer of performance on his part, and a demand

> from the other party, must make the proper offer in his complaint; and if he is able to perform at the time of the final judgment he is entitled to his relief, although he may not have been in a situation to perform at the time he brought his suit."

See also *Cheney* v. *Libby*, 134 U. S. 68, 83; *Gould* v. *Cayuga County National Bank*, 86 N. Y. 75, 83.

The perusal of the mortgage or indenture of pledge to the Equitable Trust Company will show that the fullest powers are conferred upon the trustee in the premises. Although the present contingency may not have been specifically contemplated (*vide* record, pp. 39–40), there is no reasonable ground for the suggestion that the trustee could not, on behalf of all its bondholders, at the request and with the consent of the pledgor, deliver the certificates for Northern Securities stock in exchange for cash or Northern Pacific stock. The mortgage specifically provides among other things that "the trustee shall, upon the written request of the railroad company, subject the deposited shares of stock or other deposited securities to any plan for the reorganization or readjustment of the Securities Company," etc. (p. 39). The trustee is bound, at the request of the railroad company, to deliver to the latter or upon its order any or all of the pledged shares upon the payment of the sum of $105 per share (p. 41), and the substitution of securities is also provided for (pp. 39–40; see also pp. 38–39). The bonds are redeemable at 102½ (p. 50) and the Oregon Short Line Company is abundantly able to pay any cash or deposit any securities necessary to release the pledged stock whenever

such a step becomes necessary in order to enable it to make its tender good.[1]

The objection to the power of the trustee to maintain a bill for the protection of the interests of its bondholders is so extreme and unreasonable that it is difficult to treat it seriously. The trust indenture specifically provides that all suits shall be brought by the trustee, and it appears that the trustee is suing to recover for the security of its bondholders property worth approximately ten million dollars more than the property offered by the Securities Company under its plan of distribution *pro rata* (record, p. 53). If the Securities Company had acted under the authorization to return the stocks contained in the decree of April 9, 1903, surely no one could seriously have contended that the action of the trustee had been paralyzed by the provisions of the mortgage and that it could not make the exchange.

There is nothing in the mortgage which prevents the trustee, at the request of the pledgor, from taking such steps as may be necessary to protect the interests it represents and the value of the collateral it holds. The suggestion below that it is attempting to prove its security to be valueless, when it is seeking to recover property of greater value than it now holds, is not worthy of consideration and refutes itself. The certificates clearly represent the evidence of beneficial interest in the Northern Pacific stock in suit, and the

[1] As matter of fact, this step has been taken, all the bonds have been paid off, and the pledge has been released since the decision below. Counsel deem it proper to call this fact to the attention of the court, just as it would be their duty to call attention to any fact which had changed the situation *pendente lite*. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301.

trustee, as in duty bound, is seeking to recover what those certificates legally represent.

It is likewise difficult to perceive the force of the contention that the pledge by the Oregon Short Line Railroad Company of the share certificates of the Northern Securities Company tended to change the nature and legal effect of the *holding* of the railroad stocks by the latter company or to create an estoppel. If such share certificates had been on their face in the form of mere receipts showing beneficial interests in a deposit in trust, or if there had been voting trust certificates in the usual form, or trust company's receipts, as Mr. Morgan originally planned (record, pp. 175–176), the pledge by the holder of such receipts or certificates would manifestly not have changed the nature of the contract of holding or tended to convert a bailment into a sale, or estopped both pledgor and pledgee *as against the issuing company* from showing the real transaction (see discussion *infra*).

As the Northern Securities Company was threatening immediately to distribute and transfer the 717,320 shares of Northern Pacific stock claimed, traced and identified by the complainants, and as the proposed distribution and transfer would have dissipated the whole subject-matter of the litigation and denuded the company of ninety-nine per cent. of its assets, and would thus have completely frustrated the object of the suit and have rendered unavailing any final decree that might be rendered in favor of the complainants, an application was made to the Circuit Court in New Jersey for a preliminary injunction to preserve the *status quo* and restrain the defendant Northern Securities Company from disposing of the Northern Pacific stock claimed by the com-

plainants until the cause could proceed to a final hearing on pleadings and proofs. Both the defendants were duly served (record, pp. 358–359).[1] A temporary restraining order was granted by the late District Judge Kirkpatrick, sitting as Circuit Judge.[2] The motion for a preliminary injunction thereafter came on to be heard before District Judge Bradford, sitting as Circuit Judge, and was heard on the complainants' verified second amended bill of complaint and numerous *ex parte* affidavits on their behalf as well as on numerous *ex parte* affidavits on behalf of the defendant Northern Securities Company. At the time the motion for an injunction was heard and decided, no pleading had been filed on behalf of the defendant Northern Securities Company, and none was served until after the perfecting of the appeal hereinafter mentioned, when an answer was filed in the office of the clerk of the Circuit Court on September 3, 1904, to which a replication was duly filed.

The Circuit Court granted a preliminary injunction restraining until final hearing the transfer of the Northern Pacific stock claimed and identified by the complainants as belonging to them. The opinion showed, among other things, that the defense controverted material allegations of the bill, that the affidavits

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[1] Record, pp. 358-359. Even if the Northern Pacific Railway Company had not been served, it was not an *indispensable*, although a proper, party. Equity rule 47; *Shields* v. *Barrow*, 17 How. 130, 139; *Payne* v. *Hook*, 7 Wall. 425, 432; *Jerome* v. *McCarter*, 94 U. S. 734, 736; *Williamson* v. *Krohn*, 66 Fed. Rep. 655, 661; *Dennis* v. *Perry*, 12 R. I. 540, 541, 542; *King* v. *Barnes*, 109 N. Y. 267, 281; *Sayward* v. *Houghton*, 82 California, 628, 630; *Louisville, &c., Railroad Co.* v. *Ide*, 114 U. S. 52, 56; *Pirie* v. *Tvedt*, 115 U. S. 41, 43; Wisconsin Stat., 1898, sec. 1752.

[2] Record, p. 154.

and exhibits were conflicting on substantial points, that the case was not ready for a final decision, that grave and doubtful questions of law were involved, that the sole object for which the injunction was sought was the maintenance of the *status quo* until the question of right between the parties could be decided on final hearing, that the denial of a preliminary injunction would, if the complainants ultimately prevailed, render barren their victory so far as relief in this suit was concerned, that the affidavits were also conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of the Securities Company could be traced and identified on its books or otherwise, and that it was manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence then before the court. The opinion of Judge Bradford is printed at length in the record at pages 321–344, and is reported in 132 Fed. Rep. 464. It is also printed at length in the pamphlet of opinions.

The injunction order granted by the Circuit Court was limited expressly to the Northern Pacific stock traced and identified by the complainants, and, as stated by the learned judge in his opinion (record, p. 342), the complainants expressly disclaimed all right to any stock of the Great Northern Railway Company which the Northern Securities Company then held. The effect of the injunction order was, therefore, confined to the 717,320 shares of the capital stock of the Northern Pacific Railway Company actually traced and representing the original property of the complainant Oregon Short Line Railroad Company, and the order left the Northern Securities Company at liberty to dispose of or

distribute the remaining Northern Pacific stock, constituting a majority thereof, as well as all its holdings of Great Northern stock, constituting more than ninety-six per cent. thereof.

The complainants, on the granting of the preliminary injunction, gave a bond in the penal sum of $2,000,000 (record, p. 345) to cover all possible damages which the Northern Securities Company might sustain; the sufficiency of the bond was not challenged; the responsibility of the sureties was admitted (p. 346); and the complainants stood ready and willing, and offered in the court below, to increase the bond if required.

The Northern Securities Company appealed to the Circuit Court of Appeals for the Third Circuit, and that court reversed the injunction order, holding in effect that, although the Circuit Court did not abuse its discretion in maintaining the *status quo* until a hearing on the merits, nevertheless, the defendant was entitled to have a complete adjudication on the merits of the entire controversy in the appellate court. The majority of the Court of Appeals thereupon proceeded to adjudicate finally the whole case, and held that the Northern Securities Company had become the absolute legal and equitable owner of the railway shares acquired and held by it in pursuance of the illegal combination condemned by the final decree of this court in the Government suit, that the question of ownership had not been involved or decided or even incidentally passed upon by this court in that suit, and that the determination of this one question was sufficient to dispose of the whole case adversely to the complainants (p. 386 *et seq.*). Circuit Judge Gray dissented on the ground that the Circuit Court had exercised a sound

judicial discretion in granting the motion for a preliminary injunction, for the reason that a *prima facie* case had been established at the hearing, which entitled the complainants to the protection of such an injunction and an opportunity to have the controversy heard and determined, according to the ordinary practice in equity, on pleadings and proofs (record, p. 396 *et seq.*). Consistently with this view, and concurring in the course followed by Judge Bradford, the learned dissenting Circuit Judge did not discuss the merits.

The complainants, appellees below, thereupon, on January 23, 1905, presented to this court their petition for a writ of *certiorari* to be directed to said Circuit Court of Appeals, and the petition was granted January 30, 1905; and the following brief is submitted on their behalf in support of the contention that the majority of the Circuit Court of Appeals erred in reversing the temporary injunction order granted by the court of original jurisdiction.

Specification of errops relied upon.

Complainants respectfully urge that the majority of the Circuit Court of Appeals erred—

1. In proceeding to a complete adjudication of the entire controversy on an appeal from an order granting a preliminary injunction in view of the *prima facie* and probable case presented and the proper exercise of discretion by the Circuit Court in granting such injunction.

2. In failing to give due effect to the decision of this court in the Government suit upon the same question of ownership there presented upon substantially the same facts.

3. In deciding that the parties had entered into a valid and effective contract of purchase and sale which vested the ownership of the shares in question in the Northern Securities Company.

4. In disregarding the settled rule that, upon the discovery of the illegality and *ultra vires* character of the contract, and the consequent abandonment of its purpose and object, resulting in a failure of consideration, the complainants were entitled to disaffirm the contract of acquisition and reclaim their property.

5. In holding that, upon the termination and abandonment of the illegal enterprise and the contemplated dissolution of the corporation, the Northern Securities Company was entitled to treat the illegal contract of acquisition as authorized and valid and to deal with the property according to its terms.

6. In failing to hold that the proposed plan was intended to circumvent and evade the decree in the Government suit.

7. In holding that the plan of distribution was legal and equitable and not in violation of the rights of the complainants.

8. In failing to hold that it was unlawful and inequitable to permit the original depositors of Great Northern stock and their assigns now to receive, through the instrumentality of the illegal combination, a majority of the capital stock of each railway company, and thus to perpetuate the joint control by removing every motive for legitimate competition.

9. In failing to hold that the complainants were entitled to follow and reclaim the Northern Pacific stock delivered by them to the Northern Securities Company in November, 1901.

I.

THE SETTLED RULES WHICH GOVERN THE GRANTING OF PRELIMINARY INJUNCTIONS AND APPEALS FROM INJUNCTION ORDERS.

Although the jurisdiction to issue the writ of injunction in all proper cases is conferred on the courts and judges of the United States by sections 716 and 719 of the Revised Statutes, and the method of obtaining a preliminary injunction, as to application, notice and hearing, is prescribed by section 718 and Equity Rule 55, the principles which govern the exercise of judicial discretion in granting or refusing a preliminary injunction, in order to maintain the *status quo pendente lite*, are to be found only in the general principles of equity procedure as declared by this court, as embodied in the practice of the High Court of Chancery in England as it existed in March, 1842, when the Equity Rules were adopted (Rule 90; *Thomson* v. *Wooster*, 114 U. S. 104, 112, note), and as contained in the decisions of courts of equity, particularly of the various Circuit Courts and Circuit Courts of Appeals of the United States.

Two of these principles of equity procedure are involved in the case at bar: (I) As to what is necessary to be shown to support a motion for an injunction which seeks simply to preserve until hearing the subject-matter of the litigation, and (II) as to the review on appeal of the exercise of discretion by the chancellor.

(I) In *Georgia* v. *Brailsford* (August term, 1792), 2 Dall. 402, which was the first case presented to this court involving equity procedure or the issue of an injunction, and which has ever since been followed, Mr. Justice Johnson used the following language (p. 405):

> "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a prob-

able danger that the right would be defeated, without this special interposition of the court."

Mr. Justice Blair said (p. 407):

"It appears to me to be too early, likewise, to pronounce an opinion upon the titles in collision; since it is enough, on a motion of this kind, to show a colorable title. The State of Georgia has set up her confiscation act, which certainly is a fair foundation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, till we are enabled, by a full enquiry, to decide upon the whole merits of the case."

And Mr. Chief Justice Jay said (p. 408):

"Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the hands of the marshal, till the right to it is fairly decided; and to avoid the risque of putting the true owner to a suit for the purpose of recovering it back?

"For my part, I think that the money should remain in the custody of the law till the law has adjudged to whom it belongs; and, therefore, I am content that the injunction issue."

In *Glascott* v. *Lang* (1838), 3 Myl. & C. 451, 455, on appeal from an order granting a temporary injunction, Lord Cottenham, L. C., said:

"Now, in the first place, I have looked, as far as I have been able, through the case made upon the affidavits and upon the pleadings; and, in looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity; and on that I think it would be very difficult here to raise any dispute."

In *Great Western R. Co.* v. *Birmingham and Oxford Junction R. Co.* (1848), 2 Phil. Ch. 597, 602–603, Lord Cottenham, L. C., said:

> "It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. Such are the cases *Echliff* v. *Baldwin* (16 Ves. 267), *Curtes* v. *Lord Buckingham* (3 V. & B. 168), *Spiller* v. *Spiller* (3 Swan, 556), per Lord Redesdale in Dow, 440. It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff.
>
> "If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

These are among the cases in the High Court of Chancery which, together with the case of *Georgia* v. *Brailsford*, *supra*, are the foundation of the rule followed in the various circuits: *Casey* v. *Cincinnati Typographical Union No. 3* (C. C., Ohio), 45 Fed. Rep. 135, 147; *Blount* v. *Societe Anonyme du Filtre, etc.* (C. C. A., 6th cir.), 53 Fed. Rep. 98, 101; *City of Newton* v. *Levis*

(C. C. A., 8th cir.), 79 Fed. Rep. 715, 718; *Southern Pac. Co.* v. *Earl* (C. C. A., 9th cir.), 82 Fed. Rep. 690, 691–692; *Allison* v. *Corson* (C. C. A., 8th cir.), 88 Fed. Rep. 581, 584; *Denver & R. G. R. Co.* v. *United States* (C. C. A., 8th cir.), 124 Fed. Rep. 156, 161; *Atlanta, K. & N. Ry. Co.* v. *Southern Ry. Co.* (C. C. A., 6th cir.), 131 Fed. Rep. 657, 662; and constituted the basis of Judge Bradford's decision. *Harriman* v. *Northern Securities Co.* (C. C., N. J.), 132 Fed. Rep. 464, 476–478; record, pp. 334–336.

So, also, in *Bloxam* v. *Metropolitan Railway Co.* (1868), L. R., 3 Ch. App. 337, 348, 354, Lord Chelmsford, L. C., on appeal from an order granting a preliminary injunction, said:

> "This is not the occasion upon which I can be called upon to pronounce a definitive judgment upon the important questions raised in this case, nor are there materials before me which would enable me to form a satisfactory opinion upon them. All that I am called upon to consider upon this appeal is, whether there are doubtful questions of importance to be determined in the case, and if there are, whether the proceedings of the company with reference to the matters in dispute between the parties ought, or ought not, to be suspended until the hearing.
>
> "It is said on the part of the defendants, that the evidence in the case is extremely meagre; and, probably, for the final determination of the disputed matters, it is so. But for the purpose of to-day there is quite enough to shew the nature of the questions which will ultimately have to be decided. If it should appear upon what is at present before me either that the proceedings of the company can be completely justified, or that for any reason the court has no power to interfere with them, it would be wrong to allow the injunction to stand. But if the questions are not only doubtful, but of great importance, and if the hands of the court are not fettered, then it will be necessary to con-

> sider whether there is any ground for refusing the injunction, either on account of any personal exception to the plaintiff, or upon the ground of the inconvenience which the injunction must occasion exceeding the mischief which would be sustained by the plaintiff, and those whom he is said to represent, from permitting things to take their course until the hearing. . . . But it must be remembered that if I allow the dividend to be received, and the court should, at the hearing, determine that it was improperly declared, it will never be recovered (even if recoverable) from those to to whom it will be paid; and in this sense the injury to the Extension shareholders may be not incorrectly described as irreparable."

The practice of granting an injunction to stay a threatened disposition of property *pendente lite*, which, if not restrained, would render a final judgment wholly ineffectual, is firmly established. The fairness and justice of the practice are obvious. In such a case, even though the complainant's right may be doubtful, courts of equity seldom refuse to preserve the *status quo*, and never where any possible damage to the defendant can reasonably be covered by a bond, and the effect of a refusal would be irretrievable. The complainants, in the case at bar, gave a bond in the penal sum of two million dollars, to cover all possible damages (record, pp. 345–346), and that bond can be increased if delay or other circumstances shall so require.

In addition to the authorities cited in the opinion of the Circuit Court on this point (pp. 334–336, 343), reference may be had to the following cases, although the citation of further authorities ought to be unnecessary in support of a proposition so universally recognized by the courts. *Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 120 Fed. Rep. 981, 984, 985; *Cartersville L. & P. Co.* v. *Mayor, &c., of*

City of Cartersville, 114 Fed. Rep. 699, 700; *Utah N. & C. R. Co.* v. *Utah & C. Ry. Co.*, 110 Fed. Rep. 879, 893; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *United States* v. *Duluth*, 1 Dillon, 469, 474; *Andrae* v. *Redfield*, 12 Blatchford, 407, 425; *Charles* v. *City of Marion*, 98 Fed. Rep. 166, 168; *Jensen* v. *Norton*, 64 Fed. Rep. 662, 664.

Moreover, in the case at bar, the balance of convenience and comparative injury, which a court of equity always considers in such cases (*Russell* v. *Farley*, 105 U. S. 433, 438), was clearly in favor of the complainants in view of the fact that if the Northern Securities Company were to distribute the Northern Pacific shares claimed by the complainants prior to the final hearing, as it threatened to do, and the complainants should ultimately prevail, the final judgment prayed for would be rendered wholly ineffectual and success would be utterly barren.

(II) Since the act of Congress authorizing an appeal from an order granting a preliminary injunction (act of March 3, 1891, sec. 7, 26 Stat. 826, 828), the rule uniformly followed by the several Circuit Courts of Appeals has been that they are justified in reversing orders of the circuit courts granting preliminary injunctions only when the discretion of the latter has been improperly exercised or abused. In that respect, they have followed the long-settled rule of equity procedure in this country and in England as to the province of appellate courts, as will appear from the reported cases:

Fourth circuit: *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623, 625; *United States Gramophone Co.* v. *Seaman*, 113 Fed. Rep. 745, 749.

Fifth circuit: *Railroad Commission of Texas* v. *J. Rosenbaum Grain Co.*, 130 Fed. Rep. 110, 111; *Massie* v. *Buck*, 128 Fed. Rep. 27, 31, 32; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924; *Workingmen's Amalgamated Council* v. *United States*, 57 Fed. Rep. 85, 86.

Sixth circuit: *Louisville Home Tel. Co.* v. *Cumberland Tel. & Tel. Co.*, 111 Fed. Rep. 663, 667; *Loew Filter Co.* v. *German-American Filter Co.*, 107 Fed. Rep. 949, 951; *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. Rep. 148, 153; *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. Rep. 357, 359; *Societe Anonyme du Fil. Chamberland Sys. Pasteur* v. *Allen*, 90 Fed. Rep. 815, 818; *Thompson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 Fed. Rep. 712, 730; *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472, 477; *Thompson* v. *Nelson*, 71 Fed. Rep. 339, 341; *Duplex Printing-Press Co.* v. *Campbell Printing-Press & M. Co.*, 69 Fed. Rep. 250, 252.

Seventh circuit: *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, 782; *F. C. Austin Mfg. Co.* v. *American Wellworks*, 121 Fed. Rep. 76, 77; *Chickering* v. *Chickering & Sons*, 120 Fed. Rep. 69, 73; *Bartholomew* v. *Union Paper & Bag Co.*, 113 Fed. Rep. 289, 290; *City of Terre Haute* v. *Farmers' Loan & Trust Co.*, 99 Fed. Rep. 838, 839; *Bradshaw* v. *Miners' Bank*, 77 Fed. Rep. 932, 934.

Eighth Circuit: *Denver & R. G. R. Co.* v. *United States*, 124 Fed. Rep. 156, 160; *Stearns-Roger Mfg. Co.* v. *Brown*, 114 Fed. Rep. 939, 941, 942; *Higginson* v. *Chicago, B. & Q. R. Co.*, 102 Fed. Rep. 197, 199; *Dimick* v. *Shaw*, 94 Fed Rep. 266, 268; *City of Newton* v. *Levis*, 79 Fed. Rep. 715, 717.

Ninth Circuit: *Empire State-Idaho M. & D. Co.* v. *Bunker Hill & S. M. & C. Co.*, 121 Fed. Rep. 973, 978; *Murray* v. *Bender*, 109 Fed. Rep. 585, 589; *Pacific Steam Whaling Co.* v. *Alaska Packers' Ass'n.*, 100 Fed. Rep. 462, 463; *Southern Pac. Co.* v. *Earl*, 82 Fed. Rep. 690, 692; *Shea* v. *Nilima*, 133 Fed. Rep. 209, 216.

Not only was this universally-followed rule as to the province of appellate courts disregarded in the case at bar, but a new practice seems to have been introduced, namely, that the circuit court may properly grant an

injunction and preserve the *status quo* without deciding the merits, "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy" by the appellate court (record, p. 386).

It is important to bear in mind that this is not such a case as *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, relied on by defendant in the court below. In that case the court was speaking of situations where under no aspect of the bill or by no possible amendment or suggested proofs could the complainants recover. It was a patent case in which the proofs had been taken, and the injunction order was really entered upon what was practically a final hearing. The decree was interlocutory only because a reference to a master to ascertain damages was necessary. The subsequent case of *Mast, Foos & Co.* v. *Stover M'f'g Co.*, 177 U. S. 485, 494, clearly recognizes that if the bill be good on its face or capable "of remedy by amendment," or if "suggestion be made of further proofs upon the subject," as in the case at bar, the appellate court ought not to dismiss the bill.

Circuit Judge Gray, in criticism of the new practice suggested in the opinion of the majority of the court below, used the following language (p. 397):

> "That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he had stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial sys-

tem, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think that we can conform to this general rule, 'without in effect renouncing the appellate jurisdiction conferred upon us by Congress.'"

This view of the learned dissenting judge as to the province and duty of the appellate tribunal entirely coincides with the views of this court in analogous cases where attempts have been made, as here, to induce the court to assume the determination of the whole controversy without a proper prior adjudication by the court of first instance. Mr. Chief Justice Taney in *Webster* v. *Cooper*, 10 How. 54, 55, said:

"This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other."

This language was quoted with approval by the late Mr. Justice Gray in *Jewell* v. *Knight*, 123 U. S. 426, 433.

And in *Chicago, Milwaukee &c. R'y* v. *Tompkins*, 176 U. S. 167, 179, Mr. Justice Brewer, speaking for the court, said:

> "This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had."

The Court of Appeals nevertheless professed to and did proceed to "a complete adjudication of the entire controversy," and "determined the same upon the merits without further delay," although, concededly, the lower court had not made any such "complete determination" or attempted to "determine the same upon the merits." It is respectfully but confidently submitted that a compulsory final hearing of a cause in equity in an appellate court, not upon proofs taken in the orderly and usual way, but upon *ex parte* affidavits filed by the defendant controverting a few of the allegations of a verified bill, is too obviously irregular and unjust to be allowed to pass into a precedent, and ought not to be sanctioned. If the Circuit Court ought to have passed upon the merits, the case should have been remitted to it for the exercise of its statutory jurisdiction and discretion, which then could have been *reviewed* by the Court of Appeals.

The decision of the two learned judges constituting the majority of the Circuit Court of Appeals is the first,

and so far the only, decision on the merits. If the order be now affirmed, this important case will have been finally disposed of without giving to the complainants the benefit of any consideration of the merits by the court of original jurisdiction, or of any regular exercise of appellate jurisdiction and review. The complainants submit that, in a cause presenting for decision the meaning and effect of the decision of this court in the Government suit, and the vast interests and important questions, public and private, involved, it was not fitting or proper that the complainants should have been thus summarily dismissed without a day in court.

The practice of the majority of the Court of Appeals in the case at bar is not sanctioned by the statute or the settled rules of courts of equity, and such a course of procedure would give a defendant an unfair and unwarranted advantage and completely overturn the fundamental principles upon which courts have heretofore proceeded in granting preliminary injunctions. As Mr. Chief Justice Fuller said in *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63:

> "The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on final hearing, very few motions of that sort would be made.
>
> "We think the case comes within the exceptions pointed out in the *Mast, Foos & Company* decision, 177 U. S. 485, and are impressed with the conviction that complainants have not had their day in court and that it ought to be accorded them."

In the case at bar, the complainants earnestly prayed for the opportunity of proving their case as tendered in their verified bill, according to the ordinary procedure

of courts of equity, which affords litigants presenting a serious controversy the benefit of their day in court on final hearing. They were advised by their counsel that a motion for an injunction was not a final hearing and only required the showing of a probable and *prima facie* case. Two judges have held that they presented a *prima facie* case. The four Circuit Judges at St. Paul had declared that complainants were *entitled to litigate* the questions presented. On a final hearing testimony would be available which could not reasonably or possibly be submitted on a motion. The complainants would have had the opportunity to cross-examine Mr. James J. Hill and the other officers and promoters of the Northern Securities Company and all those who, on the motion, were mere *ex parte* witnesses; they could have shown that the recitals in the resolution of the board of directors of the Securities Company and the persistent use of the word "purchase" did not comport with the legal effect of the transaction; they could have proved all the circumstances surrounding the organization of the Securities Company and demonstrated their ability to trace and identify the railroad shares received not only from the complainants but from Messrs. Hill and Morgan and their associates; and they could have established that it would be inequitable to allow Messrs. Hill, Morgan and associates to divide among themselves a large part of the complainants' Northern Pacific stock, and to perpetuate the combination by holding in "associated" hands a majority of the stock of these two competing railroad companies and thus to circumvent and nullify the decree in the Government suit, while professing to comply with it.

The four Circuit Judges at St. Paul concurred in declaring that there were "disputed and debatable questions of fact which the parties would be *entitled to litigate and with witnesses and evidence*" (128 Fed. Rep. at p. 811). District Judge Bradford, presiding in the Circuit Court, held that there were controverted questions of fact which ought to be investigated and grave and difficult questions of law which ought to be solved before the rights of the parties could be finally adjudicated. Circuit Judge Gray concurred fully in that view, and conceived it unjust to dispose of the litigation irrevocably and dissipate its subject-matter until there had been a judicial investigation, in the usual manner, to ascertain and determine the truth and the legal rights of the parties litigant. We thus have the declaration of *six* United States judges that the complainants were entitled to litigate the questions they presented in good faith by their bill and affidavits, and the declaration of only *two* judges to the contrary.

The propriety of granting the injunction order might well be rested upon the opinion of the Circuit Court, in which the following lucid statement will be found (record, pp. 332–333):

> "The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. *On the face of the bill it is evident* that the final decision necessarily will involve the consideration of *grave, novel and delicate questions of law*. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reach-

ing in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship

ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo* until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting."

After citing the authorities in support of this statement of the rule, and critically and with great pains analyzing the various conflicting claims of the respective parties, the court thus states its ultimate conclusion (record, p. 343):

> " It is manifestly improper that these matters should be decided upon the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master."

The Circuit Court did not decide the merits of the case. On the contrary, it carefully refrained from so doing in

view of the gravity of the questions involved, of the necessity for first ascertaining the facts and of the settled practice of courts of equity in this country and in England. It considered that the cause was not ripe for final decision. It agreed with the four Circuit Judges in St. Paul that the facts alleged entitled the complainants to a hearing on pleadings and proofs. It confined itself to determining the question whether an injunction should or should not be granted. It declined, in the exercise of the discretion which the law vests in the chancellor, to completely dispose of the merits of a serious and important litigation on conflicting *ex parte* affidavits in the absence of any pleading by the defendant. This course evidently commended itself to the court as being fair and just to both parties, as not prejudging the controversy in the absence of all the facts and in view of the conflicting affidavits. Nor was the court required under the settled practice of courts of equity to hold that the complainants were clearly entitled to a final decree in their favor, for this would turn every motion for a preliminary injunction into a final hearing and adjudication upon the merits. Lawyers could then seldom advise a motion for a preliminary injunction, and this immemorial and beneficent jurisdiction of equity would be undone. The conclusion reached, manifestly after a painstaking examination of the papers submitted, was that it would be in the highest degree unjust to permit the directors of the Northern Securities Company, Mr. Hill and his associates, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the action by distributing to third parties beyond recovery the stock

involved in this suit, and denude the company of ninety-nine per cent. of its assets, before the controversy could be investigated according to the ordinary procedure with the right to examine and cross-examine witnesses, which the experience of centuries has shown to be best calculated for the ascertainment of the truth.

The majority opinion admits that the lower court "was justified in requiring that the *status quo* should be preserved and the subject-matter of the controversy be withheld from dissipation until the judgment of this court could be obtained" (record, p. 386). There was no claim that the verified bill of complaint failed to state a cause of action entitling the complainants to equitable relief; no one has yet ventured to suggest that the bill was demurrable; and the Securities Company has since filed an answer. The majority of the Circuit Court of Appeals, nevertheless, ruled that, although there had been no abuse of discretion, the defendant was entitled, without any pleading, to invoke an immediate adjudication of the whole controversy *by the appellate court, i. e.*, a court of *review*, on the merits. It is submitted that the majority of the court below erred in their understanding of the practice of courts of equity and of the province of appellate courts in the determination of appeals from injunction orders, that an appeal from such an interlocutory order is not a hearing on the merits but is a review of the exercise of discretion by the lower court, and that the settled rule is not to reverse orders granting preliminary injunctions except in cases of abuse of that discretion.

The argument urged on behalf of the Securities Company in the courts below was that it would work

hardship and embarrassment to delay the distribution *pro rata* pending the ascertainment of the rights of the complainants in the orderly method usually pursued by courts of justice, and that numerous other stockholders, including Mr. Hill and his associates, were anxious to get their share of the corporate assets and to receive income therefrom. No proof was offered showing that there existed a single case of hardship or that the bond given would not cover all possible loss.

It is important to bear in mind, upon this question of comparative inconvenience and injury, that the injunction order restrained the transfer and distribution of only 717,320 shares of the capital stock of the Northern Pacific Company (record, p. 344), which is 396,614 shares more than complainants are offered by defendant; and that the order did not prevent the transfer or distribution of the remaining Northern Pacific stock, constituting a majority of the entire outstanding issue (nearly 54 per cent.), nor did it prevent or affect in the slightest degree the distribution of the Great Northern stock held by the Securities Company.

The necessary operation of the preliminary injunction *so far as it injures the defendant*, is only to tie up *pendente lite* $39,661,450 of Northern Pacific stock, in addition to the $32,070,612 par value thereof which the complainants are offered under the Hill plan of division. Six months' dividends at 7 per cent. on this amount of $39,661,450 would represent $1,388,149, which would, indeed, only be *delayed* in payment and not otherwise jeopardized, while the bond given by complainants was $2,000,000 (pp. 160, 345). The only real or possible damage as matter of fact would be six per cent. interest on the delayed payments.

The Circuit Court, therefore, made a just disposition in staying the dissipation of the whole subject-matter of the litigation until the question of right between the parties could be regularly investigated.

II.

THE NORTHERN SECURITIES COMPANY, HAVING BEEN ORGANIZED FOR AN ILLEGAL PURPOSE AND HAVING OBTAINED POSSESSION OF THE RAILWAY STOCKS IN PURSUANCE OF SUCH PURPOSE, COULD NOT THEREBY ACQUIRE THE TITLE TO AND OWNERSHIP OF THE STOCKS.

It is indisputable that the Northern Securities Company was organized for the purpose of carrying into effect an illegal combination entered into by Messrs. Hill and associates, and that the Northern Pacific stock involved in the case at bar was acquired and is held solely by virtue of such illegal combination, in violation of an act of Congress. That much was surely settled by the decree in the Government suit, for it covered "*all*" the railway stock "now *claimed* to be held and owned by the defendant, the Northern Securities Company" (*supra*, p. 2). It is equally clear that the purposes and undertakings of the Securities Company, as the instrument of this illegal combination, were still executory when the decree in the Government suit was rendered, and that the directors have determined to abandon the enterprise and to "fully and unreservedly and without delay" comply with the decree in the Government suit (record, pp. 9, 153), and that the company "contemplates a speedy dissolution" (p. 160).

Stated in its simplest analysis, the case is one where property has been acquired and is held by a corporation under a contract in violation of an act of Congress, where the end, object and purpose of the illegal contract cannot be continued and must be abandoned,

where it is being actually abandoned, and where the consideration for the transfer—based upon the assumed legal power and authority of the corporation to permanently hold—has utterly failed.

Under such circumstances, have the original depositors with the corporation the right to disaffirm the illegal contract and demand the return of their property; or may the corporation treat the illegal contract as valid for the purpose of securing absolute ownership in itself, and, while admittedly abandoning the unlawful purpose, dispose of the property and enjoy the fruits of the transaction, as fully as if the contract had been lawful and valid and the acquisition and continued holding of the property were not in violation of law, and as if the consideration of the contract had not failed?

In the decree in the Government suit, the court dealt with all the consequences of the illegal contract before it, and expressly authorized the *return* and retransfer "*to the stockholders* of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively," of "any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore *received from such stockholders in exchange* for its own stock" (*supra*, p. 3; record, p. 151). The court did not authorize any division *pro rata*, but the return to the stockholders of the railway companies (including necessarily the complainants) of the same railroad stocks "*received from such stockholders.*" All the facts were before the court, and the express permission or sanction in the decree is a part of its adjudication. Permissive in form, this provision of the decree was nevertheless the *judicial* action of the court, and not a mere *brutum*

fulmen, and it was called forth by the allegations of the bill and the defenses interposed as to the rights and good faith of the depositors. Both this court and the Circuit Court in Minnesota deemed it necessary to make some provision upon the subject. It is submitted that the effect of this provision of the decree was to eliminate from controversy in the present suit the contention on the part of the Securities Company that the complainants were not entitled to the return of the stock *received* from them by the Securities Company, "*in exchange* for its own stock," provided such return be practicable, which the complainants averred and sought to prove.

Notwithstanding this adjudication, the defendant Securities Company is now contending that even though restoration be perfectly feasible, yet under no circumstances are any of the original depositors entitled to their property, but that all the stock belongs to it and must be treated and disposed of as corporate assets. In a word, the defendant contends that the illegal contract of acquisition and holding conferred upon it the rights of ownership.

On the contrary, in contemplation of law, the original contract, being for an illegal purpose, could confer no rights of ownership; and the corporation had no legal right or power to make the acquisition for any such illegal purpose. The whole transaction was illegal, *ultra vires* and void from the beginning to the end. It was, legally speaking, a nullity—"an aggregate of nothings."[1]

Thus, in the leading case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R., 7 H. L. 653, 666, the directors undertook to purchase the concession of a

[1] *Scovill* v. *Thayer*, 105 U. S. at p. 150.

railway—an object not within the memorandum of association, and therefore prohibited by the Companies Act.

Lord Cairns, L. C., said (p. 673):

> " Every court, whether of law or equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified."

Lord Chelmsford said (p. 679):

> " I have already observed that the contract entered into by the company with Messrs. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act was absolutely void.
>
> " *It is exactly in the same condition as if no contract at all had been made*, and therefore a ratification of it is not possible."

The *Ashbury* case was approved in *Thomas* v. *Railroad Co.*, 101 U. S. 71, 80, 83, and again in *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 22, as establishing the broad doctrine that—

> " a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the stockholders."

The *Ashbury* case is also approved in *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 308, 317, where the court, by Mr. Justice Miller, said:

> " But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

The subject of the effect of illegal contracts of corporations, either *ultra vires* in the strict sense or contrary to statute or public policy, has been frequently considered by this court. The settled rule is that such a contract is wholly void and of no effect for any purpose, that the objection is not merely that the corporation

ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Scovill* v. *Thayer*, 105 U. S. 143, 149; *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 310; *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 38; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138.

It is also the settled doctrine of this court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548), and that "it is vain to contend that any right can be acquired under such a contract." *Montgomery* v. *United States*, 15 Wall. 395, 399. To same effect see *Desmare* v. *United States*, 93 U. S. 605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouachita Cotton*, 6 Wall. 521, 532; and cases cited in *Bank of the United States* v. *Owens*, 2 Pet. 527, at p. 541.

The general rule governing cases, where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, is stated by Mr. Justice Matthews, speaking for this

court, in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, as follows:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

See also *American Tube Works* v. *Boston Machine Co.*, 139 Massachusetts, 5, 11.

In the case at bar, the agreement actually entered into having failed because of illegality and lack of corporate authority, the only contract remaining is the one implied by law to return property transferred by virtue of a *void* contract entered into under a mistake as to the rights of the parties and the corporate powers of the Northern Securities Company and for a purpose which has wholly failed and is being abandoned. The law implies that when property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder will return the property on demand. It is that implied contract which the complainants seek to enforce, and by virtue of which they seek to recover their property. It is the defendant Securities Company which, by denying the right to reclaim the property and refusing to return it, is now relying upon the illegal contract and seeking to obtain a benefit thereunder, and thus *pro tanto* to give it force and effect.

As Chief Justice Waite said in *Louisiana* v. *Wood*, 102 U. S. 294, 299:

> "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

If, in such a case, the courts were to refuse to permit a restoration of the *status quo*, obviously they would be giving sanction and continued effect to the illegal contract. As Mr. Justice Blatchford said in *Parkersburg* v. *Brown*, 106 U. S. 487, 503:

> "*To deny a remedy to reclaim it, is to give effect to the illegal contract.*"

See also *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181, 185–186; *La Caussade* v. *White*, 7 D. & E. 535.

It ought hardly to be necessary to argue that the present suit is in no sense whatever an action *on* an illegal contract or to *enforce* an illegal agreement. On the contrary, it is brought on the repudiation thereof by both parties. As Mr. Justice Holmes said, speaking for the court in the recent case of *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "Cases where the action is on the illegal contract do not apply. . . . Here the attempt is to recover outside of it, treating it as set aside. . . . But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract."

No precedents in support of the right to recover could be stronger than the series of decisions in the long

controversy between the Pullman Palace Car Company and the Central Transportation Company, where, although the contract was illegal and the parties *in pari delicto*, return of the property delivered under the illegal lease, or its value, was ultimately decreed (139 U. S. 24; 65 Fed. Rep. 158; 171 U. S. 138).

The Securities Company, however, contended below that the avowed and conceded illegality of its acquisition of the railroad stocks precluded recovery in the case at bar, that it had *not* abandoned the illegal contract, and, in effect, that it might retain all the railroad stocks without accountability to any party who was privy to the illegal contract. And the case of *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, was confidently relied upon by the Securities Company in the courts below as a controlling authority in support of this defense. It will be proper, therefore, to consider the case somewhat out of the logical order of the discussion. Now, in the so-called *Terre Haute* case, the complainant, an Illinois corporation, invoked the aid of equity to rescind a lease of its railroad in Illinois to the defendant, an Indiana corporation, for 999 years, and to recover the leased property. The sole ground of the bill was the alleged illegality of the lease resulting, as was claimed, both from the complainant's own lack of authority under the laws of Illinois to make the lease and the defendant's lack of authority under the laws of Indiana to accept it. It appeared, however, as pointed out by the court below (33 Fed. Rep. 440, 443-445), that the validity of the lease as to the complainant lessor had been ratified by the legislature of Illinois, as well as by the acquiescence for seventeen years of its stockholders, during all of which time the lessee had

duly paid the rent and performed all of its obligations under the lease. For these reasons it was held that the bill could not be maintained, although the lessee was not expressly authorized by the state of Indiana to accept the lease. Differentiating the case from such as the case at bar, this court in its opinion distinctly recognized the right to recover upon the abandonment of an unlawful contract and the termination of its illegal purpose. Thus, at page 409, Mr. Justice Gray said:

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited."

There is nothing in the *Terre Haute* case as authority for the extraordinary proposition that, upon the abandonment or termination of an illegal contract,—in that case an illegal lease—the owner or lessor of the property is not entitled to its return and cannot sue for its recovery. Had the term of the lease in that case expired, or had it been terminated or abandoned, or had the lessee refused to perform, there can be no doubt that the right of the lessor to recover the leased property would have been recognized, as in the *Pullman* cases.

The defense that a lessee could retain the leased property by pleading illegality, after the illegal lease had come to an end by the expiration of the time fixed by the parties, was interposed in the case of *Sittel* v. *Wright*, 122 Fed. Rep. 434, 435, but it was overruled as utterly untenable. Sanborn, C. J., speaking for the

Circuit Court of Appeals, eighth circuit, used the following language:

> "The third paragraph of the defendants' answer, in addition to the allegation that the lease was in violation of the laws of the Indian Territory, alleges the lease was made by an agent of the Choctaw Coal & Railway Company without its authority, and from that fact deduces the extraordinary conclusion that the corporation, or its assignees or lessees, have acquired good right to keep the plaintiff's property. *Such a defense does not merit serious consideration.*"

The same question arose in the case of *Railroad* v. *Railroad*, 66 N. H. 100. The plaintiff and defendant railroad companies operated competing lines, and entered into a contract whereby the defendant acquired and operated the properties of the plaintiff together with its own property as one line in violation of an anti-monopoly statute of the state of New Hampshire. The term of the contract having expired, the plaintiff instituted a suit in equity against the defendant for a return of its properties, for an accounting of the proceeds of the use thereof, and for the determination and adjustment of the respective rights of the parties (similar in this respect to the *Pullman* cases, *supra*). The defendant pleaded in bar the illegality of the transaction under which the property of the plaintiff had been held and operated by it. The plaintiff demurred to this plea, and the demurrer was sustained. The court, by Blodgett, J., after holding that the contract was prohibited and void and that no right of action could be founded upon it, said (p. 131):

> "Nevertheless, we do not think the defendants are entitled to retain the money or other property so acquired, and for which they have rendered no corre-

sponding equivalent to the plaintiffs in return, but on the contrary, we are of opinion that it is their duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding."

And again (p. 133):

"Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associates, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain.'"

This New Hampshire case was cited among others by this court in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, in support of the proposition that—

"The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

It is submitted that, in the nature of things, there can be no difference in principle between the termination of an illegal contract by its own limitation and its termination by judicial decree, or by repudiation or compulsory abandonment. The essential thing is that the illegality has come, or is about to come, to an end.

The Northern Securities Company, it is true, contends that it has not abandoned or terminated or refused to perform the illegal contract and that, there-

fore, the case does not fall within the exception recognized by Mr. Justice Gray in the *Terre Haute* case. But it is difficult to perceive any merit in this contention in view of the proofs, which establish beyond question that the Securities Company was organized as a *holding* company to *permanently* hold the railroad stocks, that concededly it cannot continue so to do, that it is about to "divest" itself of the same, and that it "contemplates a speedy dissolution."

The proposed plan of distribution is incontestably an abandonment of the illegal combination. The Securities Company reduces its capital stock exactly to the extent necessary to "divest itself" of all the shares of stock of the railway companies acquired and held by virtue of the illegal contract. It declares its purpose to speedily dissolve because of the decree in the Government suit. It proposes to call in and cancel every certificate outstanding which in any way represents its holdings of railway shares and to retain only the assets which were in no way involved in the Government suit. A more complete abandonment or repudiation of the illegal combination and holding and of the purpose for which the stock was transferred cannot be conceived.

Indeed, it may be asked, were the directors disingenuous when they adopted the resolution of March 22, 1904, and did they, after all, not intend to abandon and terminate the illegal combination? Let us read the resolution they then published (record, pp. 9–10):

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay;
>
> "Resolved, In consideration of the premises, it is declared *necessary* and desirable for this company so

to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it."

And their circular to the stockholders was to the same effect (record, p. 153):

"Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the company and to distribute to its shareholders the shares of stock of said railway companies now held by it."

What did Mr. Hill, as president of the Securities Company, mean by his letter to the Attorney-General if the company did not intend to abandon the illegal combination? His language was as follows (p. 160):

"The decree of the Circuit Court of Minnesota having been affirmed by the Supreme Court of the United States, the Northern Securities Company, without question or delay, will comply therewith. In order that there may be no room for misleading or untruthful reports, we deem it advisable to state to you this fact. The Company contemplates a speedy dissolution; but it is deemed by the Directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders.

"I enclose a copy of the resolutions which have been passed by the Board. Without delay, after the stockholders have acted, the capital stock will be so reduced as to permit a distribution of the railway shares amongst the stockholders of the Northern Securities Company in the only way feasible, in the judgment of the Board. The method of distribution proposed by the Board of Directors will accomplish the purpose of the Government, and will preserve the equitable rights of all the stockholders as amongst themselves."

It is preposterous to expect any court to hold, on this showing, that the Northern Securities Company is not about to abandon and terminate the illegal contract in consummation of which the complainants' stock was held and that it has not refused further to continue the unlawful combination. As it is about to abandon and terminate the contract by which it acquired and held the railroad stock, the authorities which permit recovery on the termination or abandonment of such a contract are clearly in point.

The idea of the defendant Securities Company seems to be that although the contract of acquisition and holding was illegal from the beginning, nevertheless some rights have been acquired thereunder by what has been done before and since the institution of the Government suit. The fallacy of this reasoning is pointed out by Mr. Justice Miller in the *Pennsylvania Co.* case, *supra*, in the following language (118 U. S. 317):

> " But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

This language has been repeatedly cited with approval, *e. g.*, in *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, at p. 61. See also *Jacksonville &c. Railway* v. *Hooper*, 160 U. S. 514, at p. 524. In the *Central Transportation Co.* case, the court by Mr. Justice Gray said (139 U. S. 59, 60):

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it,

but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

As Chief Justice Parker of Massachusetts said in *Dwight* v. *Brewster*, 1 Pick. 50, 55 :

"The principle settled is that a party to an unlawful contract shall not receive the aid of the law to enforce that contract or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract who becomes possessed of the property of the other party with which he is to do something which the law prohibits can acquire a right to that property. *A contract being void, the property is not changed, if it remains in the hands of him to whom it is committed.*"

The settled rule as to the invalidity and nullity of contracts entered into in violation of statutes or public policy has been uniformly applied in analogous cases arising out of contracts relating to illegal combinations or trusts, and it was the fundamental postulate of the ruling in the Government suit. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

"Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. . . . *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

In *State, ex rel.* v. *Standard Oil Company*, 49 Ohio St. 137, 183, the Standard Oil Company of Ohio, which had become a party to an agreement to have its stock transferred to trustees for the purpose of effectuating an

illegal combination, was ousted of its corporate power to fulfill the agreement. Discussing the nature of the transaction under which the stock had been delivered in exchange for trust certificates, the Supreme Court of Ohio said:

> "In other words, it is to be managed in the interest of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; *for the holders of the trust certificates, received in exchange for their stock transferred to the trustees, remain in law and in equity the real owners of the stock so transferred;* and the averment in the answer that the dividends of the company are paid to the holders of its stock, appearing as such on its stock-books, is immaterial; since these persons are not the owners, but the trustees of the stock."

And again in conclusion (p. 189):

> "And in this connection, it is proper to say, that, in the judgment of the court, if the company through its directors, or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for in the trust agreement, or should hereafter make such transfers; or should pay dividends to them instead of to the real owners of the shares; or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case, it must be regarded and held, as performing the agreement in violation of the judgment of this court."

In *The People ex rel.* v. *Chicago Gas Trust Co.* 130 Illinois, 268, it appeared that the defendant company was organized under the General Incorporation Act of the state of Illinois, which permitted the organization of a corporation "for any lawful purpose." In the certificate of incorporation, the company had stated

that one of its objects was "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois. It was held that the incorporation was not for a lawful purpose and that all acts done by it toward the accomplishment of such purpose were illegal and void. Magruder, J., said (p. 292):

> "The purpose for which a corporation is formed under the act must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois it was not organized for a lawful purpose, and *all acts done by it toward the accomplishment of such object are illegal and void.*"

In *People* v. *N. R. S. R. Co.*, 121 N. Y. 582, an illegal combination of several corporations had been effected by the stockholders in form selling their stock to a joint stock association for its share certificates, and the franchise of one of the corporations to exist as such was forfeited for participation in the illegal combination. Such participation consisted in registering the transfer of shares on the corporate books in the names of trustees of the association and in recognizing them as the owners of the stock. Judging the transaction by its real purpose, the court held (p. 611)—

> "that the corporate stockholders parted with the legal title to their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates."

And the court, per Finch, J., said (p. 614):

> "The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such,

got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name."

And again, meeting the contention that the corporation was bound to recognize the illegal ownership under the sham transfers, the court said (p. 620):

"The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that *the original stockholders remain not only the beneficial, but the legal owners of the stock;* and, if the board of trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career."

In *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446, in considering the situation of the parties composing the Sugar Trust after the decision of the Court of Appeals and pending a reorganization, Pratt, J., said (p. 446):

"Now, a most serious question arises, whether or not they have any title, or are anything more than mere custodians of property which belongs to others, to wit, the certificate holders.

"At the present time, I think, they are mere custodians. If any argument is required to establish this proposition, it will be found in the history of the organization of the Sugar Trust."

And again (p. 447):

"We therefore find the defendants in possession of property belonging equitably to others, which came into their hands under an agreement void as to the main purpose for which it was made, and which they cannot legally use for the purposes for which it was placed in their hands; and they are utterly powerless to convey and give a good title or to distribute it to its rightful owners."

In the subsequent case of *Unckles* v. *Colgate*, 148 N. Y. 529, 536, one who had bought trust certificates sued to enforce a claim of right founded thereon and to recover his share of the assets. The court refused to sustain the action because wholly based upon and arising from an illegal transaction; but it distinguished the case before it from one brought by an original depositor in disaffirmance of an illegal agreement and seeking a restoration of property conveyed and held thereunder.

In *State* v. *Neb. Distilling Co.*, 29 Nebraska, 700, there was an information in the nature of a *quo warranto* to oust the Nebraska Distilling Company of its franchise to exist as a corporation because of its having entered into an illegal combination. It had conveyed all its property to a trustee from whom it took a lease for twenty-five years. The stock of the corporation had also been conveyed to trustees, who elected its board of directors and controlled its management, its stockholders receiving trust certificates. A stockholder who had participated in the illegal transaction was permitted to intervene. The court said (p. 719):

> "Any contract entered into with such an object in view is, under the laws of this state, null and void, and the conveyance from the Distilling Company to the trust was in contravention of the authority conferred by the statutes on that company, in excess of the powers granted by its charter, and against public policy and void, *and no title passed by such conveyance.*"

It is, therefore, submitted that this court and the Circuit Court in Minnesota, in the Government suit, undoubtedly contemplated, in accordance with the well-settled rule of law, that the necessary effect of an adjudication that the stock "*claimed* to be held

and owned by the defendant, the Northern Securities Company, was acquired and is now held by it" in violation of an act of Congress, coupled with authority to *return* it to original depositors, was that the contract was void for all purposes, that the absolute ownership of the railroad stocks did not pass to the Securities Company but remained in the depositors or their assigns as beneficial and equitable owners, and hence that such owners were entitled to the return of the stocks.

The cases holding that a *bona fide* purchaser may acquire a good title from one holding possession under an illegal contract are obviously distinguishable, because in such cases the doctrine of estoppel operates to prevent the real owner from asserting *his* title or the right of the custodian as his agent *against the innocent third party*, but not to affirm any title in the one having such illegal possession or in any one acquiring with full notice (record, p. 4). *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, 575, 576; *Anderson* v. *Armstead*, 69 Illinois, 452, 454, 455.

III.

THE QUESTION OF OWNERSHIP WAS INVOLVED AND DECIDED IN THE GOVERNMENT SUIT.

A.

It is submitted that the learned majority of the court below were in error in holding that the question of ownership of the railroad stocks was not even incidentally passed upon by this court in the Government suit (p. 393).

As matter of fact, not only was the subject-matter of the litigation in the Government suit the

same as that involved in the present suit, *i. e.*, the Northern Pacific shares now claimed by the complainants, but substantially the same facts were then before this court from which the learned Circuit Court of Appeals has deduced the finding *as matter of law* that the acts of the parties resulted in vesting the absolute legal and equitable title to the railroad shares in the Northern Securities Company. The proposed plan of distribution now attacked is avowed to be "necessary" in order to comply with the decree in the Government suit (record, pp. 9, 153); the issues tendered in both suits are in many respects the same; and the present complainants were identified in interest and in privity with the defendants in that suit. In regard to the *same* railroad shares and on the *same* documentary evidence and facts, the court below now holds *as matter of law* that, notwithstanding the emphatic decision of this court that the contracts of acquisition and holding were in violation of a statute and that the Northern Securities Company became merely a "trustee" or "custodian" of the railway shares in an attempt to organize a "trust" by "pooling the earnings of the two roads for the common benefit of the stockholders of both companies," nevertheless, the transaction did amount to an absolute and unconditional purchase or investment as fully as if the contract had not been illegal.

The majority of the learned Court of Appeals, in ruling that the Northern Securities Company had become the legal and equitable owner of the shares of stock of the Northern Pacific Railway Company held by it, declared as follows (pp. 393, 396):

> "If the question before us had been involved and decided in the suit of the *United States* v. *The Northern*

> *Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. . . . The present suit is an independent one, and as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative."

Such issue of ownership was not only presented for decision in the Government suit by the pleadings and proofs, the assignments of errors and the printed briefs and arguments in this court, as will appear by reference to the record and briefs on file in the office of the clerk of this court,[1] but, with all deference, the point was actually decided by this court.

An examination of the record in the Government suit, in comparison with the record in the suit at bar, will disclose that the very resolution of the directors of the Securities Company of November 15, 1901, which is now referred to by the court below as establishing that the railroad shares were absolutely purchased, was submitted and urged in that suit as tending to establish the same fact of *absolute ownership;*[2] that the identical statement now contained in the affidavit of Mr. Hill was then testified to, in almost the precise words, by Mr. Clough, general counsel and a director of the Securities Company;[3] that the testimony of Mr. Harriman, which is now regarded by the court below as estab-

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[1] *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243; *Putnam* v. *Lay*, 22 Wall. 60, 66.

[2] Record, Govt. suit, p. 190; present record, pp. 311-312.

[3] Record, Govt. suit, p. 758; present record, pp. 243, 271.

lishing a sale and not a bailment, was also before this court in the prior case;[1] and that Mr. Hill testified in the Government suit as to the so-called Harriman stock (record, Govt. suit, p. 96):

> "I knew that the [Harriman] stock was *exchanged* the same as other stock. Now, that is all the exact information I had on the subject."

In the Government suit, there was also before the court, Mr. Hill's circular letter of November 30th, 1901, as follows (record, Govt. suit, p. 703):

> "NOVEMBER 30th, 1901.
>
> "DEAR SIR:
>
> "Replying to your letter of the 23d instant, asking for further information about the Northern Securities Company, I beg to say that the business of that company is to deal in high class securities, to hold the same for the benefit of its shareholders and to do such other acts as will advance the interests of the companies whose securities it holds. . . . *These men have deemed it wise to* MAKE PERMANENT *arrangements for the protection of their interests and for securing a continuous policy in the management of their properties. Believing the Northern Securities Company will secure the objects named, they have generally sold to it their holdings of Great Northern shares, on the terms stated in the circular.* . . . JAS. J. HILL."

With all the evidence before this court, and speaking of the contention that there had been a purchase or investment by the Securities Company and not a deposit or bailment, Mr. Justice Harlan said (193 U. S. at p. 353):

> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.*"

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[1] Record, Govt. suit, pp. 623, 901, 905; present record, pp. 199, 235, 238.

And Mr. Justice Brewer was speaking to the same point when he said (193 U. S. at p. 362):

> "*But no such investment by a single individual of his means is here presented.*"

Nevertheless, the Northern Securities Company, upon the rendition of the decision of this court in the Government suit on March 14, 1904, at once proceeded to invoke the same facts as were before this court in the prior suit for the purpose of establishing its power to acquire and hold and its lawful acquisition of the railroad shares, and it has successfully contended that it became the absolute owner of these stocks and that, as such owner, it was entitled to distribute them to its stockholders as corporate assets. And the majority of the Court of Appeals has adopted the very contention on behalf of the Northern Securities Company which was unsuccessfully urged in this court in the Government suit on substantially the same facts, which contention Mr. Justice Harlan characterized as wholly fallacious and as not comporting with the actual transaction, in which conclusion Mr. Justice Brewer concurred.

The petition of the United States expressly alleged among other things *in substantially the same language as the bill in the case at bar* (record, pp. 3, 72; 193 U. S. 211) that—

> "The Northern Securities Company is a mere depositary, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

This averment was put at issue in the various answers in the Government suit by denials and allegations of absolute ownership (193 U. S. 227–228, 239,

241; record, pp. 90, 99, 100). The answer of the Securities Company itself averred that in acquiring shares of the Great Northern and Northern Pacific Railway Companies, it dealt solely with the separate owners of the shares in their respective individual capacities, and that "all the sales and transfers of the said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person" (193 U. S. 227–228; record, p. 91), *being the very same contentions advanced in the case at bar and on substantially the same evidence.*

The briefs in the Government suit on file in the office of the clerk of this court show that the issue as to whether or not the Northern Securities Company had become the absolute owner of the railroad stocks was the most important of all the questions considered, and was the basis of the discussion of the constitutional point presented. These briefs disclose that it was insisted in every conceivable form of argument that the Securities Company had derived the power to purchase the railroad stocks from its incorporation and charter under the laws of the state of New Jersey, that it held the stocks under valid contracts of absolute and unconditional purchase and sale, that its possession was that of absolute owner, that the original depositors had no longer any property interest therein, and that Congress had no power to regulate the exercise of the rights of ownership such as voting and collecting dividends. In the principal brief filed on behalf of the Northern Securities Company in this court, the following statements were made (pp. 82, 307):

> "The Securities Co. does not hold its railway shares as trustee, but as absolute owner. This is posi-

tively stated by Mr. Kennedy, I, 213; Mr. Morgan, I, 361; Mr. Hill, I, 699; Col. Clough, I, 788, 792, and is alleged as positively and directly in paragraphs VI and VIII of the petition, though in paragraph XI the Securities Co. is put into the before-mentioned inconsistent and incongruous positions of 'depositary, custodian, holder and trustee' of the same shares—as trustee, with the legal title, and custodian, with no title at all. And the decision seems to halt between the statement, in one place, that the Securities Co. is the owner of the shares it has acquired and the statement in another that it is a mere fictitious personage, and that the shares have merely been placed in its name by the real owners. Compare II, 1704–5, with II, 1706–7, 1708, and see pages 12, 13, 17, *supra*.

"Being absolute owner of the shares it has acquired, the Securities Co. is free to sell (and, indeed, as Mr. Hill says—I, 699—'to burn'), all or any of its shares of either railway company without selling any of its shares of the other. And the same absolute ownership and consequent absolute power of sale was of the essence of the original project of a company to hold only Great Northern stock. . . . The Securities Co. is the absolute owner of the shares held by it. The decision itself says as much (II, 1705). But the decree divests it, if not of the naked ownership, yet of every use and every profit and every incident of ownership. It may not vote the stock, nor exercise any of the powers or rights of ownership nor receive dividends, nor dispose of the shares except as permitted in the decree. There is no difference in law between stripping one's property of everything that gives it utility or value and depriving one of the property altogether. It is true there is a permission, if not an invitation to the Securities Co. (an invitation of the royal kind, with all these injunctions in case of non-acceptance) to turn back its railway shares to their former owners in exchange for its own shares held by them—but not for cash; *the Securities Company may not sell the railway shares to others.*"

In the other briefs filed on behalf of the appellants (defendants) in the Government suit, the claim was re-

peated again and again, with much amplification of argument, that the Northern Securities Company was an absolute *owner*, that the *ownership* of stock could not be regulated or controlled by Congress, and that the Circuit Court erred in not recognizing and giving effect to this *ownership*, to which all the parties in interest had testified.

The principal questions before this court in that suit were whether or not the Securities Company had in legal effect become the absolute owner of the railway stocks as a result of an illegal combination, and as such entitled to exercise all the rights of ownership, and, if so, whether Congress had the constitutional power to prohibit the exercise of such rights of ownership. The allegation in the Government's bill above quoted was, therefore, a most material allegation, and speaking of it as of the other material allegations of the bill, Mr. Justice Harlan said (193 U. S. 325, 353):

> "*In our judgment, the evidence fully sustains the material allegations of the bill.* . . . Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—*more properly speaking, the*

custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. . . .

"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. *There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of *both* these [constituent companies] into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as al-

ready indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) 'smothering' competition between the lines of two railway carriers."

And Mr. Justice Brewer, addressing himself to the contention that the Northern Securities Company had purchased the railway shares by way of investment and paid therefor with its own stock, and that it had the constitutional right to be protected in the exercise of all rights appurtenant to such absolute ownership, in his concurring opinion said (p. 362):

"*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination* to destroy competition and thus unlawfully restrain trade *was carried out.*"

The above quoted extracts from the opinions of Justices Harlan and Brewer, when read in the light of the dissenting opinion, it is respectfully submitted, leave no reasonable doubt that every member of the court understood that the question of *ownership* and the nature of the possession of the Northern Securities Company as "a holding company" was one of the points presented for decision. Thus, at page 366, Mr. Justice White used the following language:

> "It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads *did not make the Northern Securities Company the real owner of the stock in the railroads*, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

Furthermore, the answers of the various defendants in the Government suit set up the constitutional right of such stockholders to sell their property as they saw fit, and pleaded that the act of Congress, as construed and enforced by the court below, was unconstitutional in that "persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest" (record, pp. 100, 115, 123, 127, 135, 143; 193 U. S. 241, 246, 254, 255). It was in answer to this plea that Mr. Justice Harlan said (p. 357), that—

> "The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce."

And, as is respectfully submitted, the learned majority in the court below (record, p. 395) quite misappre-

hended the point to which this part of Mr. Justice Harlan's opinion was directed.

Moreover, when the decree in the Government suit expressly adjudged that *all* the railroad stock "*claimed to be owned* and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy," etc. (193 U. S. at p. 255), and authorized the *return* and retransfer of the stock to the original depositors or their assigns, the court in effect held that the Government was right in its contention in bill and argument, and that the Securities Company had not become the *owner* of the stocks, as was, on its part, contended. This resulted logically and necessarily from the adjudication that the transaction of acquisition and holding was not and could not have been authorized by the laws of New Jersey, because in direct violation of an act of Congress, and that the company might return the stocks to the original owners. When the court decided that the company acquired possession and claimed to own the stocks without lawful authority and in pursuance of an illegal combination in violation of the statute and authorized the *return* of such property, it was not called upon to go further and declare the effect of such adjudication or to reiterate the settled doctrine of this court that a contract which is *ultra vires* or in violation of a statute is wholly void and of no legal effect, that it cannot be the foundation of any right or power, that "it is vain to contend that any right can be acquired under such a contract,"[1] and that "neither what has been done under it, nor the action of the court, can infuse any vitality into it."[2]

[1] *Montgomery* v. *United States*, 15 Wall. 395, 399.

[2] *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 317.

It is respectfully submitted that if this court had contemplated that, notwithstanding the finding in the decree in the Government suit that *every* share of railroad stock, including the Northern Pacific shares in question, had been acquired and was held without lawful authority and in pursuance of an unlawful combination and under a contract in violation of a statute, nevertheless the ownership had become fully vested in the Securities Company and constituted a corporate asset as fully as if the contract were *intra vires* and lawful, and that the original depositors or their assigns were not the equitable or beneficial owners thereof, it would hardly have authorized the *return* of the stock to them or their assigns, or held that their rights were not affected by the decree. If the original depositors had no property interests other than as stockholders upon the failure of the object and purpose for which they transferred their property—if they were not entitled to the return of the deposited railroad stocks as owners thereof—if the absolute ownership had passed out of them to the Securities Company by virtue of the illegal contract, and the original depositors had nothing left but its certificates of stock, then, surely, the destruction of the value of the railroad stocks in the hands of the Securities Company necessarily operated to destroy the value of the only interests remaining in the original stockholders. If all the property of a corporation be rendered worthless in its hands, the property interests of its stockholders are certainly destroyed. But if the conclusion of the court was that the absolute ownership had not been acquired, that the purpose of the transaction was illegal and the attempt to acquire title was void, and that, upon the

utter failure of that purpose, resulting from the invalidity of the contracts of acquisition, the original depositors or their assigns were entitled to the *return* of their property, then the meaning and import of the express authorization to *return* and of the declaration that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies," etc. (193 U. S. p. 357), become at once plain, logical and consistent. The provision in the decree expressly sanctioning the *return* and re-transfer of the very railroad stocks to the original depositors or their assigns was an adjudication that could have been grounded upon no other basis than that the shares belonged to them as the real owners thereof. Mr. Justice White so understood the effects of this provision when he said (193 U. S. p. 373):

> "And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, *authorizes* its return to the alleged conspirators, and does not restrain them from exercising the control resulting *from the ownership*."

It is submitted that neither this court nor the Circuit Court in Minnesota would have authorized the Securities Company to *return* the railroad stocks if it had not recognized that the real ownership of them remained in the original depositors or their assigns, and had not passed to the Securities Company under an illegal and void contract. Indeed, how could the courts have given such authorization by solemn adjudication if that was not the logical and legal consequence of the decision? How could any court conceive itself empowered to *authorize* or sanction a return of property to those who were not the owners thereof?

The language used by Mr. Justice Harlan, to that extent certainly concurred in by Mr. Justice Brewer, is inconsistent with any other assumption than that the ownership of the railroad stocks remained in the original depositors as the necessary and logical result of the adjudication that the Northern Securities Company had acquired and held property as a mere "holding" company in violation of the act of Congress and could return the stocks to the original stockholders of the respective railway companies, because "no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it" (Mr. Justice Gray in *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60).

It is well settled that the extent and effect of the decision of any court, as *res adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records. *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243. The long-established rule is that every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its

opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal or qualification of the decree below. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 690; *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 256; *In re Potts, Petitioner*, 166 U. S. 263, 265; *Baker* v. *Cummings*, 181 U. S. 117, 126; *Nat. F'dry. &c. Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234.

And, as Mr. Justice Harlan said in the Government suit in reference to propositions concluded by prior decisions of the court under the Sherman Anti-trust Act (193 U. S. 332):

> "They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties."

See also *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143.

The learned court below, therefore, erred in holding that the question of ownership was not even incidentally passed upon by this court in the Government suit, and that the decision in that case did not constitute *res adjudicata*.

B.

In view of the fact that the present suit indisputably arises out of the condition of affairs created by the decree in the Government suit, and of the further fact that the proposed plan of distribution is alleged by the directors of the Northern Securities Company to be ***necessary*** in order to comply with that decree, it

seems extraordinary that the company should have contended, and that the Court of Appeals should have held, that such decree did not constitute a controlling judicial precedent upon any question relating to such distribution. The position seems to be that a controversy arising on a distribution of property alleged to be *necessary* in order to comply with a decree in a prior suit is to be determined as if such decree had never been rendered.

That the present threatened action of the Securities Company is claimed by it to be necessary in order to comply with the decree in the Government suit is unquestionable. Thus, the directors of the Securities Company in the resolutions of March 22, 1904, declared that (record, pp. 9–10)—

> " Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay ;
>
> " Resolved, In consideration of the premises, it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, *to distribute among its shareholders*, the shares of capital stock of said railway companies held by it."

And this was supplemented by the declaration in the circular to the stockholders as follows (p. 153):

> " Therefore, your directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company and *to distribute* to its shareholders the shares of stock of said railway companies now held by it."

To repeat, the subject-matter of the litigation, the railway shares, was the same; the controversy before the court was the result of the decree in that

suit; the effect of that decree was to create the existing conflict; the defendant was professing to *comply* with that decree, and was asserting that the abandonment of the whole enterprise was rendered *necessary* by that decree; the issues tendered by the bill of complaint in both cases were in many respects the same; and the present complainants, as stockholders of the Securities Company and as *cestuis que trustent*, were identified in interest with it in the Government suit. Yet, the conclusion of the majority of the learned court below was that no question affecting *distribution* or rendering it necessary was even incidentally involved in that suit, when it should have been recognized that the decision of this court constituted *res adjudicata* binding upon and available to the corporation and every one of its stockholders or *cestuis que trustent*.

As stockholders, the complainants were clearly not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property, received from them. As depositors, they were represented by their custodian, agent or trustee as to its right to hold and the legality of its custodianship. The rule is elementary that all identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit does not constitute *res adjudicata* in the strict technical sense, which we earnestly claim it does, it undoubtedly should have been regarded as a controlling judicial precedent on the same facts suffi-

cient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep., 663, 664; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924.

But, it is well settled that a stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. His stock may not be fully paid-up or issued for a legal consideration, but nevertheless he is a stockholder so long as he stands registered as such on the books of the company. The real parties in interest behind the corporations are always the stockholders. Thus, if a corporation has been adjudged insolvent in legal proceedings, this adjudication of its status is binding upon every stockholder, for reasons quite applicable to the question now being considered. In *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 59, Mr. Justice Swayne, delivering the opinion of the court, said:

> "As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510."

See, also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, fifth ed., § 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 508, 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006, 1007; *Secor* v. *Singleton*, 41 Fed. Rep. 725.

Moreover, the Securities Company, the custodian or trustee of the railway shares deposited with it, represented the complainants as the *cestuis que trustent*. It is a familiar rule that, in suits respecting trust property, all the *cestuis que trustent* are fully represented by the trustee and bound by the decree. The reason is that, through the trustee, their rights are deemed to have been fully and effectually presented and protected.

As this court said, speaking through Mr. Chief Justice Waite in *Kerrison, Assignee* v. *Stewart*, 93 U. S. 155, 160:

> "In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

See also *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508; *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40–41.

But aside from the settled doctrine that a corporation in such a suit represents its stockholders or constituent members and that when it is bound as to a matter

affecting its status or condition or powers, they are bound, and aside also from the view that the company was a trustee for the railway stockholders, the Government in its bill of complaint expressly nominated the defendants Morgan, Bacon, Baker and Lamont as representatives of the class to which the complainant Oregon Short Line Railroad Company belongs, namely, those original holders of Northern Pacific stock who deposited their shares (record, p. 65; 193 U. S. 202), viz.,

> "The defendants J. Pierpont Morgan and Robert Bacon . . . George F. Baker and Daniel S Lamont, and certain other persons whose names are unknown to complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Northern Pacific Railway Company."

The procedure of the Government in thus naming part of the class to represent and bind the whole was based upon the settled practice in equity recognized by this court in the case of *Smith* v. *Swormstedt*, 16 How. 288, 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties and would oftentimes prevent the prosecution of the suit to a hearing. For convenience,

therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

IV.

THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE FORM AND NOT THE LEGAL EFFECT OF THE TRANSACTION WAS CONTROLLING.

Notwithstanding the fact that the decree in the Government suit on its face expressly adjudged that *all* of the stock of the Northern Pacific and Great Northern Railway Companies *claimed* to be *owned* and held by the Securities Company was acquired and held by virtue of an unlawful combination in violation of an act of Congress (record, pp. 149–150), thus necessarily including the stock acquired from the complainants, it has now been held by the Circuit Court of Appeals that the Northern Pacific stock, so delivered to the Securities Company by the complainants, was acquired and is held under a valid contract of purchase and sale. And, for the very purpose of establishing this fact, directly contradicting the decree in the Government suit, the Northern Securities Company submitted to the court below extracts from the testimony in that suit and repeated below the arguments then addressed to this court.

There is no denial in the record of the *fact*, as adjudged in the Government suit, that a *holding* company was organized for the purposes sworn to

by the main promoters and that it was to *permanently* hold the railroad stocks and not dispose of them as any ordinary investor would have been at liberty to do. Those allegations of the complainants were allowed to go unchallenged, for the proof was overwhelming. The only remaining evidence which can be cited to sustain the ruling of the majority of the Circuit Court of Appeals is the fact that the parties persistently characterized the transaction as a *purchase* instead of a *deposit*, bailment or pool, and that Mr. Harriman so testified in the Government suit. But this same line of reasoning was urged in that suit, and complainants' counsel in the case at bar assumed that whatever was then before this court was concluded by the decision in that suit and need not be further considered.

The transaction in November, 1901, was undoubtedly put by the promoters and officers of the Northern Securities Company in the *form* of a contract of purchase and sale. That was patent in the Government suit as it is here. The facts and surrounding circumstances, however, fixed the legal nature and effect of what the parties did and not the particular form they adopted or the words they selected as expressing their intention purpose, or opinion. It is quite true that Messrs. Hill, Morgan and associates characterized all the transactions as purchases on every occasion and in every record they made on their books. Nevertheless, this court in the Government suit was not blinded by mere forms or names, or prevented from dealing with the substance and reality of things. Evidently, Mr. Harriman at the time believed *as matter of law* that the transaction constituted a sale, and so testified. Of course, Mr. Hill and Mr. Morgan studi-

ously used the word "purchase" and not "deposit" or "custody" in the documents. But Mr. Harriman's opinion or testimony on such a point of law no more changed the real nature of the transaction than did Mr. Hill's equally positive testimony in the Government suit as to the power of the Securities Company "to burn" the railroad shares. Indeed, if the form of the transaction—if mere names, or the language of the parties—if the recitals in all the documents could have changed the substance of the transaction, necessarily the result of the Government suit must have been different. But there, as here, and as in every case of this kind, the court has looked through the form and the phrasing of the parties, and has dealt with the substance and reality in seeking to determine the *truth*.

Moreover, *every word of Mr. Harriman's testimony was before this court in the Government suit.*[1] The only new feature is Mr. Harriman's present affidavit (record, p. 158), in which he candidly states that Mr. Morgan had said that the Securities Company would "purchase." A careful examination of his testimony and affidavit, however, will show that it contains nothing inconsistent with the present position as to the purposes and objects for which the Northern Securities Company was organized, and the real object and consideration of the contract. The new affidavit should be read in connection with the verified bill. Mr. Harriman testified that he was acquainted with the basis upon which the company was to be organized (pp. 215, 237), and was generally cognizant of the plan of forming a securities or holding company (pp. 216, 238), and it must be assumed that such plan was as it is alleged in the

[1] Record, Govt. suit, p. 96.

verified bill without contradiction and as testified to by the promoters. Among other things, Mr. Harriman testified (record, pp. 238–239):

> "A. The statement was made to me that they would put this Northern Pacific stock into a *holding* company and give us—not this Northern Pacific stock—but that they would *give us in part payment a holding company's stock* on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a *holding* company, or had formed a *holding* company, and would pay us in this stock, and that those were the terms on which it was to be bought.
>
> "Q. Did they state to you that if they took in any other stock than what you would surrender to the holding company they would take it on the basis of $115 for the Northern Pacific and $180 for the Great Northern?
>
> "A. I don't think that statement was ever made. *It was a simple statement that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.* . . .
>
> "All I remember is just as I have stated: A statement made to me that if this trade went through they would pay us in the shares of a holding company which would issue its stock *in exchange* for Northern Pacific at 115, and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

It is true that Mr. Harriman also testified in the Government suit that the transaction was an unconditional purchase and sale, and that he understood the company was legally at liberty to sell the railroad

stocks, but this was only his opinion and understanding on a question of law, and was not at all in conflict or inconsistent with his now stating the facts and letting the court determine the legal effect. Is this court now seriously expected to hold that, notwithstanding its adjudication in the Government suit *on the same evidence*, Mr. Harriman's testimony nevertheless estops the complainants from showing the real facts and operates to validate the contract and to vest legal title in the Securities Company? Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts? [1] Whatever the parties may think, their legal relations are to be determined by the legal consequences of their acts.[2] The legal consequences of the acts of the parties in the case at bar have been adjudicated by this court. The proofs show that the words "pay", "payment", "purchase", "change", "exchange", were all used. Nevertheless, had Mr. Morgan's idea been adopted of making a trust company the depositary and using its *receipts*, instead of organizing a new company and using its certificates, or had individual trustees been selected to perform exactly the same function as the above-quoted evidence in this record shows was to be performed by the *holding* company, the parties might well have used the very same words and have said that the trust company or the trustees would issue receipts in "payment" instead of "exchange," or that the trust company or trustees would, in the current phrase,

[1] *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327, 342-343.

[2] *John Towle and Co.* v. *White* (H. L. 1873), 29 L. T. N. S. 78, 80.

"pay" depositors in voting trust certificates; and yet the use of one word or phrase or another would not have affected the real nature of the transaction, nor have transformed a deposit in trust into an absolute sale, nor have operated to vest the absolute legal title in such custodians or depositaries, *nor have turned an illegal and void contract into a lawful and valid one.* This court has often pointed out that, although parties may industriously and repeatedly call a transaction what it is not, even in the most formal instruments, the words, as well as the form or the name, are of little account, but that it is the legal effect of the whole transaction which is to be sought for and gathered from the acts of the parties.[1] In a word, equity looks behind the mask at the true face; behind the form to the fact.[2]

The learned majority of the Court of Appeals was, it is submitted, clearly in error in assuming that the pledge by the complainant Oregon Short Line Railroad Company, of the share certificates of the Northern Securities Company was in any way material upon the question of the nature and legal effect of the *holding* of the railroad stocks by the latter company or the right of the Oregon Company to demand the restitution of its original holding of Northern Pacific stock. The pledge of the certificates or receipts could not change an original bailment into a sale. It could not operate to make valid an illegal and void transaction. If the share certificates of the Securities Company had on their face been in the

[1] *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 268, 280; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 569.

[2] *McNamara* v. *Culver*, 22 Kansas, 661, 668, per Brewer, J.; *Peugh* v. *Davis*, 96 U. S. 332, 336.

form of mere receipts showing beneficial interests in a deposit in trust, or had there been voting trust certificates in the usual form, or trust company's receipts, as Mr. Morgan originally planned, the pledge by the holder of such receipts or certificates would manifestly not have changed the nature of the contract evidenced by such receipts, or have tended to convert an illegal bailment into a legal contract of sale, or estopped pledgor and pledgee as against the issuing company from showing the real transaction and the invalidity of the illegal contract of acquisition and holding. The organizers might just as well have issued receipts or voting trust certificates, and the nature of the holding, as contemplated by them, would not have differed in the slightest degree from the form they actually adopted to effect their purpose. Obviously, the Oregon Short Line Company became the holder and owner of the certificates the same as if they had been mere receipts, and it could pledge, transfer and assign them without in any way affecting or changing the contract of holding which those certificates or receipts evidenced, to be determined by the legal effect of what the parties did and sought to accomplish. It would indeed be an extraordinary method of legal reasoning to say that the certificates would represent an illegal and void contract if still in the hands of the Oregon Company, but if in the hands of its pledgee, would become evidence of a valid and effective contract, there being no intervening equities of any kind, and the certificates still standing in the names of Harriman and Pierce. Of course, the fallacy of such reasoning is quite obvious, and illegal contracts cannot be validated by any such methods. In a word, an illegal and void contract cannot be validated by estoppel (*infra*, pp. 129–137).

V.

THE PROOFS BEFORE THE COURT BELOW AS TO THE PURPOSES FOR WHICH THE NORTHERN SECURITIES COMPANY ACQUIRED AND HELD THE RAILROAD STOCK IN QUESTION.

Aside, however, from the conclusive effect of the adjudication in the Government suit, the verified bill of complaint alleged that the Northern Securities Company was organized in order to effectuate and accomplish the objects of an illegal combination adjudged to have been in violation of the act of Congress and in pursuance of an agreement among the promoters, including Mr. Hill and Mr. Clough, affiants in the case at bar (record, p. 3), viz.,

> "to organize a holding company under the laws of the state of New Jersey, and that said *holding* company should acquire and *permanently* hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that *said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns.*"

The attention of the court is particularly called to the fact that there was no denial of these verified allegations as to the purposes for which the Northern Securities Company was organized, in any form or manner whatever, although the president, the secretary, and the transfer agent, all of whom are also directors of the company, volunteered *ex parte* affidavits. Indeed, the testimony of five directors was submitted in answer to the bill in the case at bar, one-third

of the whole board, two of them, Mr. Hill and Mr. Clough, being respectively the president and the general counsel, and being also original promoters and defendants in the Government suit, but they all deliberately elected to remain silent as to the terms of the combination in pursuance of which the company was incorporated, as to the purposes and objects for which it was organized, and as to the nature of the intended holding of the railroad shares in the company's possession, although distinctly alleged and charged in the verified bill. The reason is obvious: they could not do so in view of the decree in the Government suit. The Circuit Court of Appeals entirely disregarded this most material and significant omission in determining, contrary to the uncontradicted allegations of the bill, that the Northern Securities Company was a purchaser and not a bailee.

The only proof submitted by the defendant Northern Securities Company, as to the contract by which it acquired and held the railroad stock in suit, was the testimony of Mr. Clough in the Government suit and a new *ex parte* affidavit of Mr. Hill, president of the company, to the effect that no contract, agreement or understanding in regard to the acquisition of the Northern Pacific shares in question was ever made or authorized by the company except as recited in the resolution of the 15th of November, 1901 (record, p. 271). This was the very same resolution which was before this court in the Government suit, and the statement of Mr. Hill now made is but a repetition, almost word for word, of what Mr. Clough, the company's general counsel, had testified to in the Government suit.[1] The new affidavit

[1] Present record, p. 243; testimony Clough, record, Govt. suit, p. 788; resolution, *ibid.*, p. 910.

of Mr. Hill did not controvert the allegations of the bill as to the terms, substance and intent of the agreement to which he was alleged to have been a party and in pursuance of which the Northern Securities Company was organized (record, p. 271). He paid no attention to these vital allegations. He confined himself to swearing that "no other or different contract, agreement, or understanding, relating to the acquisition of such shares by the Northern Securities Company, than as expressed in such resolution, was ever made or authorized by said company" (p. 271).

But, in addition to the failure of Mr. Hill and Mr. Clough to deny or controvert the fundamental material allegations of the bill as to the objects for which their company had been organized by *them* and their associates, which failure, upon an application of this kind, is equivalent to an admission of the truth of the allegations,[1] the uncontradicted and uncontroverted proofs before the court below fully supported the allegations of the bill.

(1) The intention to organize a "holding company" was shown as follows:

(*a*) Uncontradicted allegation of verified bill (record, p. 3).

(*b*) Uncontradicted affidavit of E. H. Harriman (record, pp. 157–158).

(*c*) Answer of Northern Securities Company in Government suit (193 U. S. at p. 233; present record, p. 95 *et seq.*).

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[1] *Young* v. *Grundy*, 6 Cranch, 51; *Agawam Company* v. *Jordan*, 7 Wall. 583, 609; *Brown* v. *The Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532; *Christensen* v. *Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61, 70.

(*d*) Answer of James J. Hill *et al.* in Government suit (193 U. S. at p. 241; present record, p. 110 *et seq.*).

(*e*) Answer of J. P. Morgan *et al.* in Government suit (193 U. S. at p. 251; present record, pp. 133–134).

(*f*) Testimony of Mr. Hill, Mr. Morgan and Mr. Harriman in Government suit (present record, pp. 173, 175–176, 216, 235).

(2) The purpose and intention to have the "holding" company *permanently* hold the shares of the railway companies and control their operation and management and not to act as a mere purchaser or investor were shown as follows:

(*a*) Uncontradicted allegation of verified bill (record, p. 3).

(*b*) Answer of Northern Securities Company and James J. Hill *et al.* in Government suit (193 U. S. 234, 241; present record, pp. 93, 111, 115):

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company.* It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their invest-

ments. . . . The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies and defeat the great enterprise they had undertaken of establishing a large international and interstate traffic."

(*c*) Answer of J. P. Morgan and Robert Bacon (latter being a director of the Securities Company) in Government suit (193 U. S. 251; present record, p. 133):

" For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with *the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time.* In or about August, 1901, as this plan was approaching maturity, *said parties* FOR SIMILAR REASONS determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire."

(*d*) Testimony of Mr. Hill, Mr. Kennedy and Mr. Morgan in the Government suit. Thus Mr. Hill testified (present record, pp. 171–173):

" A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning *making their*

holding together permanent, and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe, discussed the matter with me, going over the entire situation, the relations of the Burlington; the relations growing out of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific, and *suggested whether we should not include in our holding company our holdings in the Northern Pacific.*

"Q. *And for the same purpose?*

"A. *For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.*

"Q. *For the purpose of unifying the interests that you had in the two roads?*

"A. *Yes, sir; for the purpose of unifying the interests in each road;* because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of the shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock.

"Q. Of the Northern Pacific?

"A. Of the Northern Pacific, if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. . . . We wanted to put it in a corporation that was not a railroad company,--a company that would hold it as an investment, and the larger the company the more difficult it would be to secure a majority of it."

Mr. Kennedy testified (record, p. 174):

"Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

"A. Yes, sir.

"Q. *Under all circumstances?*

"A. *Under all circumstances.*"

Mr. Morgan testified (record, p. 175):

"Q. And then you had that in your own mind to have a *holding* company for the Northern Pacific?

"A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger; that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want it to go on indefinitely, and I thought the best plan was to go to some trust company. *My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

"Q. *That is to hold control?*

"A. *Hold control of the stock.* JUST TO SURRENDER IT TO THEM AND TAKE THEIR RECEIPT.

"Q. For the purpose of keeping control in one place?

"A. No; not alone to keep it in one place, but *to keep it so that the policy of the company upon which its future depended could be continued.* We didn't want convulsions going on. You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put that stock so that it could be protected--to maintain the policy of the company as it then existed.*"

This testimony, which was wholly unexplained and uncontroverted by the defense, surely presented a *prima facie* case as to the purposes and objects for which the Northern Securities Company was organized and the nature of the contracts by which it acquired and held the Northern Pacific stock in question. The complainants were advised by their counsel and assumed that if they submitted substantially the same evidence as was before this court in the Government suit under a stipulation with the defense (p. 161), and no qualification or explanation was vouchsafed

by the defendant, the trial court would, on such a preliminary motion, follow the adjudication in that suit, or at least regard the testimony and prior decision as sufficient to support a *prima facie* case and to warrant the granting of a preliminary injunction until the merits could be fully investigated on final hearing. And the Circuit Court so held.

VI.

THE TRUE AND SOUND RULE TO BE APPLIED ON THE DISSOLUTION OF ILLEGAL TRUSTS AND COMBINATIONS.

It is submitted that in the case of an illegal trust and combination entered into and adjudged to be in violation of an act of Congress, particularly where, at the very inception of any such scheme, its legality is at once publicly challenged by the National Government, justice and sound public policy will be promoted by decreeing the restoration of the *status quo*, and not permitting distribution on the basis of alleged rights acquired under and by virtue of the illegal contract and in disregard and defiance of the pending litigation. The strict enforcement of such a rule would not only put an end to the continued violation of the law, but prevent any party from profiting by unlawful acts. Men should not be permitted to enter into illegal trusts and combinations inimical to the public welfare and hold property under an illegal contract, and, after their plans are stayed and adjudged illegal, nevertheless proceed to effectuate the illegal contract of acquisition for an illegal purpose to the extent of vesting title in themselves. Restoration of the *status quo* is the full measure of justice that the promoters of illegal combinations and trusts should be permitted to enjoy. Such a rule would operate as a

salutary restraint, and would deprive the parties of any advantage or benefit from their unlawful acts. It would restore to each what he parted with, but deny him the right to any more. It would leave no inducement to transgress the law, and would hold out to promoters no premium or profit in the formation of illegal trusts or combinations in violation of law and inimical to the public welfare. And, as in the case at bar, it would prevent the promoters and responsible parties from being rewarded for their unlawful acts.

This question is one of great public interest, of far-reaching import, and of profound concern to the whole community. It is one likely to recur constantly in connection with the dissolution of illegal trusts and combinations adjudged to be in violation of the act of Congress.

The evil aimed at and sought to be eradicated by the decree in the Government suit, was the holding of the shares of two competitive railway companies "in one ownership." The vicious consequence of such a control and ownership was that it removed all motive for, and deprived the public of all benefit from, legitimate competition in the management of the railroads. Obviously, also, if any combination of individuals acting together were to hold a majority of the stock of two competing railroads, all incentive to competition would inevitably at once disappear, and could not exist as long as such holding continued. Any scheme or *agreement* which directly provides for, or brings about, this joint holding would be declared illegal, just as the present form of combination has been declared illegal.

Under the proposed plan of distribution in the case at bar, the stockholders of the Northern Securities Com-

pany will receive both kinds of stock, and, as long as the majority retain their holdings there will exist no more incentive to competition than existed while the stocks were held *for them*, the very same persons, by the Securities Company. On the other hand, the restoration of the *status quo* would place both railway companies in a position where actual competition, so much dreaded by Mr. Hill and his associates, would be promoted. Moreover, on the consummation of the *pro rata* distribution proposed, the control of a majority of the stock of both companies would undoubtedly be found vested in the same parties who, prior to the organization of the Securities Company, held Great Northern stock, and who, as Mr. Hill said in his testimony in the Government suit, would "stand without hitching" (record, Govt. suit, p. 62).

The record shows that in 1901 Mr. Hill and his associates, then largely interested in the Great Northern Company, entered into the combination condemned by the courts for the purpose of suppressing competition between that company and the Northern Pacific Company. The railroad stocks were acquired in pursuance of that plan, and for no other purpose, and that purpose can be defeated only by completely undoing what was attempted and by separating the ownership and control of the two railways. If the original owners of Great Northern stock, to whom a majority of the Securities Company's stock was concededly issued (viz., $211,057,600 out of a total issued capital of $395,400,000, record pp. 4, 268), are now to receive a clear majority of both the Northern Pacific and the Great Northern stocks, as the plan proposes, Mr. Hill and his associates will accomplish the fundamental and essential feature of their un-

lawful scheme, for they will secure and perpetuate the same joint ownership under another form and name. The holders of a majority of Great Northern stock will then become the holders of a majority of Northern Pacific stock. *And this result, tending patently to prevent all competition, will be brought about through the medium and as a direct result of the illegal contract and in pretended compliance with the decree in the Government suit that was intended to annul and put an end to that illegal contract.* In other words, Mr. Hill and his associates will accomplish, through the medium of the present illegal contract, exactly what they were proceeding to do in 1895 until they were frustrated by the decision of this court in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, and exactly what they were proceeding to do in another form by means of the Northern Securities Company until they were frustrated by the decision of this court in the Government suit.

Although the stockholders of the Securities Company, who are to receive the railroad stocks when distributed, will be at liberty to sell, they will appreciate that, as long as they continue to hold both kinds of stock, the joint holdings will be much more valuable than any separate holding of only one kind of stock. The railroad stocks together are undoubtedly more valuable than the sum of the value of the separate stocks to any person interested in preventing competition between these two railroads. Constituted as humanity is, the great body of stockholders will obviously consult their pecuniary interests and retain both stocks, and, of course, boards of directors in the same interest will be continued. As Mr. Hill boldly asserts, they will all "stand

without hitching," if he can only succeed in getting for them a majority of the stock of each company. And if they sell, the purchasers will want the joint holdings. It is possible to conceive of but two other schemes better calculated to effectuate and continue for many years the joint ownership and control in the same interest, and thus effectually remove all legitimate competition, and those are the schemes which were terminated by the decisions of this court in the *Pearsall* case and in the Government suit.

Although one of the affidavits submitted by the Securities Company avers that Mr. Hill and those who were consulted in the formation of the Securities Company now hold only twenty-five per cent. of its stock (record, p. 264), the testimony was of an officer of the company and was mere hearsay. The affidavit of this officer shows that he was speaking only of the few leaders within what may be termed the Morgan-Hill coterie. He was not speaking of the numerous Great Northern stockholders who in 1901 held a majority of its stock, to whom a majority of the Securities Company's stock was issued, and who still hold it. Not one of the gentlemen in this coterie ventured to make an affidavit on the subject. It is putting too great a strain on the credulity of any court to expect it to believe that if they could have testified on this very vital point without injuring the defense, their affidavits would not have been at once submitted. Mr. Hill, who volunteered an affidavit, was absolutely silent on this point (pp. 270–271). Mr. Clark, another affiant-director, was likewise silent (pp. 272–273). So, also, was Mr. Terhune, another director (pp. 277–278). Why was Mr. Nichols selected? Because Mr. Nichols could swear as to

what the books show, and as to what he believed, and could, therefore, safely tell but half the truth. What could he know as to the stock standing in the names of others for the account of the original promoters? Is it not a well-known custom to register stock in the name of unknown and obscure persons? Does not this appear in innumerable cases before the court? Is it not clear that, except by the cross-examination of Mr. Hill, Mr. Morgan and their associates, the complainants could not get at the exact truth, that they should have had a day in court to prove the facts, and that all the evidence ought to have been fully disclosed before the case was finally disposed of?

For all that the proofs disclose, ninety-nine (99) per cent. of the stock originally issued in exchange for Great Northern and Northern Pacific stock is still in the hands of original holders or held for their account. Although numerous transfers are shown, it does not appear that even one per cent. of that stock, which would amount to $4,000,000 par value or 40,000 shares, has been transferred to third parties ignorant of the illegal purpose. These same 40,000 shares may have been transferred thousands of times in the legitimate and illegitimate dealings of the Street, in genuine or washed sales. Who knows? If one per cent., or more or less, has been transferred to third parties, it does not appear how much of that stock has become so commingled on the books of the Northern Securities Company as to be incapable of being traced. The great bulk of the stock has never changed hands, so far as the affidavits disclose. And the defendant remained silent on this vital point.

VII.

THE PROPOSED PLAN WAS INTENDED TO CIRCUMVENT THE DECREE OF THIS COURT, AND IS NOT EQUITABLE OR LEGAL AS AMONG THE DEPOSITORS THEMSELVES.

The learned majority of the Court of Appeals erred in holding that the proposed plan of distribution did not violate the decree in the Goverment suit and was equitable simply because it was ratable (record, p. 393). On the contrary, if the exact effect and result of the plan had been appreciated, its illegality and want of equity would have been manifest.

A.

A majority of the stock of the Northern Securities Company, namely, $211,057,600 par value, was concededly issued to Mr. Hill and the other original holders of Great Northern stock (pp. 4, 268). If the Great Northern stock is returned to them, they will get exactly what they put in, no more and no less, and will not profit or benefit by the illegal combination in violation of an act of Congress. If, however, they are to be entitled to over one-half of the Northern Pacific stock, they will secure a profit, *as the direct result of the illegal combination*, of $19,329,321. That is to say, the market value of Great Northern stock was, at the time the motion was argued, $170 per share (p. 160), which equals $200,811,140 for the $118,124,200 par value transferred, while the market value of the Northern Pacific and Great Northern stock, which the original depositors of Great Northern stock would receive on distribution *pro rata* (viz., $82,882,319 par value of Northern Pacific stock at $135 and $63,676,077 par value of Great Northern stock at $170), would be $220,140,461, making a difference or

profit of $19,329,321 resulting from the illegal combination, distributed among the promoters and original holders of the Great Northern stock or their assigns. On the other hand, the difference against the complainants, if we consider only the $71,732,062 of Northern Pacific stock which the complainants have traced, will be $9,117,167 (record, pp. 12, 338, 339). The Northern Pacific stock has paid in dividends fourteen per cent. since November 18, 1901 (p. 159), which would equal $10,935,120 on the $78,108,000 par value of Northern Pacific stock received from the complainants. The Northern Securities Company, on the other hand, has paid to the complainants only $7,939,835.75 (p. 159), leaving an excess or surplus received by the Securities Company, over and above what it has paid to the complainants, of $2,995,284.25. Notwithstanding these facts, the Circuit Court of Appeals decided that the proposed division of the railway stocks "would effect a *ratable, and, therefore, equitable* division of them" (p. 393).

On the motion for an injunction, the complainants traced and identified at least $71,732,062 of the Northern Pacific stock which they originally owned or into which it was converted. They were offered, under the proposed plan, only $32,070,612 par value thereof, namely, forty-four per cent. of what they actually traced and identified, and instead of the remaining $39,661,450 of their own Northern Pacific stock, they were offered and are to be compelled to take $24,638,919 par value of Great Northern stock. In order to maintain that the majority are to be thus entitled to deprive complainants of nearly sixty per cent. of their property and force them to take Great Northern stock against their will, the majority must necessarily assert some legal or

equitable right. Upon what legal or equitable principle are the holders of a majority of the Northern Securities Company's stock issued for Great Northern stock entitled to take for themselves nearly sixty per cent. of the Northern Pacific shares originally belonging to the Short Line Company? What legal or equitable right can they possibly assert against the Short Line Company except under and by virtue of the illegal agreement? If they had sued to enforce distribution *pro rata*, asserting alleged rights *as* stockholders, could they have maintained their case except by grounding their claim on the illegal contract and insisting that they had acquired rights under and through that contract? *Qua* stockholders, how can they possibly assert any greater right than the corporation itself? What possible estoppel can exist except one based upon an illegal contract? Surely, the majority stockholders have no greater legal rights against the complainants than the Securities Company itself has, for they must necessarily claim under and through it.

The affidavits before the court below established no conceivable equity in favor of Mr. Hill and his associates as against the complainants, which would justify a court of equity in handing to the former one-fourth of the complainants' Northern Pacific stock claimed in this suit; and no equity can be imagined which would commend Mr. Hill and his associates to the court or entitle them to indemnity at the expense of the complainants. If there be parties, more than any others, who ought to be prevented from profiting by the illegal combination condemned by this court, it is clearly Mr. Hill and his associates. Yet, the substance

of the defense below was that because speculators and jobbers in the Street had bought into the situation pending the suit of the Government, and in defiance of the notice then served upon the whole world, some sort of an estoppel had been created in favor of alleged innocent and guileless investors who may have been induced to buy some of the stock, and that Mr. Hill and his associates were, therefore, to be not merely indemnified, but actually rewarded, at the expense of the complainants, and to be enabled to force the complainants to give up most of the Northern Pacific stock belonging to them, and to accept in lieu thereof Great Northern stock against their will.

B.

If Mr. Hill and his associates are to be judged as other men are judged and are to be presumed to have contemplated and intended the consequences of their own acts, there can be no escape for them from the conclusion that the present proposed plan of distribution is a wilful and deliberate attempt to circumvent the decree in the Government suit, and was, in fact, all along, the alternative intended as part of their original unlawful scheme.

The answer of Messrs. Hill, Clough, Kennedy, James and Baker in the Government suit, expressly declares (present record, p. 115; 193 U. S. p. 241) that—

> "The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies."

That the alleged rival interests thus intended to be referred to were those represented by Mr. Harriman is

shown by the testimony taken from the Government suit (record, 171–176) and is undisputed.

Now, we may examine the various steps in this alleged defensive measure, which, it is submitted, is a mere pretense to cover and mask the real purpose of suppressing competition between the Great Northern and the Northern Pacific. It might be asked whether the scheme declared illegal in the *Pearsall* case was part of this same line of defense, and whether the subsequent scheme to make these two competitive public corporations jointly liable for the Burlington bonds in an amount greatly exceeding the capital stock of either was also a defensive measure. That the object of the former was to suppress competition was adjudged in the *Pearsall* case (161 U. S. 646). That the object of the latter was to suppress competition was unconsciously confessed in the Government suit (pp. 96, 111–112; 193 U. S. 235, 241).

In the brief below on behalf of the Securities Company, it was contended that, even if the contract of acquisition were illegal, nevertheless, an implied contract thereby arose between the corporation and the depositors which entitled the company to insist upon distribution *pro rata* as the legal right of its stockholders. Complainants submit that this now disclosed implied provision was intended and contemplated from the beginning as the alternative of the illegal plan.

The situation should be considered as if the implied contract now insisted upon had been expressed, and it had been declared in the documents themselves, in the charter or by-laws of the Northern Securities Company, as alternatives of the illegal combination, viz., that the railroad stocks should be acquired and held permanently by the holding company, but, in case such

holding were illegal, then that they should be distributed among the holders of Great Northern stock so that they should secure and hold a majority of Northern Pacific stock—very similar to the alternative in the *Pearsall* case. Would it not have been plain to the courts that the object of both alternatives was exactly the same, namely, to suppress competition, and would not the agreement have been equally illegal under either aspect? Yet, the proposed plan of distribution *pro rata* is nothing more or less than effectuating this now alleged implied or undisclosed alternative *through the direct medium of the illegal agreement itself.*

Complainants assert and intend to prove that the fundamental features of the illegal scheme of Hill and his associates for the organization of the Northern Securities Company were, first, that it should have only enough capital to cover the stocks of the two railroad companies, and, secondly, that that stock should be divided so that in any event and under all circumstances the existing holders of Great Northern stock should thereby acquire and hold a majority of the stock of the new company and be enabled to stifle all competition. Great Northern was, therefore, to be exchanged at 180 and Northern Pacific at 115. These figures could not be varied without upsetting the whole plan, whatever change might occur in the actual relative values. Thus—

$155,000,000 of Northern Pacific stock at 115	=$178,250,000
$123,000,000 of Great Northern stock at 180	= 221,400,000
Total	$399,650,000

Was this fortuitous or was it the result of method and

design? As Mr. Justice Harlan said, stating the bill of the United States (193 U. S. at p. 324):

> "Its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par."

But the case before the court suggests something far more significant. The bill of the United States in the Government suit, among other things, alleged that the Securities Company had acquired substantially all of the capital stock of the Northern Pacific Company and a majority, "but if not a majority, at least a controlling interest" of the capital stock of the Great Northern (record, p. 70). This allegation and charge, according to settled rules, called for a full, true and candid answer, and not an evasion. Since the days of Lord Eldon, it has been the settled policy of equity procedure to require a defendant to relate candidly and fully *all* the information he has on any matter alleged or charged, and as to facts not within his knowledge he *must* answer as to his information and belief. The answer of the Northern Securities Company (p. 89; 193 U. S. at p. 226), and the answer of the defendants Hill, Clough, James, Kennedy and Baker (p. 105), however, were most indefinite and evasive. When the case came to be tried, the Circuit Court in Minnesota found "the following conclusions as respects matters of fact" (120 Fed. Rep. 723–724):

> "Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per

share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share, and using its own stock at par to make the purchase.

"The Securities Company subsequently made further purchases of the stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company."

And the case was heard and decided in this court on these findings.

Yet, within eight days after the decision of this court, the directors of the Northern Securities Company met and were prepared to issue their circular of March 22, 1904 (record, p. 153), in which it was disclosed for the first time that the outstanding capital stock of the company amounted to 3,954,000 shares or $395,400,000 par value, and a distribution was proposed on each share as follows:

"$39.27 stock of the Northern Pacific Railway Company.

"$30.17 stock of the Great Northern Railway Company, and proportionate amounts thereof for each

fraction of a share of stock of this company so to be surrendered. . . .

"The assets of the company remaining in its treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit, producing income, and conservatively valued at an amount in excess of the $3,954,000, to which it is proposed to reduce the stock of your company."

In some way or other, yet undisclosed, but pending the Government suit and perhaps in defiance of the decree of April 9, 1903, the Northern Securities Company increased its holdings of Great Northern stock from $95,000,000 par value, or about 76 per cent., to $118,124,200 or nearly 97 per cent., for which $211,057,600 of Securities stock was issued (see affidavit of Nichols, p. 268), and increased its holdings of Northern Pacific stock to over 99 per cent.

The effect of these concealed increased holdings, thus secured pending litigation, was to vest a full majority of the Securities Company's stock in original holders of Great Northern stock, so that on the entry or affirmance of the contemplated final decree, the plan of distribution pro rata could accomplish the original purpose of vesting control of both railroads in one and the same body of men, viz., holders of Great Northern stock, an object which could not have been consummated if the situation had remained as it was when the Government suit was brought and as it was found by the Circuit Court in Minnesota and by this court. For had it so remained, and had the company not secretly increased its holdings pendente lite, the majority of the stock of each railroad company on a pro rata distribution would have been transferred to original depositors of Northern Pacific stock and their assigns, instead of, as now, to original depositors of Great Northern stock or their assigns.

Is it not worthy of investigation in this cause whether or not there was design and method in all these acts, whether or not this was the concealed alternative contemplated and provided for from the very beginning, whether or not a court of equity should permit the fruition of any such alternative? Was it not distinctly the concern of the courts below to permit this to be investigated and the truth ascertained and laid bare? Were not complainants entitled to prove, as they believe they can, that these additional acquisitions pending the Government suit were made for the very purpose of consummating a scheme of *pro rata* distribution and circumventing the decree? Should not any court consider this material? Could not complainants have shown that, pending the litigation, the Northern Securities Company had changed the relative situation purposely and to accomplish an improper object? Will this court say that this called for no investigation in the absence of all explanation on the part of the defendant? Was it necessary, in order to be entitled to go into this vital point, which appears on the face of the record, to indulge in epithets or charges of improper conduct? *Res ipsa loquitur.*

But, again, we hear the plea on behalf of the alleged *bona fide* purchasers of the cash stock. Let us look closely at this plea. Is it not extraordinary that this company, which had and was to have no other business than holding the railroad stocks, and was in receipt of an enormous income from the combined earnings of the two said railroads, should have sold stock *to the public* in September, 1902, during the pendency of the Government suit? According to defendant's theory, although they paid the Oregon Short Line Company

$8,915,629 in cash borrowed from Morgan & Co. (record, p. 180), $6,375,938 was at once reimbursed by the alleged retirement of preferred stock "in cash" at par (p. 180). Consequently, there was no need of any sales to the public at 112 (p. 319). Why was $7,522,000 of stock then sold to the public at a premium? Why was this done in defiance of the pending suit brought by the Government of the United States? Was it not simply that "equities" might be created? Was it not to manufacture a situation which would enable some one to contend that restitution of the *status quo* was "absolutely impossible"? Why were the sales made without first consulting the board? Why was submitting the facts to the board delayed for four months until a meeting occurred at which Mr. Harriman was present as a director? May not all this have been because somebody wanted to manufacture an *estoppel in pais* as against Mr. Harriman and the interests he represents? Is this incredible? The proofs on final hearing would show. Are not complainants justified in asking a day in court and an opportunity to prove the facts?

C.

In support of the proposed plan of distribution *pro rata*, it was contended below, as indicated in the affidavit of Mr. Nichols (pp. 268, 269), that the true object and effect of the plan was to scatter the stocks of these two competitive railroads over the whole world so that no combination would control it, and the court was asked to believe that Mr. Hill and his associates had sincerely determined to abandon the efforts of ten years and leave the two roads open to competition, and, perhaps, to dispose of their Great Northern stock and not hold it "a day longer than we could have sold

it " (record, p. 172). Let us, however, look through protestations to the record itself. It was within the power of the officers of the defendant Northern Securities Company to show that the stock of the company was so held that a *pro rata* distribution would have scattered control all over the world among a very large number of individuals, and to do this they only had to furnish the facts from the company's books, which would have shown beyond question whether the stock was or was not generally distributed, although the *record* names are not always a safe guide. The facts, so far as the books recorded them, were in their hands, but they preferred to submit a general statement to the effect that the stockholders now numbered 2,531 (p. 269), which it will be observed is *less* than one-half of the number of original depositors of Great Northern and Northern Pacific stock (5,300), as alleged in the answers in the Government suit (pp. 86, 102, 117). This statement in its last analysis, means what? It was intended to convey what idea? Plainly, the idea that the 3,954,000 shares of the Northern Securities Company had been about evenly distributed among 2,531 stockholders, and that it would be very difficult under such circumstances for any one combination or group of individuals to buy control in the market, as was pointed out by Mr. Justice Brown in the *Pearsall* case (161 U. S., pp. 646, 672). The brief filed in this court on behalf of the Securities Company January 23, 1905, confessed that this was the object of the statement (p. 11), viz.,

> " The distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the whole will concentrate in a single interest."

The facts so far disclosed, however, are as follows:

Northern Securities stock still held in name of Mr. Hill and associates twelve in number (record, p. 264)..	$99,601,600
Northern Securities stock still standing in the names of complainants Harriman and Pierce (p. 265).....	82,491,871
Leaving in the hands of the public or registered in the names of persons holding the stock for others, 2,517 in number,.....	213,306,529
Total	$395,400,000

Is it reasonable to ask any court to assume *without the slightest proof* that this remaining stock is divided among 2,517 different holders with even approximate equality? It would represent 846 shares per stockholder, or $84,600 par value. Is a court to assume that every one of the shareholders has approximately that number of shares, when we are told that "multitudes" of them are women and children and eleemosynary institutions?

As Bowley points out in his Elements of Statistics (p. 123):

> "The incomes of a small number of millionaires and an army of paupers may have the same arithmetic average as a nation composed entirely of people moderately well off; but the modes will be very different in the two cases."

For example: ten men are in a room, one worth $10,000,000 and the others worth but a few dollars apiece. Would it be rational to say that we should assume without proof that the average wealth of the ten men was $1,000,000 apiece?

Yet the court is asked to adopt exactly this line of reasoning.

The only plausible argument may be that it is unreasonable to ask any court to assume that Mr. Hill and his associates among themselves control as much as $200,000,000 of Northern Securities stock. But it is confessed that they hold $99,601,600 par value (record, p. 264), which is somewhat more than "a small fraction." To those familiar with the modern magic of finance, there is nothing incredible in Mr. Hill and his associates now holding together in one group a majority of the capital stock of the Securities Company. If we may look at the history of the times or of this series of litigations, from the *Pearsall* case down to date, or examine the records of the Interstate Commerce Commission, what shall we find? The Northern Pacific Company, which in the *Pearsall* case was to have had a capital of $100,000,000, apparently shortly found itself with a nominal capital of $155,000,000 and a voting trust controlled by Morgan and Hill (p. 204). No one will claim that this $55,000,000 represented money put into the Northern Pacific system. The Great Northern, which at the time of the *Pearsall* case had a capital of $25,000,000, has somehow expanded to $125,000,000. The Burlington capitalization, which in its old days of simple management was $107,000,000, every share of which notoriously represented the full par in cash, was expanded in one transaction by an issue of $214,000,000 of bonds and a yearly fixed burden of $8,560,000, without a dollar put into the railroad system, and the Great Northern and Northern Pacific became liable for the bonds. The Northern Securities scheme, as was pointed out by this court and the Circuit

Court in Minnesota, added $122,000,000 to all this capitalization (193 U. S., p. 325). As Mr. Justice Brewer declared, "the organizers might just as well have made the nominal stock a thousand millions as four hundred" (*ibid.*, p. 362), and the community ought, perhaps, to be grateful, if not amazed, at their moderation and self-restraint.

D.

It was further contended in the courts below that it was impossible to restore the *status quo* because of alleged inextricable confusion and insuperable difficulty in tracing the origin of the outstanding certificates on the books of the Northern Securities Company. As to this, the Circuit Court said that the affidavits were conflicting (p. 343) and the learned Court of Appeals has not challenged the correctness of this statement.

The same pretence of inextricable confusion was made in the answer in the Government suit (present record, p. 98), but the court was not deceived by it, for a return of the stock to the original depositors or their assigns was expressly authorized (*supra*, p. 3).

But, as is known to every one, stock is only issued in the names of individuals or corporations. There is no such thing in this country as a bearer certificate of stock. Every corporation keeps a stock ledger and a list of stockholders. The laws of New Jersey require this corporation to do so.[1] In addition, a set of books is kept by the transfer agent and another set of books by the registrar of transfers (record, pp. 370–371). It was shown that there are two ledgers of the Securities

[1] An Act concerning Corporations (Revision of 1896), § 33.

Company relating separately to the Great Northern and Northern Pacific stock which it acquired and now holds and "showing the original deposit of the stock of the said companies" (record, p. 185). Through these books, every share of stock can be traced back to the original issue, because the books must show in the case of every new certificate exactly what old certificates have been surrendered. A stock ledger is always kept in the names of the individual stockholders. No other method is known to corporate bookkeeping. We have only to be given from the books the names of original holders to enable us to trace every share issued for Northern Pacific stock, and, after eliminating that part of the issue and the stock issued for cash, the remainder will be $211,057,600 issued for Great Northern shares (pp. 4, 268). If this latter has been broken up among ten thousand holders, still the problem would not be complicated thereby, for it is obviously a simple matter to divide the Great Northern stock among such holders of Northern Securities stock at the rate of issue, and thus return exactly what their Northern Securities shares originally represented and now represent—in other words, restore the *status quo* of the original holders or their assigns as authorized by the decree in the Government suit.

It is true that it is contended that there were cases where the same individual turned in both kinds of stock in one lot and received therefor certificates for Northern Securities stock; but Mr. Kahn's affidavit, on behalf of complainants, indicated that there was only one such instance, and that related entirely to Mr. Hill's individual holdings (p. 185). The Securities Company controverted this (p. 278). The affidavits were

conflicting. But if we were to divide among the holders of certificates so issued for holdings of both kinds of stock, exactly what was received in exchange for them, we would be restoring the *status quo.* Or such commingled assets might be sold for account of the depositors and the proceeds divided. *However, in either event, we would not be vesting title derived through, or recognizing, or enforcing, the illegal transaction, as is proposed in the plan of pro rata distribution.* It would simply be treating the transferees exactly as we would treat the original party who had turned in both kinds of stock. The assignees would stand *pro tanto* in the shoes of their assignor, who was the original joint holder, as fully as if they had purchased an undivided part of the original joint holding or deposit of both kinds of stock. And the same remark applies to all the cases of commingling and confusion. After identification by those who can trace their property, constituting the great bulk of the railway stocks, what remained will necessarily belong to those whose certificates cannot be traced, and will be divided among them, as it would be in the ordinary case of the commingling of any kind of property belonging to different owners for which receipts had been issued, *e. g.*, warehouse or grain elevator receipts.

VIII.

The St. Paul decision relied on by defendant.

The complainants, before instituting any independent suit, applied to the Circuit Court in Minnesota, sitting at St. Paul, for leave to intervene at the foot of the decree in the Government suit. They conceived such

a course to be proper in view of the opinion of this court and of the express provision in its mandate that the decree was affirmed, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require" (record, p. 188; 193 U. S. 360). The Circuit Court, however, refused to grant leave to intervene, and held that, as the Government objected to intervention, the petitioners should be remitted to a new suit in another tribunal, saying (128 Fed. Rep. 808, 813):

> "If it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, *these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce.*"

The court at St. Paul did not intend to pass upon or even to consider the merits of the controverted questions of fact and law presented by the petition and affidavits. The Circuit Court of Appeals, however, assumed in its opinion that "the ground of that application was substantially the same as that upon which this bill is founded" (record, p. 394). The learned court overlooked the fact that the record was not the same and that Circuit Judge Thayer, speaking for the Circuit Court in Minnesota composed of *four* Circuit Judges, did not pass upon the questions of fact then presented or decide the merits. On the contrary, the language of Circuit Judge Thayer was as follows (at p. 811):

> "But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact

> which the parties would be *entitled to litigate*, and with witnesses and evidence after leave to intervene had been granted, and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone."

The refusal of leave to intervene was discretionary and not appealable. *Credits Commutation Co.* v. *United States*, 177 U. S. 311. It surely cannot be reasonable to assume that the Circuit Court in Minnesota intended to pass upon or to prejudge or prejudice the merits of a controversy which it declined to consider or decide. When that court distinctly and unequivocally declared that the petitioners "would be entitled to litigate, and with witnesses and evidence" the merits of the questions involved, and declined to consider the proofs, its disposition and *refusal to adjudge* ought not to be urged as a *decision* on the merits. It is most earnestly submitted that the Circuit Court in Minnesota never for a moment conceived it possible that any court would interpret its opinion in such a way as to dispense with any further "litigation with witnesses and evidence" upon the very questions which the *four* Circuit Judges then declined to decide and concurred in declaring the parties would be *entitled to litigate.*

It is fair to the majority of the Circuit Court of Appeals to state that it did not have before it the record in the Circuit Court in Minnesota on such application for leave to intervene A certified copy of the record has, however, been filed in the office of the clerk of this court, with printed copies for reference, should the court desire to refer to it, to ascertain exactly what occurred in St. Paul.

Now, of course, the effect of any judicial decision is

to be considered in view of the facts before the court. The application of the petitioners in St. Paul was opposed, not only on the ground that it would be bringing into the Government suit matter which should be litigated in an independent suit, but on the ground that restoration of the *status quo* was practically impossible. An affidavit was filed, sworn to by Mr. Nichols, secretary of the Northern Securities Company, to the following effect (record of proceedings in St. Paul, p. 16):

> "It would be absolutely impossible now to ascertain the specific number of shares of stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, represented by any one of a very large proportion of the present outstanding certificates of stock in the Northern Securities Company."

It was undoubtedly in view of this showing that the court, recognizing that property of the nominal value of $400,000,000 could not be treated as a derelict and that there might be a legal *impasse* created by its decree, declared that the permissive feature of its decree and its sanction that the *status quo* should be restored, was not exclusive of what might "appear" to be more equitable (record, p. 367). Of course, Judge Thayer did not mean to intimate that the directors of the Securities Company could conclusively determine whether any particular plan appeared more equitable. That is a judicial question, for the courts to decide.

In the case at bar, the complainants were seeking to show the facts and to prove that it is practicable to trace substantially all of the outstanding stock (pp. 183, 371). Judge Bradford in his opinion adverts to the fact that upon that point the affidavits are conflicting (p. 332). This being so, the complainants should have been afforded the opportunity to ascertain and prove the

true facts, which can be shown only on the books of the Northern Securities Company, and from the examination and cross-examination of defendant's directors, officers, transfer agents and registrars.

It will not fail to be observed by the court that for some reason or other the same Mr. Nichols, secretary of the Northern Securities Company, who had sworn at St. Paul that to trace the origin of the Northern Securities stock would be "absolutely impossible," changed and qualified his language in this case, and became much less emphatic in his assertions, for we find that he now swears (record, p. 270) that—

> "It is not feasible . . . to trace every (*sic*) outstanding certificate of stock back to its original source."

With this form of negative pregnant, the statement would, of course, be true if only one certificate could not be so traced, and in the face of this cunning and evasive method of answering the bill and affidavits, any court would have concluded that something was being concealed and that justice required further light. In the language of Judge Bradford in the Circuit Court on another point (record, p. 342), "its failure" to make a full and fair showing "gives rise to an unfavorable inference."

IX.

The defense of estoppel.

It was strenuously contended on behalf of the Northern Securities Company in the courts below that it was entitled to the protection of an equitable estoppel. The argument was that the circumstances had somehow created an estoppel against the complainants, the benefit and protection of which could be availed of by the company or by any stockholder, even though an original

depositor and a promoter of the company. This estoppel was supposed to have been created by what the company did or continued to do during the pendency of the Government suit and in defiance of the serious claim therein made, and by the receipt of dividends on the Northern Securities stock by the complainants; in other language, the estoppel was *created* by the fact that the promoters succeeded in selling or giving to the public some undisclosed part of their holdings, and that the company paid complainants $2,995,284.25 less than it collected on complainants' Northern Pacific stock (record, p. 159; *supra*, p. 110).

The reasoning on behalf of the Northern Securities Company seems to be that the court will assume *without proof* that superior rights of innocent third parties may have intervened, and that the company and its promoters can range or mask themselves under the shield of possible equitable rights thus acquired, the argumentative shield thus forged being eloquently compared in the court below to the "sacred ægis that is held over property and the rights of contracts."

On this point of estoppel, the defendant Northern Securities Company has resorted before this court to the plea *ad misericordiam*, supposed to be effective in other forums, and has endeavored to substitute *solutio ad hominem* for *solutio recta*. Thus, in the brief filed in this court on behalf of the Northern Securities Company January 23, 1905, in opposition to any hearing being granted, the following statement was made (p. 14):

> "The stockholders of respondent have from the beginning been a body of investors and not a body of speculators. They rely upon the revenues from their Securities stock, to meet their regular financial needs. Multitudes of them are women. Other multitudes are

estates of deceased persons and minors. A considerable number are institutions of learning and charities, which hold this stock as part of their endowment, upon which the support of the establishment is largely dependent."

We conceive it to be our duty merely to call the court's attention to the fact that there is not a scintilla of evidence in the whole record to warrant a single one of these statements.

The suggestion that this court should treat as material the fact that the promoters and original holders have induced the public to buy or take some of their stock is answered by the verified allegation of the bill that every holder acquired the stock with full knowledge (record, p. 4) and the notorious facts of the case, as well as by the language of Mr. Justice Brown, speaking for the court in *Louisville & Nashville R'd Co.* v. *Kentucky*, 161 U. S. 677, 691:

> "In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted powers, and that its capital stock of $1,500,000 in 1856 has expanded to $51,000,000, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it; and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the Commonwealth is not bound to respect investments made under a misapprehension of the law. Indeed, the argument proves too much, and would justify the inference that capitalists put their money into the road upon the assumption that it had been given irrevocable right to absorb to itself every road which might thereafter be constructed within the limits of the Commonwealth."

So, likewise, in the leading case of *Scovill* v. *Thayer*, 105 U. S. 143, 151, it was contended that the defendant,

who had voted for an illegal issue of stock, should be estopped to deny its validity because the public had acted to its prejudice, etc. Mr. Justice Woods, speaking for the court, showed the fallacy of this argument in a few succinct sentences, viz.,

> "The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. *Zabriskie* v. *The Cleveland, Columbus & Cincinnati Railroad Co.*, 23 How. 381. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false."

In *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court, by Mr. Justice Gray, said:

> "But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

And in *Tilton* v. *Cofield*, 93 U. S. 163, 168, the court, by Mr. Justice Swayne, said:

> "The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

The fact that Mr. Harriman participated in any acts attending the issue of the stock to third parties or ratified the sale of the cash stock, even if unexplained, would not estop him from showing the truth and that they all bought with notice (record, p. 5). Illegal acts cannot be given validity by assenting to them or acting under them, for otherwise persons or corpora-

tions could easily abrogate a statute by simply contracting to do and doing the prohibited act. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Scovill* v. *Thayer*, 105 U. S. 143, 149; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *Veeder* v. *Mudgett*, 95 N. Y. 295, 310.

But, if the record be examined, it will be seen upon how little the defense of estoppel hangs, and the court will search in vain for proof that a single person has any equity whatever as against the complainants. No individual has yet come forward to assert that he bought in ignorance of the purposes for which the Northern Securities Company was organized or of the fact that the Government of the United States had a suit pending in which it was claimed that the acquisition and holding of the railway shares by the Securities Company was in violation of an act of Congress. That was left to Mr. Nichols. It would have required unusual temerity even on the part of "women" or the representatives of "estates of deceased persons and minors" or of "institutions of learning and charities" to come into any court and assert that they had acquired the stock by purchase or gift without knowing of the pending litigation or of the notorious purposes for which the Northern Securities Company had been organized.

But, turning back to the law, it must be confessed that there is some difficulty in perceiving upon what rational or logical ground the Northern Securities Company itself or its promoters, who now still openly hold in one group $99,601,600 par value of the outstanding stock, (record, p. 264), can have acquired any equity against the complainants unless it be through the illegal and void contract or unless the court is seriously

expected "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." (Mr. Justice Miller in *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86.) Surely, the proposition will not be seriously entertained by this court that because third parties have bought or accepted gifts or endowments of Securities stock during the pendency of the Government suit and with full notice of the questions involved, the company and all its promoters and original stockholders are, as it were, to be subrogated to the possible equities of these third parties, which possible equities are *yet to be proved.*

The principal argument in support of the defense of estoppel is advanced on behalf of what are termed the holders of cash stock. Now, as to this cash stock, it will be helpful to examine critically the evidence before the court. It appears that on January 22, 1903, nine months after the commencement of the Government suit, the board of directors of the Securities Company were asked to ratify the sale in the open market of 59,346 shares of its capital stock, and to approve a contract entered into in September, 1902, by the company with Mr. James J. Hill, its president, by which he had himself loaned some of his own stock for the purpose of making deliveries. The board thereupon authorized "the issuance to Mr. Hill of 59,346 shares of the stock of this company to replace the said shares so sold" (record, p. 319; see also p. 268). It was not until several months after these sales had been made that the matter was disclosed to the board, and then not until a meeting at which Mr. Harriman was present.

But, assuming for argument only, for it is highly improbable, that the Securities Company actually sold 75,220 shares of its stock to innocent third parties for cash, there is not the slightest proof that this cash stock cannot be traced and identified as fully as if every certificate representing it were labeled cash stock or were still in the hands of Mr. Hill. Nor is there any proof that the Securities Company has not sufficient assets to return the full amount of cash and interest to any *bona fide* purchasers from the company for cash. On the contrary, the bill charges specifically that there are ample surplus assets to protect the rights of such *bona fide* holders (record, p. 12), if any there be, and the Securities Company vouchsafed no answer to this positive allegation. The failure of the defendant to furnish the facts, when it alone could do so, is commented on in the opinion of the Circuit Court (p. 342). The complainants relied upon the elementary rule of evidence that when, under such circumstances, a defendant elects to stand mute, it is to be taken as established that, had he spoken and told the truth, the facts would have been unfavorable to him.

The complainants, however, submit that even if it were not the fact that the assets of the Securities Company remaining after the return to original depositors or their assigns of the deposited railroad stocks were sufficient to enable cash and interest to be repaid for the cash stock, a court of equity could require the complainants to do equity and, if necessary, reimburse *bona fide* holders of the cash stock to the full measure of their rights; and the Circuit Court in its opinion recognized that this might become necessary (p.

343). The complainants are quite prepared to meet and adjust any equities found in favor of the holders of this cash stock, and in their bill they have offered to do so (record, p. 12).

The possible equities of less than two per cent. in interest of the holders of the outstanding stock of the Northern Securities Company (probably less than one-third of one per cent. if we eliminate Mr. Hill's holdings of cash stock) cannot be permitted to affect and alter the legal rights of the great body of certificate holders who have no equities as against each other. The possible equities of these cash holders, *yet to be proved*, and in any event representing so small a percentage of the interests involved, ought not to control as to the relative rights and equities of the remaining holders, particularly in the absence of the facts as to the true situation of these cash holders. But these cash holders *must* claim under and through the corporation; and how can they have or assert an equity which it itself is not entitled to assert?

The fact that the petitioners, complainants below, refrained from filing a bill until after affirmance of the decree in the Government suit does not charge them with laches or create any element of estoppel. The question of law was doubtful and in litigation. They were justified in waiting until the final adjudication. Good faith required this. If the contract were held valid and legal, which it is conceded they believed, they would necessarily have to abide by its terms and permit the Securities Company permanently to hold the Northern Pacific stock and distribute the dividends. Even if the complainants would have been entitled to disaffirm and compel restitution without any repudiation

or abandonment of the contract on the part of the Securities Company, the pendency of the Government suit since early in 1902 constituted a full excuse for delay, and precludes the defense of laches. *Grand Trunk Railway Co.* v. *Wade*, 140 U. S. 65, 69–70; *Boardman* v. *Lake Sh. & Mich. So. R'y Co.*, 84 N. Y. 157, 182–183; *Cox* v. *Stokes*, 156 N. Y. 491, 511–513. Moreover, it may well be regarded by the court that, under the doctrine of the *Terre Haute* and *Pullman* cases, the right to sue in disaffirmance for a restoration did not accrue until the illegal combination was put at an end in the Government suit, and the directors took steps toward an abandonment of the scheme and enterprise and a dissolution of the company.

X.

The defense of *in pari delicto*.

The principal contention relied upon by the defendant Northern Securities Company in the courts below, however, was that because it now holds possession by virtue of an illegal contract between parties *in pari delicto*, the complainants and all other depositors can be allowed no standing in any court of law or equity to reclaim their property. The result of this contention obviously would be that the company might dispose of and distribute at will all the property it held without legal accountability to any one. This defense, strenuously insisted upon, was advanced in the face of the uncontradicted proof that the complainants Harriman and Pierce and the Oregon Short Line Company were not parties to the original combination in pursuance of which the Securities Company was organ-

ized (record, pp. 3, 5, 157–158), that it was entered into in direct hostility and antagonism to their interests (pp. 157–158), and that they acted in good faith and in the full belief that the transaction was legal and that the company had legal power to acquire and hold the railroad stocks for the purposes mentioned (p. 5).

The complainants submit that the express provision of the decree in the Government suit, authorizing the return of the deposited railroad shares to the original stockholders of the railway companies or their assigns, constitutes an adjudication that, notwithstanding the illegality of the whole transaction, the stocks could nevertheless be returned, and that, in any event, it does not lie in the mouth of the Northern Securities Company, defendant in that suit, to now interpose the defense applicable to parties *in pari delicto* as a ground for holding or dealing with the deposited stocks, and refusing to *return* them to the original depositors or their assigns. The defense that the depositors acted in good faith and in the belief that they were not violating the law was actually interposed in the Government suit (pp. 114–115), and hence the reason why this court and the Circuit Court in Minnesota expressly authorized and sanctioned a *return to the depositors* notwithstanding they were *in pari delicto*.

The Securities Company, of course, realized that this defense, in its final analysis, would permit it to retain the railroad stocks in perpetuity, free from any accounting to the holders of its certificates, and also enable it, or rather its officers and directors in actual possession of the certificates for the railroad stocks, to appropriate the property to their own use. This was recognized as an unreasonable, if not unconscionable, con-

tention. The directors, therefore, appreciating that the courts had "often stated in similar cases that the defense is a very dishonest one and it lies ill in the mouth of the defendant to allege it,"[1] sought by much euphemism to minimize the character of the plea. In exculpation, the argument in effect was that the defense should be tolerated because the directors did not intend to retain the property for themselves, but proposed to distribute it according to their own ideas of law or equity or expediency. It is submitted that no such plea can defeat the complainants' right to recover their property, and that the maxim *in pari delicto potior est conditio possidentis* affords no support to any such defense under the circumstances of this case. As Lord Esher, M. R., so well expressed it in *Yarmouth* v. *France*, 19 Q. B. D. 647, 653:

> "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Or, as Chief Justice Church of Connecticut said in *Northrop* v. *Graves*, 19 Connecticut, 548, 554:

> "It is better to yield to the force of truth and conscience, than to any reverence for maxims."

And Stephen in his History of the Criminal Law, vol. 2, p. 4, note 1, well says:

> "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called rules."

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[1] *McMullen* v. *Hoffman*, 174 U. S. 639, 669.

A.

The allegation of the bill that the complainants Harriman and Pierce, in exchanging the Northern Pacific stock in question for certificates representing shares in the Securities Company, acted "in good faith in the belief that the organization of said Securities Company was not and the acquisition and holding by it of said railway stocks, as aforesaid, would not be in violation of any statute of the United States" (record, p. 5), was admitted. Indeed, it was indisputable. Thus, in the circular of March 22, 1904, issued by the officers and directors of the Securities Company immediately after the decision of this court, it was among other things publicly declared that (p. 152):

> "The Company's acquisition of Northern Pacific and Great Northern shares was made *in the full belief that such purchases were in no wise obnoxious to any law of the United States*—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the Company to hold and vote the shares."

And in the reply brief submitted to the Circuit Court, on behalf of the Securities Company, the following concession was made (p. 3):

> "*There is and can be no doubt that all parties believed that they were doing nothing contrary to law*, and in this particular the complainants are in no better condition than the other organizers of the Securities Company."

The case is, therefore, concededly one where the complainants, acting in good faith, transferred property for a purpose which they fully believed to be legal, but which has subsequently been adjudged to be illegal.

Under such circumstances, where the illegal purpose cannot be continued and must necessarily be abandoned, is it the law that the innocent owner of property so transferred has forfeited his legal rights, that he has become outlawed, that he cannot maintain an action to recover his property, that the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and that the one in possession is protected in appropriating the property by a maxim of equity?

As Mr. Justice Holmes said in *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "A person does not become an outlaw and lose all rights by doing an illegal act."

Now, in the case at bar, it is manifest and conceded on the present record that the complainants acted upon the assumption that the Northern Securities Company could lawfully acquire and permanently hold the stocks of the railway companies, that the point of law was unsettled and doubtful, that there was no illegal or criminal intent by Harriman and Pierce, that there was no consciously wrongful act—no *mens rea*, and that at most there was a mistake by them as to the application and interpretation of a doubtful statute, the full effect of which had not yet been determined.

The mistake of law in the case at bar is not only admitted, but was one which even learned counsel might well make. The language of the statute was most general; its scope and meaning were admittedly uncertain; it was a new experiment in federal legislation of doubtful constitutionality; until interpreted by the courts, no one, even though skilled in the

law, could venture to assert with any degree of confidence what was or was not within the scope of the law. A penal statute was passed by Congress in uncertain and vague language, so that most men could not discern what was intended to be prohibited by its general language. Indeed, it was deliberately contemplated by Congress itself that the effect of the legislation would remain uncertain until authoritatively construed by the courts. In the final debate in the House of Representatives, after the passage of the bill by the Senate, Mr. Culberson of the Judiciary Committee, who had special charge of the bill on its behalf, among other things said (Congressional Record, 51st Cong., 1st. sess.; vol. 21, pt. 5, p. 4089):

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, *will not be known until the courts have construed and interpreted this provision.* . . . I wish to be understood, Mr. Speaker, as having stated at the outset that I do not know, *nor can any man know*, just what contracts will be embraced by this section [section 1] of the bill until the courts determine."

Senator Sherman, who introduced the bill in the Senate on behalf of the Finance Committee, said (Congressional Record, 51st Cong., 1st sess.; vol. 21, pt. 3, p. 2460):

> "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combination. This must be left for the courts to determine in each particular case. All that we as law-makers can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law as the courts of England and the United States have done for centuries."

And Senator Hoar said (*ibid.*, p. 3146):

> "Senators will remember that this is entering into a new and untrodden field of legislation. It is undertaking to curb by national authority an evil which under the opinions which have prevailed of old, under all our legislative precedents and policies, has been left to be dealt with either by the ordinary laws of trade or to be dealt with by the states."

It is, therefore, not surprising that the complainants believed, under the circumstances, that they were submitting, although against their will, to a legal plan formulated by others, who were determined to force it through as an offensive and defensive measure (record, pp. 5, 158).

To avoid misapprehension, it should be observed that the complainants are not contending that good faith, innocence of intention to violate a statute, or ignorance of the existence of a statute or its effect, would constitute a defense to any proceeding to enforce the penalty prescribed or the preventive remedy provided in the statute. The contention is that when relief is sought from a contract entered into through an honest mistake as to the application of an admittedly doubtful statute, *which contract is being or has been abandoned by the other party*, a different question and different considerations are presented. In such a case, the court is not called upon to enforce any penalty prescribed by the statute. The lawgivers here only provided for a fine and imprisonment of not more than one year and preventive relief in equity (act of Congress of July 2, 1890; 26 Stat. 209). Although Congress specifically dealt with the subject of forfeiture of property, it limited such forfeiture to property in transit from one state to another in pursuance of a violation of the statute (see § 6, 26 Stat. 210).

The court is now only considering whether the circumstances of this particular case are such that a court of justice must superimpose upon the penalties prescribed by the statute the additional punishment of forfeiture of property interests, and deny the complainants a hearing in court, in face of the *admitted* fact that they acted in good faith and with no intention to violate or defy the law.

Counsel conceive that if there be one fundamental distinction which more than any other courts of justice bear constantly in mind, it is the distinction between a deliberate transgression of the law and an unconscious transgression of the law—between harm voluntarily caused and harm involuntarily caused—between crime consciously committed and crime innocently committed—between an illegal act knowingly done and an illegal act done in ignorance of the law—between a flagrant violation of law and morality and an unintentional violation of a doubtful and uncertain statute. Men must, indeed, often be held responsible and punished for the effects and consequences of their innocent acts. Public policy and the due administration and enforcement of the law may require it; and a clear expression of the legislative will to that end must be enforced. But no jurist has ever recommended in theory and no court has ever sanctioned in practice any rule which would punish a man who, it is *admitted*, acted innocently, in good faith and in the full belief that his acts were legal, as rigidly and harshly as if he had done an evil act knowingly, with deliberate malice, or in conscious or insolent disregard and defiance of the law.

Such a rule would be so obviously unjust that it

would be a reproach to any system of government or of jurisprudence.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." It cannot be reasonably said that parties are *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction. See *The Queen* v. *Tolson*, 23 Q. B. D. 168, 171–176; *Taylor* v. *Newman*, 4 Best & S. 89, 94; *Regina* v. *Allday*, 8 C. & P. 136, 139; *Rex* v. *Twose*, 14 Cox C. C. 327; *Reg.* v. *Sleep*, 8 Cox C. C. 472, 478; *Regina* v. *Tinkler*, 1 F. & F. 513, 514; *Rider* v. *Wood*, 2 E. & E. 338, 343; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62, 68; *United States* v. *Conner*, 3 McLean, 573, 574; *The United States* v. *Pearce*, 2 McLean, 14, 18; *Halsted* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125, 126 (cited approvingly in *Stone* v. *United States*, 167 U. S. 178, 188, and *Hedden* v. *Iselin*, 31 Fed. Rep. 266, 269); *The State of Iowa* v. *Sheeley*, 15 Iowa, 404, 407–408; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.), 268, 272; *State* v. *Hause*, 71 N. C. 518, 520–521; *Dotson* v. *State*, 6 Coldw. (Tenn.), 545, 549.

It would be carrying the punishment beyond what any legislator would impose if it were now to be held that one party to a contract, which was subsequently held to be in violation of a statute, rendered himself not only liable to the punishment prescribed by the law-makers, but, in addition, forfeited all his legal

rights, however innocent he might have been of unlawful intent, and that the party in possession of property transferred under a mistake, could retain it free from any accountability whatever, and thus enrich himself at the expense of an innocent man acting in good faith. No conceivable public policy could require or sanction such a monstrous result.

The question whether the rule applicable to parties *in pari delicto* applies where the parties have acted in good faith and under a mutual mistake as to the law, has arisen in the federal courts in a number of cases, *e. g.*, *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158.

In *Spring Co.* v. *Knowlton* this court said (p. 60):

> "The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy."

In *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158, affirmed 171 U. S. 138, the opinion of the Circuit Court for the Eastern District of

Pennsylvania, delivered by District Judge Butler and concurred in by Circuit Judge Dallas, contains the following statement (p. 164):

> "Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace Car Company involves moral turpitude as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful. The statute of 1870 was supposed to confer full authority to make it. The state had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the court disagreed on the subject. It is a question of interpretation. In the court's view the lease was *ultra vires* and void; in the counsel's it was authorized and lawful. True, it violated a rule of public policy, but this was only because the court construed the statute more narrowly than the legal advisers of the parties had done. The legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. All that can justly be said, therefore, is that the parties misconstrued their authority, and that the lease is consequently *ultra vires*."

In *City of Detroit* v. *Detroit City Ry. Co.*, Circuit Judge Taft, discussing the principle as to parties *in pari delicto* and reviewing the *Terre Haute* case (145 U. S. 393), used the following language (60 Fed. Rep. 163):

> "It might well have been added that the principle invoked by defendants has application only where a court of equity is asked to aid a wrongdoer, as, for example, one who has entered into, and partially or wholly executed, a contract which is *ultra vires* because

its execution is an offense against the law, or a plain contravention of public policy (*Thomas* v. *Richmond*, 12 Wall. 349; *St Louis, V. & T. H. R. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U. S. 393, 395; 12 Sup. Ct. 953), or one who has made and entered upon the execution of an *ultra vires* contract with the deliberate intention of evading the known limitations of the law (*Common Council* v. *Schlich*, 81 Mich. 405; 45 N. W. 994). It does not apply to a case like the present, where parties in entire good faith, with no intent to violate law or public policy, but by reason of a common mistake of law, make a contract, a stipulation of which is not binding to its full extent,—not because it is immoral or unlawful or against public policy, but simply for want of statutory power in the stipulating party. In such a case, to use the language of Mr. Justice Mathews, 'the policy of the law extends no further than merely to defeat what it does not permit, and imposes on the parties no penalty' (*Chapman* v. *County of Douglas*, 107 U. S. 348, 356; 2 Sup. Ct. 62)."

The decree in this case was reversed on appeal (64 Fed. Rep. 628), but upon a ground which "did not affect the proposition here stated." *Louisville Trust Co.* v. *City of Cincinnati*, 73 Fed. Rep. 716, 732.

It is true that in *St. Louis Railroad* v. *Terre Haute Railroad* it was alleged "that at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so" (p. 397). In that case, however, whatever might be said as to the power of the plaintiff, there was not the slightest uncertainty about the statutes in so far as the defendant railroad company was concerned, and the effect of the enactments was manifest. The question as to the power of the plaintiff to lease its road was not decided, and consequently ignorance or mistake in regard thereto became immaterial, the court by Mr. Justice Gray saying (p. 404): "It is un-

necessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff," overlooking the confirmatory statute (33 Fed. Rep. 440, 443–445). There was no reasonable basis for misapprehension or mistake as to the law affecting the defendant lessee. Mr. Justice Gray, therefore, stated (p. 404) that "the contract in question was *clearly* beyond the corporate powers of the defendant," and that the invalidity of the lease "was apparent on its face . . . of which the plaintiff was bound to take notice" (p. 408). And it was held that after seventeen years of operation under the lease and payment of the stipulated consideration from time to time and as the lessee was continuing to pay and had "taken no steps to rescind or repudiate the contract" (p. 408), the assistance of a court of equity to set the lease aside ought not to be afforded. There was no question presented for decision as to the effect of an *admitted* mistake of law made by the parties in respect of a statute of uncertain meaning and scope, nor as to the right of a party to reclaim property parted with under a contract founded on such mistake which had failed of consideration by reason of its abandonment by the other party. As to such a case, Mr. Justice Gray qualified the decision by saying (at p. 409):

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v *Townsend*, 139 U. S. 67, and cases there cited."

The court thus clearly recognized that even in that case, if the lessee had "abandoned or refused to perform the unlawful contract," a failure of consideration would have resulted and recovery would have been allowed, as in the subsequent *Pullman* case.

It is objected, however, to the right of recovery under these circumstances, that courts of equity are not warranted in granting relief from a mistake of law, because everybody is conclusively presumed to know the law. The general rule need not be challenged that a mistake of law, stripped of all other circumstances and considerations, will not alone afford a ground for relief, but it has been established by innumerable decisions that relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or *admitted* and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. Such is the doctrine of the English cases extending back to the time of Lord Mansfield. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824, 825; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285, 286–287; *Earl of Beauchamp* v. *Winn*, L. R., 6 H. L. 223, 234; *Re Saxon Life Assurance Society*, 2 J. & H. 408, 412; *Jones* v. *Clifford*, L. R., 3 Ch. D. 779, 792; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381–382.

This is also the established law in this country, and the right to relief from the consequences of a mistake of law under the principles above stated has been fully recognized by this court in *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90–91; and

Hunt v. *Rousmanier*, 8 Wheat. 174, 215; 1 Pet. 1, 17. See also *The State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sebastian County*, 49 Arkansas, 24, 34, 36; *Northrop* v. *Graves*, 19 Connecticut, 548, 554, 560; *Stedwell* v. *Anderson*, 21 Connecticut, 139, 144; *Culbreath* v. *Culbreath*, 7 Georgia, 64, 67; *Underwood* v. *Brockman*, 4 Dana (Ky.), 309, 317; *Ray & Thornton* v. *Bank of Ky.*, 3 B. Mon. (Ky.), 510, 514; *Stockbridge Iron Company* v. *Hudson Iron Company*, 102 Massachusetts, 45, 48; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.), 455, 461–462; *Mortimer* v. *Pritchard*, Bailey Eq. (S. C.), 505, 507; *Hopkins* v. *Mazyck*, 1 Hill Ch. (S. C.), 242, 250; *MacKay* v. *Smith*, 27 Washington, 442, 445, 446.

B.

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. The idea that it was material has, in the language of Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412, "long since been exploded." The courts have refused, directly or indirectly, to recognize an unlawful contract or to give it validity or effect for any purpose. No rights can accrue from the doing of an act or agreeing to do an act prohibited by law whether or not that act be inherently moral or immoral. It is enough that the statute forbids it. Obviously, any statute which prohibited acts not *mala in se* would be frequently circumvented and in many instances readily defied and nullified, if courts were at liberty to enforce contracts in violation of the prohibition because they considered the acts merely *mala prohibita*.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. In such a case, the duty of the courts, constantly exercised, is to inquire into the nature of the prohibited act. The object of this inquiry is to determine relative delinquency and whether the party suing is culpable or blameless—whether deserving of punishment or not—or, as it is termed in the homely language of the old maxim, whether he comes into court with clean hands. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. In so doing, the illegal contract has not been sanctioned or enforced in any degree whatever; neither party has been allowed to profit or benefit from it; the court has simply restored property to its rightful owner and thus deprived the illegal contract of all force or effect.

In *Pratt* v. *Short*, 79 N. Y. 437, Andrews, J., speaking for the Court of Appeals, said (p. 445):

> "It is no doubt the general rule of law, that no right of action can spring out of an illegal contract,

> And the rule that an illegal contract cannot be enforced, applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract, which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party thereunder, it will, and in many cases has, given relief."

The fundamental difference between *malum prohibitum* and *malum in se* is also distinctly recognized by this court in the recent case of *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R. R.*, decided January 5, 1905, as yet unreported.

In the case at bar, it is difficult to perceive how the defendant Securities Company can consistently urge that the transaction involved moral turpitude and was therefore *malum in se*, in view of the conceded fact and its own declaration that the parties acted in good faith and in the *full belief* that they were not violating the law. The transaction clearly was not forbidden by the common law. *In re Greene*, 52 Fed. Rep. 104, 111; *Mogul Steamship Company* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598, 619, 626–627; [1892] A. C. 25, 39, 43, 46–47, 51, 57; *United States* v. *Freight Association*, 166 U. S. 290, 334–335; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572–573. It was also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51; Dill on

Corporations, pp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524–525. Except for the provisions of the federal Anti-Trust Act, there could have been no contention that the transaction was criminal in any sense, and the punishment provided by that act does not make a violation of its provisions an infamous crime. *Ansbro* v. *United States*, 159 U. S. 695, 697. Therefore, the transaction was at most merely *malum prohibitum*. A transaction which is merely *malum prohibitum* and entered into without any wrongful intention cannot involve moral turpitude.

The distinction between *malum prohibitum* and *malum in se*, when the action is brought to recover property or money after the illegal transaction has come to an end or has been put at an end by the parties or by the courts, has been often recognized by the federal courts.

Thus, in *Spring Co.* v. *Knowlton*, 103 U. S. 49, where the court sustained a recovery of money paid in part performance of an illegal contract for the issuance of stock beyond the corporate authority, which the parties subsequently abandoned upon discovery of its illegality, Mr. Justice Woods, who delivered the opinion of the court, said (p. 57):

> "It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract."

In *M'Cutcheon* v. *Merz Capsule Co.* (C. C. A., 8th Cir.), 71 Fed. Rep. 787, 796, Lurton, Circuit Judge, said:

> "The case of *Spring Co.* v. *Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted, and he

be desirous of rescinding it, provided the contract was not one *malum in se*."

In *Parkersburg* v. *Brown*, 106 U. S. 487, it was held that bonds issued for money by a municipality for the illegal purpose of aiding a private enterprise contrary to the constitution, were void, but that the holders of such bonds, succeeding to the rights of those who purchased them, were entitled to recover from the municipality the amounts so paid. Mr. Justice Blatchford, who delivered the opinion of the court, said (p. 503):

> "To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from which it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181."

In *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75, it was held that property coming into possession of a national bank under a contract in violation of an act of Congress, could be recovered by the other party upon restoration to the bank of the consideration. Mr. Justice Harlan, who delivered the opinion of the court, quoted with approval the above extract from the opinion in *Parkersburg* v. *Brown*.

In *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court held void and non-enforceable a contract of lease in violation of the statutory powers of the corporations plaintiff and defendant, but recognized the right of recovery in such a case of property conveyed under a contract thus put an end to, on principles of natural justice, the contract being "unlaw-

ful and void not because it is in itself immoral, but because the corporation by the law of its creation, is incapable of making it."

Subsequently, in *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158, 161, Judges Butler and Dallas held that the contract did not involve moral turpitude, although it had been held to violate public policy, because it consisted of an "*unintentional* wrong, or improper act *innocent* in purpose," and that, therefore, the plaintiff was entitled to disaffirm the illegal contract and recover its property which had been transferred to the defendant in pursuance thereof, after its repudiation by the defendant. That decision was affirmed in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, where the court, by Mr. Justice Peckham, said:

> "The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover."

See also, *Tappenden* v. *Randall*, 2 B. & P. 467, 470–472; *Ex parte Bulmer*, 13 Vesey, 313, 315–316; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181; *Lowell* v. *Boston and Lowell Rail Road Corporation*, 23 Pick. (Mass.), 24, 32; *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 327, 328; *Hanauer* v. *Doane*, 12 Wall. 342, 348; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373, 378.

C.

There is a striking analogy between the case at bar and those cases where money or property has been deposited with a depositary, stakeholder, trustee or

agent, with authority to apply it to an illegal purpose, and the property remains in the hands of such depositary, stakeholder, trustee or agent after the illegal purpose has come to an end, either by reason of enforced abandonment, voluntary repudiation or failure to dispose of the property or money in consummation of the illegal purpose. In all such cases, it has been held that the maxim concerning parties *in pari delicto* does not apply at all, that the property or money legally belongs to the depositor and is held by the other without consideration, and that it best comports with sound principles of public policy as well as natural justice to compel restitution. *Dwight* v. *Brewster*, 1 Pick. (Mass.), 50, 55; *Sampson* v. *Shaw, executor*, 101 Massachusetts, 145, 151; *Morgan* v. *Beaumont*, 121 Massachusetts, 7, 8; *Clarke, Harrison & Company* v. *Brown*, 77 Georgia, 606, 610; *Shannon* v. *Baumer*, 10 Iowa, 210, 211; *Taylor* v. *Bowers*, 1 Q. B. D. 291, 295, 300, 301; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 57; *In re Cronmire, ex parte Waud*, [1898] 2 Q. B. 383, 391, 395, 397.

Courts of justice will not permit a mere custodian, depositary, trustee or agent to take advantage of the alleged illegality of the transaction, but will compel him to return or account for the property to the owners. The books will be searched in vain for any authority tending to support the extraordinary contention that after the courts have once expressly adjudicated that a custodian under an illegal contract might return to the original depositors or their assigns the property received by him from them, nevertheless, the custodian, when sued by a depositor, could interpose as a defense the maxim *in pari delicto potior est conditio possidentis* and therefore refuse to return the property.

Thus in *Kinsman* v. *Parkhurst*, 18 How. 289, 293, the court said:

> "Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him."

See also *Brooks* v. *Martin*, 2 Wall. 70, 80; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500; *Block* v. *Darling*, 140 U. S. 234, 239; *Pointer* v. *Smith*, 7 Heisk. (Tenn.), 137, 144; *Railroad* v. *Railroad*, 66 N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.), 317, 319–321; *Jeffrey* v. *Ficklin and Bennett*, 3 Arkansas, 227, 236; *Barrett* v. *Neil*, Wright (Ohio), 472, 473; *Skinner* v. *Henderson*, 10 Missouri, 205; *Walker* v. *Chapman*, Lofft, 342, 345; *Wassermann* v. *Sloss*, 117 California, 425, 426; *Morgan* v. *Groff*, 4 Barb. (N. Y.), 524, 529; *Bernard* v. *Taylor*, 23 Oregon, 416, 422; 18 L. R. A. 859; *Kiewert* v. *Rindskopf*, 46 Wisconsin, 481, 484; *Douville* v. *Merrick*, 25 Wisconsin, 688, 689; *Bone* v. *Ekless*, 5 H. & N. 925; *Wright* v. *Stewart*, 130 Fed. Rep. 905, 921; *Dauler* v. *Hartley*, 178 Pa. St. 23, 35; *Mallory* v. *Oil Works*, 86 Tennessee, 598, 606.

D.

The Northern Securities Company further contended below that the illegal contract had been executed, and that this precluded any relief to the complainants.

This was but a repetition of its contention in the Government suit, namely, that the combination had accomplished its object and that the transactions had become executed before the commencement of that suit, and hence that a court of equity could not

enjoin or prevent what had already been done and consummated. The question was then squarely presented both to the Circuit Court in Minnesota and to this court. Both courts rejected the suggestion as wholly untenable, if not absurd. Disposing of the point in the language of the court below, Mr. Justice Harlan said (193 U. S. 357):

> "It was completely answered by that court when it said: 'Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it.'"

If the transaction between the Northern Securities Company and its original depositors consisted only of the transfer and delivery of the shares as a mere investment under an unqualified contract of purchase and sale, it was complete and executed the moment the delivery was made, and if that were all that either party contemplated, the contract would have been a valid contract of purchase and sale and would have been fully executed. But, as Mr. Justice Harlan said (193 U. S. 353–354): "This view is wholly fallacious, and does not comport with the actual transaction. . . . If it was, in form, such a transaction, it was not, in fact, one of that kind." Or, as Mr. Justice Brewer put it (at p. 362): "But no such investment by a single individual of his means is here presented." The uncontradicted and undisputed undertaking and promise of the Securities Company, which embodied the real purpose of the whole transac-

tion, were to hold the shares in one ownership permanently for the future and thereby control the management of the two railway companies. This was clearly the intention although not declared from the housetops. The testimony of the promoters quoted above leaves no doubt as to this. In order to effectuate this intention of the parties according to the true nature and substance of the transaction, the Securities Company was to "*permanently*" hold as custodian and to perform certain duties in the future, and that undertaking was clearly executory. The illegal purpose was to continue indefinitely. We should have to close our eyes to the real transaction if it were now to be accepted as true, as all know it is not, that the Securities Company bought the stocks as mere ordinary investments under unconditional contracts, with the intention not of holding, but of selling or disposing of the same in the market.

To show the fallacy of the plea of the Securities Company that the illegal combination had become executed, it may be asked: When did it become finally executed and no longer executory? Not when Mr. Hill and associates agreed to combine their holdings to stifle competition and as a "defensive measure" against the interests represented by Mr. Harriman, although that was illegal; not when they endeavored to cement the combination and to effectuate their illegal purpose by organizing the Securities Company and placing the railway stock "permanently" in its hands, although that was also illegal; not when they practically told Mr. Harriman that the Northern Pacific stock held by the Oregon Short Line would be unsalable and of very little value if it were not put into the combination (record, p. 158), although that

was in further pursuance of the illegal purpose, and in order to coerce acquiescence and silence opposition. The illegal thing was not alone the organization of the corporation, nor yet the transfer to or deposit with it of the stocks of the two railway companies. These were but the methods employed to establish and effectuate the illegal purpose and to equip the corporation with the power of carrying out the illegal objects in mind. Having acquired the shares of the two competing railways, the corporation was required to continue to hold them "in perpetuity" and "in one ownership," and to use them in order to execute the purposes of the combination. These are the things that the Securities Company was expected to do in execution and performance of the illegal purposes. These are the things which were implied from the acts and doings of the parties, although they may have studiously omitted to publish their purposes or to declare them in the documents, records or board resolutions. These are the things that the Securities Company would be still doing and would continue to do in the future, during the life of its perpetual charter, if the Government had not intervened. These are the things which this court decided the Securities Company could not be permitted to continue to do in violation of the statute. These are the things which the company is declaring its intention to abandon. And the final thing which the decree in this suit will prevent them from continuing to do, is the *holding* "in perpetuity" of the railroad stocks, as they now insist they have the right to do under the supposed protection and shield of a legal maxim,

E.

It is also a universally recognized exception to the rule concerning parties *in pari delicto*, that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. In the case at bar, the public policy evidenced by the act of Congress in question requires that the Securities Company shall not be permitted to retain in its possession "*in one ownership*" the railway shares, and that it shall not continue to hold the same. If this be so, then the rule denying relief to parties *in pari delicto* does not apply, for the superior interest or concern of the public is to break up such combinations and not to permit them to continue in any form. *Starke's ex'rs.* v. *Littlepage*, 4 Rand. (Va.), 368, 372; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corporations, § 6410; 2 Pomeroy's Equity, § 941; Story's Equity Jurisprudence, § 298.

The illegal combination involved in the case at bar was not between private individuals with respect to a matter that affected merely their own interests. It was not a transaction in which there was nothing more than the delivery by one individual of his private property to another in pursuance of some unlawful object, such as a gambling transaction, etc., respecting which the public had no interest further than the enforcement of general penal laws. The subject-matter of the transaction was two great railway systems in the operation and management of which the public is concerned and interested. The immediate property dealt with is the stock—practically all the shares—of those companies. The Attorney-General, suing in behalf of

the United States, sought the dissolution of the common control and management of these two great highways which resulted from the holding by the Securities Company of the stock. The court deprived the Securities Company of its power to vote upon the stock and to receive dividends upon it, and by stripping the illegal holding of its fruits rendered the stock of no value in the hands of the Securities Company and thus practically required it to dispose of the stock and forced it to abandon the illegal purpose. And it is indisputably to the public interest that the actual holding or pooling should not continue.

XI.

THE CONVERSION OF THE NORTHERN PACIFIC PREFERRED STOCK INTO COMMON STOCK.

The verified bill of complaint alleged (record, pp. 4–6) that the petitioners Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, had delivered to the Northern Securities Company on November 18, 1901, $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, being a majority of the outstanding capital stock, of which stock so delivered by said complainants $41,085,000 par value was preferred stock, and $37,023,000 par value was common stock; that it was agreed between Harriman and Pierce and the defendant Northern Securities Company that such $41,085,000 of preferred stock should be converted into common stock; that subsequently at least $34,709,062 thereof was so converted into common stock of the same par value; that said common stock originally owned by said petitioners, namely, $37,023,000, and $34,709,062 of the

converted stock had been registered in the name of the Northern Securities Company, and that the Northern Securities Company held within the jurisdiction of the court certificates registered in its own name upon the books of the Northern Pacific Railway Company for all of said stock, making in the aggregate $71,732,000 thereof (record, p. 6).

The general rule is well settled that where specific property belonging to another is changed by a custodian, bailee, trustee or agent into other property or funds, the original owner is entitled to follow it "as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them." *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

If, therefore, at least $34,709,062 par value of the preferred stock of the Northern Pacific Company was converted into common stock, and Mr. Harriman swears that such was the agreement (pp. 157, 159), the original owner, the complainant Oregon Short Line Company, was entitled to follow and recover the new common stock as fully as it would be entitled to reclaim the old preferred stock if it still existed in its original form. So, also, the proofs may show on final hearing that the remaining $6,375,938 of preferred stock was only nominally retired and paid off in cash, but was really used to pay for an equivalent in new common stock into which it was converted. This is highly probable when we recall that the only statutory au-

thority of the Northern Pacific Company under the laws of Wisconsin was to convert preferred into common stock.[1]

It was, however, contended by the defendant that, as matter of fact, there was no such conversion, and that the issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, although shown to have taken place all on the same day as part of one transaction (record, pp. 178–180), were to be regarded as separate and isolated transactions through which the Oregon Short Line Company could not follow its property. In other words, the argument in effect was that the machinery used and the steps taken changed or hid the real nature of the transaction, and annulled the agreement to convert, and that in truth and substance there was no actual conversion but merely the payment and retirement of the preferred stock and an independent and disconnected subscription for and issue of bonds convertible into new common stock and a subsequent independent conversion of such bonds into common stock. This view ought to be sufficiently negatived by the opinion of the Circuit Court of Appeals for the Eighth Circuit in the recent case of *Weidenfeld* v. *Northern Pac. Ry. Co.*, 129 Fed. Rep. 305, 309, where the court, speaking of this very transaction, said:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a large sense but steps to one*

[1] Laws 1895, c. 244, § 10, referred to in the resolution which authorized the retirement; record, p. 284.

> *ultimate act, and that act was the conversion of the preferred stock into the common stock of the company.* Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. *The issue of the convertible certificates was but a temporary expedient in the process of conversion.*"

Indeed, it was only by holding the transaction to be a conversion that it could be sustained as within the corporate powers, for the Northern Pacific had no statutory authority to diminish its stock, or to issue its bonds for the purchase of stock, but only to convert the preferred stock into common stock. Laws Wisconsin, 1895, ch. 244, § 10; *Scovill* v. *Thayer*, 105 U. S. 143, 148; *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392, 396–397; *Trevor* v. *Whitworth*, L. R., 12 App. Cas. 409, 416.

XII.

THE COMPLAINANTS' MOTIVES AND THE RELATION OF THE UNION PACIFIC RAILROAD COMPANY TO THE CONTROVERSY.

One of the principal defenses on behalf of the Northern Securities Company and its officers in the courts below consisted of a fierce attack upon the motives of the complainants in instituting this suit, and it was also proclaimed that if the court allowed the complainants to prevail and recover their property, the so-called Union Pacific Railroad System would secure control of the Northern Pacific Railway Company, and that this consideration should influence the court, change the rules of law, and produce a different result than if this feature did not exist.[1]

[1] Record, Nichols' aff. p. 279; defendant's briefs in C. C. A. p. 4; and in C. C. pp. 16, 17, 22, 23.

On the argument in the Circuit Court, Judge Bradford refused to permit the suggestion to be argued, saying:

> "The court does not care to listen to that branch of the argument. It is aside from the questions material to the issue. . . . All I mean to say is that that consideration would have no more influence upon this court than water upon a duck's back."

The attempt to inject the point into the case was, nevertheless, repeated in the Circuit Court of Appeals, and apparently it is to be renewed in this court, for we find in the brief submitted on behalf of the Northern Securities Company in opposition to the complainants' petition for a writ of certiorari the following statement (p. 10):

> "These facts characterize the purchase of the Northern Pacific stock, by the Union Pacific System, as a scheme to secure control of a powerful competitor in interstate trade. This record discloses no trace of a present purpose to abandon that plan. This suit is manifestly a mere step in realizing it. . . . Plaintiffs therefore come here asking the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railway Company."

In the first place, it might ordinarily be assumed that this court would not embark upon the consideration of the motives of parties in instituting legal proceedings to protect their alleged legal or equitable rights or to recover their property. Any such investigation would lead to much confusion, and introduce elements most incongruous to just and legal methods of thought. As Mr. Justice Brown said in *Dickerman* v. *Northern Trust Company*, 176 U. S. 181, 190:

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no

> defence to a foreclosure that the mortgagee was animated by hostility or other bad motive."

And this proposition was quoted with approval and the doctrine reiterated by Mr. Justice Brewer in the recent case of *South Dakota* v. *North Carolina*, 192 U. S. 286, 311.

Whatever may be the complainants' motives, it is submitted that the illegal combination promoted by Mr. Hill and his associates should hardly be adopted as the medium for wresting from the Oregon Short Line Company property which it incontestably *owned* in November, 1901, and still owns. Such an argument can furnish no valid or just reason for giving the property of A to B. If the holding of this stock be claimed to be against public policy, the complainants are entitled to litigate that question and to a day in court in a proper case. The defendant Northern Securities Company cannot avail of or enforce any such cause of action or defense. It does not lie with it to profess a desire to protect the public interests or to promote competition. This case ought to be considered and decided, so it seems to complainants' counsel, in all respects as if Messrs. Harriman and Pierce had been ordinary investors who had acquired and held a majority of the capital stock of the Northern Pacific Company, and against whom Messrs. Hill, Morgan *et al.* had combined as a "defensive measure," and from whom they had determined to secure such majority for themselves and associates who were interested in the Great Northern Company, at any cost, and by any methods.

But, concededly, such private ownership is not the case. In all these transactions, Messrs. Harriman and Pierce

have had no personal interest whatever, and have acted solely as agents for the corporations they represent, in the performance of their duty as trustees, as it is given to them to see that duty. Not one dollar of personal interest have they in a single share involved in this suit. It is, therefore, obviously unwarranted to assail them as if personal interest, or cupidity, or lust of power were actuating them. They believe and are advised by their counsel that it is their duty to their corporations to protect the interests of those corporations, and not allow the consummation of this new transparent phase of the original scheme to suppress competition; yet they have been assailed in both courts with overwhelming invective.

It is, likewise, true that, although the Oregon Short Line Railroad Company is the owner of the Northern Pacific shares now claimed, the Union Pacific Railroad Company in turn is the owner and holder of the capital stock of the Oregon Company. But, no court has yet declared any rule of law which would prevent the Oregon Company, which runs north and south and joins the Northern Pacific system at Butte and Silver Bow, Montana, from holding shares of stock of a connecting railway, viz., the Northern Pacific Railway Company, when expressly authorized to do so by its charter and the laws of Utah and other Northwestern States, simply because its stock has been acquired and is held by another company. If such were the law, then the corporate power of every railroad company would frequently depend not upon its charter, not upon the laws which the people see fit to enact, but upon the ever-changing character or motives of the holders of its stock.

In the strictly legal aspect of the question, the contention that the Union Pacific and Northern Pacific systems are parallel and competitive might well be disposed of by the following *uncontradicted* statement in Mr. Harriman's affidavit (record, p. 156):

> "III.—The Oregon Short Line Railroad Company and the Union Pacific Railroad Company are railroad corporations severally organized under the laws of the state of Utah, and they have express statutory authority and charter power to acquire and hold the stock of the Northern Pacific Railway Company. I am advised by counsel and believe that the acquisition and holding of such stock by either of said companies is not in violation of the statutes of the United States or of any state.
>
> "IV.—Neither the railroad of the Oregon Short Line Railroad Company nor that of the Union Pacific Railroad Company is a parallel and competing line with the railroad of the Northern Pacific Railway Company. I am familiar with all the railroad lines of said three companies. Their roads serve entirely different markets and territories and do not compete for the same traffic or connect at any competitive point or terminals. The road of the Oregon Short Line Railroad Company runs north and south, whilst the lines of the Northern Pacific Railway Company run east and west. The lines of the Union Pacific Railroad Company are hundreds of miles from the lines of the Northern Pacific Railway Company, and said lines do not run through the same states or reach or serve the same territory or terminals. The railway of the Chicago, Burlington and Quincy Railroad Company is not operated by the Northern Pacific Railway Company, and the latter company does not own a majority of the stock of the Burlington Company, but on the contrary owns less than one-half of such stock. The Northern Pacific Railway Company does not exercise control of the management and operation of the Burlington Company and cannot exercise any control of it in any way except in combination by and through co-operation with the Great Northern Railway Company. The Burlington

road is in no sense a part of the Northern Pacific system."

And it might equally be disposed of by the language of Mr. Justice Brown, speaking for the court, in *Louisville & Nashville R'd* v. *Kentucky*, 161 U. S. 677, 698, 699, which is applicable even if we were considering the Burlington in its relation to the Union Pacific system, viz.,

> "Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo, but they could scarcely be called competing, since one is dependent upon the traffic of the Northwest, while Cincinnati is the southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield, in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini, and each is required for the trade of its own section of the State."

This language of Mr. Justice Brown is peculiarly appropriate to the case now before the court. The Union Pacific and the Northern Pacific, although parallel in a certain sense, are hundreds of miles apart, and "command the traffic of distinct territories" and are, therefore, in no sense competing lines. The main line of the Union Pacific extends from Omaha westerly across the southerly half of Nebraska to Colorado, and thence substantially along the northerly boundary line of Colorado through Wyoming to Ogden. The most southerly point reached by the Northern Pacific is St. Paul, Minnesota, and it extends thence

northwesterly to North Dakota, and thence westerly through North Dakota, Montana, Northern Idaho and Washington to Tacoma, with a line running thence southerly to Portland, Oregon. Almost the entire width of Iowa and the southerly half of Minnesota lie between Omaha, the eastern terminus of the Union Pacific, and St. Paul, the southeastern terminus of the Northern Pacific, and the lines are divided by the northerly half of Nebraska, the entire state of South Dakota, and the south half of North Dakota. This distance is maintained practically as far west as Ogden; thence the Oregon Short Line runs almost due north to Butte, Montana, where it connects with the Northern Pacific. Another line of the Oregon Short Line Company runs from a connection with the line just mentioned at Pocatello to a connection at Huntington, Oregon, with the lines of the Oregon Railroad and Navigation Company, which extend thence to Portland and with a line running up to Spokane, and the railroad of the last mentioned company connects with the Northern Pacific line at Pendleton and Portland, Oregon, and at several places in Washington.

From such situation, it is obvious that the Union Pacific and the Northern Pacific lines are not competing railroads, but serve distinct territories, separated by mountain ranges and other natural obstacles and by hundreds of miles of space.

But while they are not competitive they are *connecting* lines, and if the Northern Pacific were free from the grasp of the Great Northern, so that it might utilize the Union Pacific connection, the benefits accruing therefrom to the territory served by it would be enormous. Shippers from points in Wisconsin, Minnesota,

South Dakota, Montana, North Idaho and Washington reached and served by the Northern Pacific are under existing conditions confined practically to Puget Sound ports as an outlet for their products to the Pacific. Having no line and no affiliations with any line or system reaching San Francisco, the Northern Pacific can refuse to route traffic or to make rates that will move traffic to or from San Francisco or any other Pacific port not reached by its own lines, and can so adjust its rates as to force the traffic over its own rails to the North Pacific ports so as not to utilize the present connection with the Union Pacific and Southern Pacific Systems over the Oregon Short Line via Butte, Montana.

If the Union Pacific and Northern Pacific should work closely together and were affiliated in management and control, naturally the shippers in that vast and thriving territory served by the Northern Pacific lines in Minnesota, Montana, North Idaho and Washington would be given the choice of outlets for their products and would be enabled to ship freely through Puget Sound and North Pacific ports or San Francisco and South Pacific ports via the connection at Butte, Montana, and Ogden, where the Southern Pacific, the Oregon Short Line and Union Pacific connect, and the shippers in the territory served by the Union Pacific lines in Kansas, Nebraska, Colorado, Wyoming, Utah and Montana would have an outlet through Puget Sound as well as through San Francisco. The free movement of other traffic which we need not attempt to enumerate would be promoted, and the benefits derived by both systems would be far reaching. The relations between the Northern Pacific and the Union Pacific are

unquestionably those of *connecting* railroads and not competing lines.

Possibly the greatest benefit of all to be realized by the people of the Northwest would arise from the release of the Northern Pacific from the grasp of the Great Northern, a line serving the same territory from the Lakes to the Pacific and handling not only the same through traffic, but substantially the same local traffic. The two lines lie practically side by side from one end to the other, and there is scarcely a mile of either that is not in a position to compete vigorously with the other. It is this situation that makes the control of the Northern Pacific so vital to the Great Northern; and it is safe to assert, from the circumstances just mentioned, that there is no greater menace to the Great Northern or greater promise to the people of the Northwest than the possibility of close working arrangements between the Northern Pacific and the Union Pacific Systems.

In considering this *tu quoque* defense, so thrust into the case, it will be interesting to comment briefly upon the fact that this argument on the part of the Northern Securities Company involves a confession of new light and recent conversion.

In the Government suit, the bill charged that, "in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control," the so-called Burlington deal had been entered into, that thereupon $214,000,000 of *bonds* had been issued for the purchase of $107,000,000 of Burlington *stock*, and that "in this manner, at the time stated, the defendants the Great Northern and Northern Pacific Railway Companies secured control of the vast system of railway lines . . .

constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system."[1] It was not then suggested by the Government and has never heretofore been seriously claimed that the Union Pacific and Northern Pacific Railway systems were parallel or competing, and their systems can be called such only as a result of the illegal Burlington scheme.

The answer of the Northern Securities Company in the Government suit among other things averred as follows (present record, p. 88; 193 U. S. 224):

> "It denies that what is called in the petition the Burlington System was or is parallel to or competing with what is therein called the Union Pacific System, but admits that some of the lines of each system compete with some lines of the other."

This denial in *identically* the same language was interposed in the answer of the defendants Hill, Clough, James, Kennedy and Baker, all directors of the Securities Company (record, pp. 104; 193 U. S. 241), as well as in the answer of the Great Northern Company itself (record, p. 119; 193 U. S. 241). It is not surprising, therefore, in view of this past record, that Mr. Nichols should have been now selected to swear that after all the systems were competitive (record, p. 279), while directors Hill, Clough, James, Kennedy, Baker and Clark remain silent upon this and other points.

There is another aspect suggested by the record before the court, if we are compelled to discuss motives. It is that part of the testimony of Mr. Hill in the

[1] Present record, p. 67; 193 U. S. pp. 204–205.

Government suit which the Attorney-General of the United States in his argument in this court caustically commented upon, viz. (record, p. 172),

> "It was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific . . . if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. The control of the Great Northern would have passed to the Union Pacific, because we would not have held it a day longer than we could have sold it."

In that confession lies the whole truth and the underlying motive and purpose of ten years of illegal schemes, the sole object of which was to prevent, at any cost, the competition which the owners of the Great Northern stock have dreaded.

1. It was the motive and purpose which conceived and directed the alternative scheme declared illegal in the *Pearsall* case (161 U. S. 646).

2. It was the motive and purpose which conceived and directed the creation of a voting trust of the Northern Pacific stock dominated and controlled by the so-called Morgan interests, by means of which "Mr. Hill and his associates, together with Messrs. Morgan & Co., controlled the board of directors of the Northern Pacific Company, and a majority of such board were their nominees and appointed in their interest" (see uncontradicted affidavit of Mr. Harriman, p. 157, and his testimony submitted by defendant, p. 204).

3. It was the motive and purpose which conceived and directed the equally illegal scheme of making both these competitive public railroad corporations, dominated by the same group of individuals, enter into a practical partnership and become *jointly liable* each for the debt

of the other in an amount greatly exceeding the authorized capital stock of either, so as to remove all legitimate impulse towards competition with each other, in defiance of all law and conservative financiering, and by which $214,000,000 of *joint* bonds were created without one cent of investment in the railroads themselves and a fixed burden of $8,560,000 per annum imposed upon the systems. *Pearce* v. *Madison & Indianapolis R. R. Co.*, 21 How. 441, 443; approved in *Louisville &c. R'y Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 571, and *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 41.

4. It was the motive and purpose which conceived and directed the equally illegal scheme of forming the Northern Securities Company, with the alternative, now for the first time disclosed, that if the company could not legally hold the two railroad stocks in one control and thereby stifle competition, nevertheless, on its dissolution, *the holders of a majority of the Great Northern stock would receive and secure a majority of the Northern Pacific stock wrested from Mr. Harriman and the Union Pacific, and thus Mr. Hill and his associates would accomplish the substance of the scheme declared illegal in the Pearsall case, and of ten years of constant efforts.*

XIII.

IF THE RAILWAY SHARES DEPOSITED ARE NOT TO BE RETURNED, BUT ARE TO BE REGARDED AS ASSETS OF THE NORTHERN SECURITIES COMPANY, THEN THE DISTRIBUTION SHOULD BE MADE IN CASH.

Complainants submit that it is not legal or equitable that they should be compelled, as proposed by the defendant Securities Company, to take $24,638,919 par value of the stock of the Great Northern Railway

Company, which they never owned, and thus be forced to become stockholders in that company against their will. They assert that the original holders of the stock of one railroad company cannot, against their will, be forced to become stockholders in another company; and that, in this aspect, the scheme of the defendant is clearly in violation of the rights and equities of complainants and in violation of the laws of the state of New Jersey, as alleged in the bill (record, p. 11).

If it be held that complainants are not entitled to recover the Northern Pacific stock deposited by them and that such stock has become an asset of the Northern Securities Company as claimed by the defendant, or if for any reason the restoration of the *status quo* be found impracticable, which they deny, then the only lawful and equitable method is to sell the railroad shares held by the Northern Securities Company, or such as may not be traceable, and thus convert the same into cash and distribute the proceeds ratably among the stockholders. Such is the settled law of this court, and such is the settled law of New Jersey. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63; *Kean* v. *Johnson*, 9 N. J. Eq. 401, 408, 409; *Coler* v. *Tacoma Railway and Power Co.*, 64 N. J. Eq. 117, 125 (reversed on other points 54 Atl. Rep. 413).

Even in the case of a partnership, it is elementary law that in the absence of a special agreement to the contrary, the right of each partner on the dissolution of the firm is to have the partnership property converted into money by a sale, even though a sale may not be necessary for the payment of debts, and the distribution made in cash. Lindley on Partnership, p. 555. How much stronger are the reasons for such course in

the case of a corporation. 4 Thompson on Corporations, § 4548; 2 Cook on Corporations, § 671. In partnerships, the title to partnership property is really vested in the partners. In the case of a corporation, the title, legal and equitable, is vested in the corporation. The stockholder has no sort of title to the corporate property. He is limited to a participation in the net proceeds of the business by way of dividends, and to a share of the proceeds upon dissolution.

Complainants in the case at bar never owned any stock of the Great Northern Railway Company and have no interest whatever in the stock of that company held by the defendant. We submit that it will establish a new principle in the law of corporations and in the relations of stockholders, to adjudge in this case, that complainants and other holders of Northern Securities certificates may be invested with the title to personal property and forced to become stockholders in a strange corporation without any act upon their part and against their own volition.

If there be any authority to sustain such an extraordinary proposition, it is obvious that in view of the cases above cited, it must be found, if at all, in some statute of the state of New Jersey; and we assert that there is no such statute. If it be suggested that the defendant relies upon section 54 of the statutes of New Jersey entitled "An Act concerning corporations (Revision of 1896)" the answer is that defendant is strenuously denying that it is proceeding under this provision:

> "Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts,

> sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property."

This provision seems not to have been construed in this regard by the highest court of the State of New Jersey, and this court is, therefore, at liberty, and, indeed, is required, to put its own interpretation upon it. *Beals* v. *Hale*, 4 How. 37, 54. We submit that it does not admit of the construction suggested. The obvious purpose of the provision is to create the directors trustees on dissolution and to confer upon them authority to wind up the affairs of the corporation and dispose of its assets and avoid the necessity for a resort to a receivership or other judicial proceeding. The statute ought not to be given a meaning at variance with the settled rules of law, and especially a meaning that will force parties into new contractual and property relations without their assent, unless its terms plainly demand such construction. If the directors may compel a stockholder to receive, as his portion of the assets of a corporation in liquidation, the capital stock of another corporation, they may also force him to accept real estate or any other kind of property, and that, too, perhaps, when it may be unlawful, in the case of a corporate stockholder, for it to hold such property. It is no answer to say that the stockholder may sell the property received in distribution. Every stockholder

must be upon an equal footing, and one should not be compelled to accept property which he cannot retain, and thus be forced to sacrifice it, possibly by selling under stress of necessity, while his fellow stockholders receive property which they may retain or reserve for sale to the best advantage.

The provision of the statute in reference to the division of "the moneys and other property among the stockholders" is clearly subordinate to the main purpose to constitute the directors in office trustees on dissolution and to invest them with the ordinary powers of a liquidator. It may be that in some cases the shareholders would be willing to have, and could agree upon, a division of the property of the corporation in kind. It was such a case, we submit, that was contemplated by the provision in question. In such a case, the trustees, instead of selling the property could divide it among the stockholders, and would be authorized to execute the conveyances or other transfers necessary to pass the title. If the statute required them to sell the property and divide the proceeds, without qualification, it would be their duty as trustees to follow the statute creating them and defining their powers, and to convert the assets into cash regardless of the wishes or interests of stockholders, creditors or others. This, we submit, is the only proper construction of the statute, and, as thus construed, it accomplishes a legitimate and beneficent purpose and accords with the principles of equity and the law as recognized by this court and the highest courts of New Jersey, in the cases cited.

The only argument in support of the proposed plan of distribution *pro rata* that has yet been advanced is

that, as the statutes of New Jersey authorize the reduction of the capital stock of a corporation, the method adopted was within the letter of the statute. It ought to be sufficient to say that when a statute provides a proceeding for the reduction of the capital stock of a corporation, it contemplates a *bona fide* reduction and not a dissolution, and is intended only to cover those cases where a corporation intends in good faith to reduce its capital and continue in business. In the case at bar, the company has declared that it contemplates a "speedy dissolution," and hence there can be no question but that the substance of the proceeding is a dissolution, although under the form or pretense of a reduction of the capital stock. The statute provides for reduction in a certain way and for dissolution in another way. No court can permit dissolution under the procedure prescribed solely for reduction of the stock of a going and continuing concern. The rights of parties may be very different in the case of dissolution from what would obtain in the case of a *bona fide* reduction; and no statute can be circumvented in this way. Substantially the same question came before the New York Court of Appeals in the recent case of *Zeltner* v. *Zeltner Brewing Co.*, 174 N. Y. 247, 251, where the mere letter of a statute regulating corporations was subordinated to the spirit and the principles upon which corporations should be governed.

XIV.

THE NEW JERSEY DECISION RELIED ON BY DEFENDANT.

As to the proceedings before Vice-Chancellor Bergen in New Jersey in the suit of the Continental Securities Company (record, pp. 245–263), urged by the

defendant *as settling the law of New Jersey*, it is only necessary to state that it will appear by reference to the bill of complaint in that suit that the complainant was not an original depositor and was wholly unable to show for what his stock had been issued. It might have been cash stock, and probably was, and, if so, the holders would have had no interest under any theory in preventing the distribution *pro rata* of the railway shares held by the company. Consequently, the remarks of the Vice-Chancellor as to the rights of the original parties, none of whom were before him, were clearly *obiter dicta* and beside the case. Furthermore, the suit was not an honest one. As stated by the court (record, p. 263), the complainant in that suit, on the 28th of March, 1904, six days after the resolution to distribute and fourteen days after the final decision of this court, went into the market and bought five hundred shares of the Securities Company's capital stock, manifestly for the purpose of bringing the suit, and the learned Vice-Chancellor said that "*but one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company, and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company*," etc.

A new practice has recently sprung up in important litigations affecting corporate securities. Intermeddlers, seeking to prejudice *bona fide* litigation by the institution of more or less reputable suits, rush in before the real litigants can present their case, in order to secure the supposed vantage ground of directing the litigation in an omnibus suit, if anybody sees

fit to accept their invitation and come into court and lend them countenance. If, however, the *bona fide* litigant refuses to be caught in this trap or to associate with such an intermeddler, he runs the risk of having a decision on the merits which will immediately be quoted as establishing the law of the state on the subject. In the case at bar, the petition of intervention was presented to the Circuit Court at St. Paul on the 11th of April, 1904, but before it could be decided, the Continental Securities Company rushed into court with a copy of complainants' petition of intervention revamped into an alleged and clumsy bill in equity (record, p. 245 *et seq.*). The present complainants were advised by their counsel that the whole proceeding might safely be treated with the contempt it deserved, and that no court would accept a decision disposing of a preliminary motion in such a suit as coming within the principle or dignity of *stare decisis*.

The decision of the vice-chancellor in that case cannot be treated as a precedent to control this, because the decree was not in a court of the last resort. *Beals* v. *Hale*, 4 How. 37, 54. There is but one authoritative expounder of the statutes of New Jersey and that is the Court of Errors and Appeals. *Freund* v. *Yaegerman*, 27 Fed. Rep. 248. It is fundamental that an interlocutory order never constitutes *res adjudicata*. *Webb* v. *Buckelew*, 82 N. Y. 555, 560. And a decision on such a motion seldom is given the weight of a judicial precedent, and never where the suit is not a *bona fide* litigation.

Conclusion.

It is submitted, in conclusion:

I. That the Circuit Court of Appeals erred in reversing the injunction order in view of the proper exercise of discretion by the Circuit Court, and in proceeding to a complete determination of the whole case.

II. That a contract in violation of an act of Congress is utterly void and can confer no rights, and that nothing that is done under it can give vitality to it for any purpose.

III. That the decision of this court in the Government suit is *res adjudicata* upon the question of the alleged ownership by the Northern Securities Company of the Northern Pacific shares claimed by complainants.

IV. That when the legality of such a combination as the Northern Securities Company is challenged immediately upon its formation and is the subject of litigation, nothing that the directors or officers see fit to do pending litigation can change relative rights or create a new situation which will call for a different rule of law from that which would have applied if they had stayed their hands and preserved the *status quo*.

V. That the courts cannot permit an illegal agreement, adjudged to be in violation of an act of Congress, to be made the medium through which parties shall acquire property rights.

VI. That on the dissolution of such a combination and the abandonment of the illegal enterprise, *prima facie* the only method which the courts will sanction is the restoration of the *status quo*, particularly when, as alleged in the case at bar, such restoration is practicable.

VII. That in view of the provision in the decree in the Government suit authorizing the return of the deposited railroad stocks, neither the defense of estoppel nor that of *in pari delicto* is available to defendant.

VIII. That in the case of illegal combinations entered into in violation of an act of Congress, the doctrine of *in pari delicto* may sometimes apply as necessary to effectuate and administer a sound public policy, but that where, as in the case at bar, it appears by the record that the complainants acted in the full belief that they were not violating the act of Congress, and where the statute in its application to the case is concededly of doubtful constitutionality, the doctrine of *in pari delicto* cannot in justice be applied, as between the parties, and certainly cannot be availed of by a custodian, depositary or stakeholder.

IX. That in view of the agreement entered into with Mr. Harriman to convert the Northern Pacific preferred stock into common stock, the complainants are entitled to follow the common stock into which their preferred stock was so converted, and that they are likewise entitled to follow and reclaim any common stock purchased and paid for with the proceeds of their preferred stock nominally retired for cash.

WASHINGTON, D. C., February 20, 1905.

WILLIAM D. GUTHRIE, JOHN F. DILLON,
R. S. LOVETT, D. T. WATSON,
MAXWELL EVARTS, R. V. LINDABURY,
BAINBRIDGE COLBY,
Of counsel for petitioners and complainants.

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Office Supreme Court U. S.
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FEB 23 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

vs.

NORTHERN SECURITIES COMPANY.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS:

MR. JUSTICE HARLAN, p. 1.
MR. JUSTICE BREWER, p. 42.
MR. JUSTICE WHITE, p. 46.
MR. JUSTICE HOLMES, p. 81.
THAYER, C. J., p. 92.
BERGEN, V. C., p. 99.
BRADFORD, D. J., p. 108.
DALLAS, C. J., p. 141.
GRAY, C. J., p. 154.

[19,612.]

Supreme Court of the United States.

No. 277.—October Term, 1903.

Northern Securities Company *et al.*, *Appellants*, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14th, 1904.]

Mr. Justice Harlan announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the Statute of July 2d, 1890, commonly known as the Anti-Trust Act, and entitled "An act to protect trade [*318] and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,

is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, [*319] or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such

petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district [*320] in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopo-

lize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent, through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and [*321] sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minnesota, 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago,

Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent. per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extend from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, [*322] under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI. of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each

system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the [*323] State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold

such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and [*324] Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent [*325] and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent., the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of

the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this [*326] record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the

situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original [*327] combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . . in restraint of commerce among the several States, or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust"; but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress in-

tended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, [*328] organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said — all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular

combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate or international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or [*329] conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of State corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If State corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. That was followed by *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Hopkins* v. *United States*, 171 U. S. 578, *Anderson* v. *United States*, 171 U. S. 604, *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38. To these may be added *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been cov-

ered by the Anti-Trust Act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect [*330] of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti Trust Act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota,

as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly [*331] reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon any such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to pre-

vent this play of competition restrains instead of promoting trade and commerce; [*332]

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international commerce;* and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the Court indulged in *obiter dicta.* What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must under the conceded facts lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a State corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national Government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose [*333] to interfere with the in-

ternal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign States. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"– supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all [*334] such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which

such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other State corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited [*335] by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains

of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case*, 188 U. S. 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete [*336] in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to

specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 Wheat. 419; *Sinnot* v. *Davenport*, 22 How. 227, 238; *Henderson* v. *The Mayor*, 92 U. S. 259; *Railroad Company* v. *Husen*, 95 U. S. 465, 472; *County of Mobile* v. *Kimball*, 102 U. S. 691; *M. K. & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *The Lottery Case*, 188 U. S. 321, 348. In *Cohens* v. *Virginia*, 6 Wheat. 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the nation may be used to enforce in any part of the land the [*337] full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are

at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare [*338] will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of

the State. Why that suggestion is made in this case we cannot understand, for there is no pretence that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit" (pp. 569, 571). That such a rule was applied to interstate commerce [*339] should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust Act was passed.

It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi Rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are [*340] paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . . *There is a potency in*

numbers when combined, which the law cannot overlook, when injury is the consequence." The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 Illinois, 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly [*341] against which the public interest had no protection." Again, in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the City of Chicago by buying the stock of four other gas companies, it was said: "Of what avails is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited.

But among them we refer to *Richardson* v. *Buhl*, 77 Michigan, 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 La. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 Wheat. 197—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely [*342] as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant

to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co.* v. *United States*), or in tiles, grates and mantels (as in *Montague* v. *Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate [*343] and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound, why may not *all* the railway companies in the United States, that are engaged, under State charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the People of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign States by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination [*344] described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Con-

stitution, nor prohibited by it to the States, are reserved to the States respectively or to the People"; and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway Companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow [*345] such restraint to continue to the detriment of the public, because, forsooth, the corporations concerned or some of them are State corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between

competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. [*346] It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court,

in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It [*347] would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of *Railroad Company* v. *Maryland*, 21 Wall. 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation,

may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists with a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Government [*348] as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *In re Debs*, 158 U. S. 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626, 627. In *Texas* v. *White*, 7 Wall. 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court

observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which [*349] even intimates that a State or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of com-

binations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution [*350] of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances.

The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it [*351] did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That

right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin [*352] in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vex-

atious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign [*353] nations. In *Brown* v. *Maryland*, 12 Wheat. 419, 446, it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association* case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657; *Chicago, &c., R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 90; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 332; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Lake Shore, &c., Ry. Co.* v. *Ohio*, 173 U. S. 285, 301. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This

view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. [*354] If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned

and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination [*355] or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employés, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have

heretofore received from such stockholders [*356] in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would effect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and

powerless [*357] to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but [*358] the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit,

to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said: "It is not true that the courts in the exposition of penal statutes are to narrow the construction." In *United States* v. *Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States* v. *Morris*, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said: "In expounding a penal statute the court certainly will not extend it beyond [*359] the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95." So, in *The Schooner Industry*, 1 Gall. 114, 117, Mr.

Justice Story said: "We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn*, 3 Sumner, 209, 211, 212. In *People* v. *Bartow*, 6 Cowen, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction." So, in *Commonwealth* v. *Martin*, 17 Massachusetts, 359, 362, the highest court of Massachusetts said: "If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to [*360] preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention

of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of this act" (§ 4); and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

Mr. Justice BREWER, concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with a majority of the court in the decision in *United States* v. *Freight Association*, 166 U. S. 290, followed by the cases of *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, and *Montague & Company* v. *Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, [*361] I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title,

was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the [*362] Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by

several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could [*363] the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it

the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with State law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance. [*364]

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

Mr. Justice WHITE, with whom concurred Mr. Chief Justice FULLER, Mr. Justice PECKHAM, and Mr. Justice HOLMES, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the Government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway Companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. [*365] Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the

right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The Government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust Act. 26 Stat. 209. The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several [*366] States or with foreign nations." The court below sustained the contentions of the Government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the Court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired.

The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, [*367] which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and own-

ership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the Government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the [*368] States and with foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope

of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated* [*369] *by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse"; that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be

embraced by the words "commercial intercourse between nations and parts of nations"? And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a state in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, [*370] nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations, for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated. [*371]

In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the Anti-Trust Act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform

regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such [*372] ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion resulting from the alleged distinction, to admit it would do violence to both the letter and the spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, that individuals could lawfully do

the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." *Paul v. Virginia*, 8 Wall. 168, 183.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see [*373] if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the Government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts

concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust Act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer of the government, [*374] and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both State and National, from the beginning and the adjudications of this court, how wanting in merit is the

proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act in 1890, that there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, 24 Stat. 379, it sedulously confined the provisions of that act to the [*375] carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there

was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading and the Pennsylvania systems. [*376] One of the illustrations--as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the energy of the Government in invoking the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more

practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system. [*377]

The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, 8 Wall. 168, the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.

They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled [*378] in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the question was this: The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference

that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, 118 U. S. 557. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the [*379] Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, 102 U. S. 691, was approvingly quoted. That definition was as follows (p. 574):

" 'Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by the separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *if applied to legislation upon subjects which are merely auxiliary to commerce.*' "

In *Ashley* v. *Ryan*, 153 U. S. 436, this was the question: The property of various railroad corporations operating in the States of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on

the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could [*380] alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the

United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890." [*381]

After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as

thus defined, it did not embrace the ownership of stock in state corporations, because the products of such manufacture might subsequently become the subjects of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the [*382] purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a state corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, 161

U. S. 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of [*383] state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

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"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce, and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more conclusively decisive of another than the ruling in the case just quoted is of this, I am unable to perceive. [*384]

The subject was considered at circuit in *In re Greene*, 52 Fed. Rep. 105. The case was this: A person was indicted in one State for creating a monopoly in violation of the Anti-Trust Act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville and Nashville* cases, because it was decided by Mr. Justice Jackson, then a Circuit Judge, who subsequently became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material

that such property, or the products thereof, may become the [*385] subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * * * *

"That neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, 166 U. S. 290, was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound them-

selves by the provisions contained in the articles of agreement. Many stipulations relating to [*386] the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provides as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

The Government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust Act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti Trust Act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust Law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-Trust Statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case,

[*387] *United States* v. *Joint Traffic Association*, 171 U. S. 505. In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust Law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association* case was invoked. The court reviewed and reiterated the rulings made in the *Freight Association* case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, 171 U. S. 578, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the [*388] act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against

unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust act. 26 Stat. 209.

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust Act was decided. *Anderson* v. *United States*, 171 U. S. 604. The difference between that case and the *Hopkins* case was thus stated by Mr. Justice Peckham, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins* case were only commission merchants who sold the cattle upon commission as a compensation for their services. [*389]

"Counsel for the government assert that any agreement or combination among buyers of cattle coming from

other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the Anti-Trust act.

The Anderson case was followed by *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States, and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust Act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins* cases, the *Knight* case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240):

"The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce.

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"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, [*390] but as a direct and immediate result of the combination engaged in by defendants. . . . *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State,*

upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *Montague* v. *Lowry*, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville and Nashville* cases and in the *Hopkins* case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their context [*391] they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight* case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate

commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the *Knight* case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And this would be the result in the *Pearsall* case, since in that case it was decided that the States had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville and Nashville* case, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall* case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville and Nashville* case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic* cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust Act. Now in the *Hopkins* case, decided subsequent to the *Freight Association* and *Joint Traffic* cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. [*392] It would follow then, if the sentences quoted from the opinions in the *Freight Association* and *Joint Traffic* cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins* case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that,

after having overruled those cases in the *Hopkins* case, the court, in expressing its opinion through the same Justice, proceeded in the *Addyston Pipe* case, which related only to interstate commerce, to overrule the *Hopkins* case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceed be not obscured, that is, the difference which arises from the power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the Government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the Government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Welton* v. *Missouri*, 91 U. S. 275; *Pensacola Telegraph* [*393] *Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again con-

founding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national Government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities [*394] during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and state courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of State legislation on the subject would be void from the beginning and the enor-

mous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subject.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results [*395] of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in

the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful, but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the *Greene* case. Take the *Knight* case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the *Addyston Pipe* case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it [*396] found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the *Knight* case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of prop-

erty if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, [*397] at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power,

if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the State and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers [*398] founded our government upon an enduring basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the Government is, to my mind, illustrated by the summing up of the case for the Government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the Government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in

the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to [*399] limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The

Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest. [*400]

If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust Act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust Act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been ex-

ercised by the Anti-Trust Act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice PECKHAM and Mr. Justice HOLMES concur in this dissent.

Mr. Justice HOLMES, with whom concurred the CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice PECKHAM, dissenting:

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests [*401] exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corpora-

tion for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one [*402] of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every" and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of dis-

cussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do [*403] not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination

in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what [*404] these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States*

v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 that it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation [*405] of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co.* v. *Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United*

States v. *Joint Traffic Association*, 171 U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticize or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community [*406] of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association's* case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the

trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that [*407] the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing--probably the present one does. But the Act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would

be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an [*408] objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete – and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these

lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests [*409] on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present statute. [*410] *Hopkins* v.

United States, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's* case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of [*411] trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretence. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

THIRD DIVISION.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge:

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of the *United States* v. *The Northern Securities Company and others.* The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed lately by the Supreme Court of the United States.

The petitioners recite as the grounds of their application that Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, are the registered owners of $82,491,871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company; that the plan so proposed con-

templates that the stockholders of the Securities Company shall surrender ninety nine per cent. of the stock of that Company which they respectively hold, each stockholder receiving in exchange $39.27 in stock of the Northern Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern [*810] Pacific stock, and, as they verily believe, that the proposed plan of distribution, if carried out, will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who co-operated in forming the Securities Company, and would continue the common management of the two competing railway companies and render the decree of this court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.

The principal ground, as it seems, on which the petitioners, Harriman and Pierce, base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given. *Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609. But we fail to perceive that further orders are necessary in the case in hand to insure the due exe-

cution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

The Government was satisfied with the relief obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. [*811] It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested.

It is true that the decree contained a provision in

substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned, or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last

mentioned but will lead to a very wide distribution of the stock, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate and with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. [*812]

The United States is the complainant in this case. It is the conservator of a public welfare and has a right to speak for the public. According to well established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way.

The United States, speaking by its Attorney General, says that it "neither admits nor denies the allegations of the petition but objects to the proposed intervention. This case was heard before this court on bill, answer and testimony, and a final decree was entered enjoining the defendants as therein recited. Upon appeal by defendants to the Supreme Court of the United States the decree of this court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the

United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable disposition of the stock of the two railway companies, if they can do so, which will not be in violation of the law, feeling confident of its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies, and preferring to challenge the validity of any such combination by an independent bill, rather than by future proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government bill in this case; that it has never been released from such custody, although a final decree has been entered; and that on this ground the petitioners, who assert a right to have particular shares of the Northern Pacific Railway Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that, so long as property remains actually in judicial custody, any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In re Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to the court for relief, and, as a general rule, cannot obtain relief elsewhere. This court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be [*813] done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill which was filed by the Government

one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated.

Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action, and if it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that Company in the two railway companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce.

Leave to intervene is denied.

IN CHANCERY OF NEW JERSEY.

Between—
THE CONTINENTAL SECURITIES COMPANY,
Complainant,
AND
THE NORTHERN SECURITIES COMPANY,
Defendant.

On Bill for Injunction and Relief.

On Rule to Show Cause why an injunction should not issue.

BERGEN, V. C.

Stated as concisely as the matters under consideration will permit, it appears from the bill of complaint, affidavits, and exhibits offered and used, by consent, on the hearing, that the defendant was lawfully incorporated under the laws of this State; that the objects for which it was formed, as set forth in its certificate of incorporation, was the purchase, holding, and selling of the bonds, evidences of indebtedness or capital stock of other corporations, whether incorporated in this State or elsewhere, and, as owner thereof, to exercise all the rights, powers, and privileges of ownership, including the right to vote on any such stock; that shares of the capital stock of the defendant corporation, of the par value of one hundred dollars each, to the extent of 8,954,000 shares, were issued and disposed of; that of the stock so issued, a large proportion was used in purchasing a majority of the capital stock of the Northern Pacific Railway Company, and also of the Great Northern Railway Company, by virtue of which the defendant company assumed the management and control of the railway companies; that the defendant company purchased 1,537,594 shares of the common stock and 410,850 shares of the preferred stock of the Northern Pacific Company, paying therefor in cash $43,625,036.50, and 1,768,229 shares of its own stock; that it purchased of the capital stock of the Great Northern Railway Company 1,181,242 shares, paying therefor $1,707,200 in cash, and 2,110,576 shares of its

own stock; that the defendant issued and sold, of its own stock, 75,220 shares to the public for cash; that in January, 1902, the preferred stock of the Northern Pacific Railway Company, held by the defendant, was called for payment by that company, and paid in cash, for which the defendant received $41,085,000 of which it invested $34,709,062.50 in the convertible bonds of the Northern Pacific Company, afterward availing itself of the convertible rights vested in the owner of any such bond. The defendant surrendered said bonds to the Northern Pacific Company, and received from it the equivalent in shares of the common stock of said company issued to redeem the bonds. It is thus disclosed that the capital stock of the defendant company was issued in part for the common stock of the two railway companies, which we may assume, for the purposes of this motion, was an exchange of stocks with differences paid in cash; that stock of the defendant company worth at par $7,522,000 was sold in the public market for cash; that a large amount of common stock of the Northern Pacific Company now owned by the defendant was issued by the Northern Pacific Company directly to it, for the surrender of convertible bonds belonging to the defendant company.

It further appeared that a suit brought by the United States against the defendant company, based upon an alleged violation of the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Anti-Trust Act" had resulted in a decree, afterward affirmed by the Supreme Court of the United States, adjudging that the defendant had entered into a combination in restraint of trade and commerce among the several states, which the act of Congress denounced as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company claimed to be held and owned by the defendant, was acquired and held by virtue of such illegal combination, and, upon such adjudication, enjoining the Northern Securities Company, or its representatives, from acquiring or attempting to acquire any further stock in either of said railway companies [*877], and

prohibiting the defendant from voting or attempting to vote said stock at any meeting of the stockholders of either of said railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever, over the acts and doings of said railway companies, or either of them, by virtue of its holding any stock therein, or from voting at any corporate election for directors or officers of either of said companies; and said decree further enjoined the said railway companies from paying any dividends to this defendant on account of any stock which it claimed to hold or own of either of said companies, and probibited the said railway companies from permitting the defendant to exercise any control over their corporate acts. The said decree adjudges that nothing in it contained should be construed as prohibiting this defendant from returning and transferring to the stockholders of either of said railway companies any and all shares of stock in either of said companies which the Northern Securities Company might have theretofore received from said stockholders in exchange for its stock, or as prohibiting the defendant from making transfer of the stock to such persons as might then be the holder of its own stock, originally issued in exchange or payment for stock acquired by it in the aforesaid railway companies.

It further appeared that the continued ownership of said railway stocks by the defendant company would not only be useless, but a great disadvantage to the stockholders of the company, and that the directors of the company had decided to reduce its capital stock, and divide the surplus that would arise upon such reduction between the stockholders, and, in order to carry out said determination, on the 22nd day of March, 1904, adopted certain resolutions for that purpose; those pertinent to this issue being as follows:

"*Resolved*, In consideration of the premises, it is declared necessary and advisable for this Company so to reduce its present capital stock as will enable it without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the Board of Directors of this company hereby declare it advisable that Article Fourth (4th) of this Company's Certificate of Incorporation be amended so as to read as follows:

"FOURTH. The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000) divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars each ($100). Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock, surrendering to the Company, for retirement, ninety-nine percentum (99) of the shares held by him.

"Upon the surrender to this Company by any shareholder of the entire number of shares, and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

And on the same day the said directors called a special meeting of the shareholders of the defendant company to vote upon said resolutions, and upon such other business as might be brought before said meeting. That the requirements of the statute regarding the holding of the special meeting, have been complied with is not disputed, but the lawful right of the stockholders to approve, and of the directors to carry out the distribution of surplus as proposed, is questioned; and the court is asked to enjoin the stockholders from meeting and passing upon the resolutions proposed by the directors as aforesaid, and the directors from carrying it out if approved.

The corporation act of this State very clearly and distinctly defines the method to be pursued by a corporation desiring to reduce its capital stock. It is not disputed but that the proceedings taken in the present instance have followed the statutory directions, so that the asking of the court to enjoin the meeting of the stockholders is a mere incident to the real question, which is the prohibiting of the directors of this company from dividing the surplus in the manner proposed, for, if the action of the

stockholders at the special meeting should be the approval of the proposed reduction of capital stock, the result would be, if carried out, the creation of a large surplus of assets. Before the court will allow an injunction order to restrain a corporation from distributing surplus assets, on the prayer of a complaining stockholder, it should be satisfied that the complainant is entitled to the relief he asks on the case presented.

The able and ingenious argument of the complainant's counsel rested largely upon the contention that the decree of the Supreme Court of the United States above recited not only prevents the distribution of the surplus assets in the manner proposed, but goes further and requires that the defendant company shall transfer to the original stockholder, or his transferee, the same stock which was delivered in exchange for the defendant's stock. To me it is very clear that the decree of the Supreme Court will not bear any such construction; it controls the action of these defendants only so far as the holding of the stock and the exercise of such powers as the ownership of stock in a corporation usually confers may be in violation of the act of Congress with regard to [*878] interstate commerce, and that the statement or proviso in the decree that nothing in it contained should interfere with the transfer of the stock to the stockholders of either of the railway companies, any stock which the defendant might have received from stockholders in exchange for its stock is not a direction that it shall transfer it in any particular method or form, but is added to the decree to avoid the possible construction that the stock could not be returned to the original holders if it was wise or possible to do so. There is no doubt about the character of the original transaction. It was intended to be, and was, a sale of stock to the defendant company, with every *indicia* of ownership and title. The purchaser was not bound to retain one share of the stock. It has the right to sell any or all of it, and invest the proceeds in other securities, and did do so in the case of the preferred stock of the Northern Pacific Company. Upon such sale and delivery, the stock of the two railway companies became the assets of the defendant company, upon which the value of its

stock depended. Large quantities of the capital stock of the defendant have been sold in the open market to purchasers who had a right to rely upon the well known character of the assets of this company as a protection to their investment, and it would not make the slightest difference whether the stock in one instance was originally issued for cash and in another in exchange for the stock of the two railway companies. The cash and the stock are the common assets of the company and each stockholder is entitled to the benefit of all of the assets of the corporation whose stock they hold; and if a division of the surplus is to be made from securities held as assets, every stockholder is entitled to have his proportionate share of each class, where there is a possible or probable difference in market value.

The complainant also contends that, as the purpose for which the stock was acquired has been adjudged to be unlawful, the transfer and sale of the stock was void *ab initio*, that no title passed, and, upon surrender of the stock of the defendant company, the original holder, or his transferee, is entitled to demand and have the identical stock he sold or transferred to the company returned to him. If this insistment of the complainant is sound, he does not show what property he is entitled to have returned. For all that appears to the court at present, his stock may belong to the class that was sold for cash, in which case he would have no ground to complain, for he is getting his equitable portion of the assets of the company, be they worth more or less; but, in my judgment, he would not be entitled to the relief he seeks if he had been able to show that his stock was originally issued to one who had turned over to the defendant company stock in either of the two railway companies, for, if the original stock was issued for an unlawful purpose, the person who paid the consideration and who accepted the stock was one of the conspirators, and can hardly ask the aid of a court of equity to restore to him property which he contributed to an illegal enterprise and he must abide the consequences of his own act. To permit the originators of an unlawful scheme, or their successors in title, to withdraw from the

property of the company a special class of assets, and leave as security for the unoffending stockholder such assets as might remain, as a security for his investment, is inequitable. This corporation is not to be dissolved. It holds many valuable securities, other than the stocks of these two railway companies, and expects to continue business, and might, so far as I can see, sell all of these stocks, the holding of which had become unprofitable, and divide the cash among the stockholders, or invest it in other proper securities. It seems to me that the only question on this branch of the case is, what is the character of the title by which the defendant corporation holds these stocks. I am satisfied from the evidence before me that the stocks were sold and conveyed without reservation to the defendant, and that its directors might sell all of one class of stock, and hold the other, and that each stockholder would then have a joint interest in the stock retained, as well as in the cash. If one class of assets had depreciated in value, and the other had increased in worth during such ownership, would it be seriously contended that a favored class of stockholders could take the valuable assets, and leave the depreciated to satisfy the other stockholders? I think not. Stockholders are, in a sense, partners, and the property of the firm belongs jointly to all. No trust was created when the stocks were transferred—at least, none was announced to the public when the stock was offered for sale, or shown on this hearing; and a secret trust, if now disclosed, would not be sustained, at least, against such stockholders as are not subject to its protection.

The complainant further argues that the law under which the defendant was organized, while permitting a reduction of stock, does not provide for a distribution of a portion, and the retention of the balance of the assets as the property of the corporation. The suggestion that a corporation cannot retain a portion of its assets, to represent the capital stock after reduction, is without merit; otherwise every reduction of capital would require a distribution of all the property of the company, and thereby, in effect, work a dissolution of the corporation.

By the reduction of the capital stock of a corporation, not

impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction; and unless the rights of creditors will be affected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying [*879] on of the business for the best interest of the stockholders may not require. *Strong* v. *Brooklyn R. R. Co.*, 93 N. Y. 426; *Williams* v. *Western Union Tel. Co.*, 93 N. Y. 163; Morawetz on Corporations, 443. The proposed distribution is not a dividend, in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case the character of the assets makes an equitable division easy to accomplish. Each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value. If there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean; and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders require that a division of the stock of the two railway companies be made between them, unless prevented by some imperative legal rule. No such rule exists. On the contrary, the power of directors of a corporation to divide property other than money among the shareholders is sustained by abundant authority. 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; *Ehle* v. *Chittenango Bank*, 24 N. Y. 548; *Leland* v. *Hayden*, 102 Mass. 542

Having determined that the stock of the two railway companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a vested interest to the extent of his hold-

ings of the defendant company's stock; that when the capital stock of a corporation is reduced, and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property so held for distribution; and that the proposed method of division is equitable--it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a court of equity. Whether this complainant would be entitled to equitable relief in any phase of the case is extremely doubtful. I must take the bill of complaint as stating complainant's position correctly, and it is there alleged that notice of the action of the directors on this subject, together with the call for a special meeting for its approval, was issued on the 22d day of March, 1904, and that after that, and on the 28th day of March following, the complainant went into the market and bought five hundred shares of defendant's capital stock. Manifestly he bought such stock with knowledge of the proposed action of the directors and stockholders, and thereupon immediately filed his bill of complaint in this cause. But one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company, made necessary by the restrictive order and decree of the United States court, and to delay the stockholders of the defendant company (many of whom had nothing to do with the origin of the scheme afterwards declared unlawful) in the receipt of dividends or income from their investment.

The rule to show cause will be discharged.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Complainants,
v.
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.
} In Equity.

BRADFORD, District Judge:

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in *United States* v. *Northern Securities Co. et al.*, 120 Fed. 721, and the affirmatory decree of the Supreme [*465] Court of the United States in the same case. 193 U. S. 197. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti-Trust Act. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. Section 1 declares illegal "every contract, combination in the form of trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the first section. Section 3 [U. S. Comp. St. 1901, p. 3201] declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the preceding section. Section 4 provides, among other things, that the several circuit courts of the United States shall have "jurisdiction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants Hill, Clough, James and Kennedy, and certain other persons whose names

were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned [*466] or controlled a majority of the capital stock of the Northern Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest, on and prior to November 13, 1901, entered into an unlawful combination and conspiracy " to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and

the Northern Securities Company substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for effecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies [*467] upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organ-

ization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation, and the defendants were thereby attempting to monopolize, and had monopolized, such interstate and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein

asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," [*468] and a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein"; and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway

companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the United States, March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the Court below, among other things, said:

"No valid objection can be made to the decree below, in form or in substance. . . . The circuit court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation, as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance. [*469]

Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,249 shares in the capital stock of the Great Northern Railway

Company," and " has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company," and that " there are now outstanding 3,954,000 shares of its own capital stock," and that it " desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it " necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

" FOURTH.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance, among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of

$75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the Northern [*470] Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill, Morgan, Clough, James, Kennedy, Bacon, Baker and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of New Jersey, and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or

trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a [*471] majority of the capital stock of each of the railway companies had been

or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an interest therein of $82,491,871, par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce was part of the original issue of stock by that

company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the actual custody [*472] of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be converted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, converted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway

company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in United States v. Northern Securities Company *et al.*, 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that it acquired no title thereto and cannot transfer any rights in respect thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, *pro rata* among its own stockholders, but not to return and re-transfer to stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them

which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes [*473] the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent. by a vote of more than seventy-five per cent. in interest of its stockholders, and by a like vote the proposed plan of *pro rata* distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and *ultra vires* the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their

present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies *pro rata* among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution *pro rata* in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are entitled [*474] exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such *pro rata* distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the *pro rata* share of the stock of the two railway companies which they would receive upon such *pro rata* distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the

shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration to the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their rights and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and

restrained from parting with, disposing of, transferring, assigning or distributing any part of the stock, of [*475] the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved.

The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, [*476] the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and

of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In *Russell* v. *Farley*, 105 U. S. 433, 438, the court through Mr. Justice Bradley said:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party."

In *City of Newton* v. *Levis*, 79 Fed. 715, the circuit court of appeals for the eighth circuit, through Judge Sanborn, said:

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. . . . The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful,

the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever [*477] the questions of law or fact to be ultimately determined in a suit are grave and difficult and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. . . . The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," &c.

In *Glascott* v. *Lang*, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden* v. *Dooley*, 74 Fed. 429, 431, the circuit court of appeals for the second circuit, through Judge Shipman, said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and deter-

mined' by evidence and proofs which have the merits of accuracy."

In *Great Western R. Co.* v. *Birmingham, &c., R. Co.*, 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. . . . It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In *Shrewsbury & Chester R. Co.* v. *Shrewsbury R. Co.*, 1 Sim., N. S. *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

"When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. . . . Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and in-

convenience to the one party and to the other, is or is not expedient. Where the alternative is interference or [*478] probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. . . . Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156; *Allison* v. *Corson*, 88 Fed. 581; *Buskirk* v. *King*, 72 Fed. 22; *Sanitary Reduction Works* v. *California Reduction Co.*, 94 Fed. 693; *Southern Pac. Co.* v. *Earl*, 82 Fed. 690; *New Memphis Gas & Light Co.* v. *Memphis*, 72 Fed. 952; *Indianapolis Gas Co.* v. *Indianapolis*, 82 Fed. 245; *Georgia* v. *Brailsford*, 2 Dall. 402.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great North-

ern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary and extra-judicial arrangement. But this court has power to require of the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed *pro rata* among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of $71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of [*479] $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A *pro rata* distribution under the proposed plan of the $39,661,450 par value of stock of the latter company included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to

a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case, should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value, was taken by the Northern Securities Company at an agreed real valuation of $115 for each $100 at par without distinction between common and preferred stock. The plan of *pro rata* distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for

each $100 par value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan [*480] the holders of the remaining one-hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive $24,638,919 par value of the preferred stock of the Great Northern Railway Company and $32,070,612 par value of the common stock of the Northern Pacific Railway Company. The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the holder of $37,023,000 par value of the common stock, became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy-five eightieths of its par value in the new common stock. There is evidence furnished by the affidavits and exhibits that the Northern Securities Company exercised this right, and received of such new common stock $34,709,062

at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of the common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, $4,062,000, fairly may be treated as an offset to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000, amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the *pro rata* plan, leaving $8,803,166 in their favor, less the amount of their share of [*481] the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629, paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the latter company. The affidavits and exhibits furnish evidence of some weight that the

above mentioned par value of $6,375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely, $34,709,062 par value was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount, leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

" 1901.
Novbr. 18th.

INVESTMENT ACCOUNT No. 1. To CAPITAL STOCK a/c.	
For 410,850 shs. N. P. Pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day	8,915,629
Balance paid in stock.....	$32,169,371

say 321,693 shs. & $71 scrip issued as fully paid up stock at par " [*482].

Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy-five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value of its preferred stock on the seventy-five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part, directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits

and exhibits fail to disclose, and counsel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company, was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,172,371 par value or a real present value of $93,409,701. The deduction from the latter amount of $83,181,488 which the complainants would receive under the proposed *pro rata* distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern [*483] Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy-five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050, representing the real value of $37,023,000 par value of the old common stock, would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the

par value of $100 each. The proposed *pro rata* plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and " proportional amounts thereof for fractional shares of the stock of this company." $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And $30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety-nine one-hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one-hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one-hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application [*484] partly on the ground that the real value in dispute is not sufficient to warrant an

exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one-twelfth of $11,117,104; less than one-eleventh of $10,228,213; less than one-ninth of $8,803,166; and less than one-eighth of $7,513,922. It is unnecessary, and would be tedious to discuss in this connection and on the present application, the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit, it should be borne in mind that the right of the complainants to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the

Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the [*485] first named company was organized, and the affidavits are conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156, 161, as follows:

"The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to

the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

NORTHERN SECURITIES COMPANY

v.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge:

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 123 Fed. Rep. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is

some strong reason for it." *Massie* v. *Buck*, 128 Fed. Rep. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

"(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State,

Territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... Shares

NORTHERN SECURITIES COMPANY.

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies that.....is the registered holder of.....Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this ..... day of ....., A. D. 190...

....., President.

....., Treasurer.

Countersigned this ..... day of ....., A. D. 190...

....., Transfer Agent.

Countersigned and Registered this ..... day of ....., A. D. 190...

MANHATTAN TRUST COMPANY, Registrar of Transfers.

By ....., Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. The object of this bill was to restrain the violation of the Act of Congress of July 2, 1890, 26 Stat. c. 647, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed—

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by

it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. . . ."

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197), and thereupon, viz., on March 22, 1904, the Board of Directors of the Securities Company adopted the following preamble and resolutions:

"WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, In a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and

each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company held by this Company; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, This Company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

RESOLVED, In consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

RESOLVED, That the Board of Directors of this Company hereby declares it advisable that Article (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH.—The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof, for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the num-

ber of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

RESOLVED, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the Company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants allege "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators." The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the

several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed,

however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding com-

pany." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree that it should not continue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2,500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States* v. *Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in

disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act." 193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that ap-

plication was substantially the same as that upon which this bill is founded; but, in denying it, the Court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. . . . It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey

the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the Government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. "The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357. We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of

the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed. As was stated by the learned judges who made it—

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusion reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

GRAY, J., dissenting:

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so

determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree as prayed for, in favor of complainants. Nothing but a clear conviction that complainants' bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and

violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

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IN THE

Supreme Court of the United States.

No. 513 OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Appellants here,

vs.

NORTHERN SECURITIES COMPANY, Appellant Below and Appellee here.

On Appeal (by Special Certiorari) from the Decree of the Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF APPELLANTS.

D. T. WATSON,
Attorney for Appellants.

Smith Bros. Co., Franklin Print. 428 Grant Street, Pittsburg, Pa.

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It is not proposed in this brief to discuss all the questions in this case but to prove:

That the main, controlling question in the present case has been definitely adjudicated against the Securities Company by this court in the Government Case:

That such adjudication is *res adjudicata* in the present case:

That under your decree, appellants are entitled to the 717,320 shares of Northern Pacific stock involved in this case, and the Securities Company cannot distribute the same *pro rata*.

That the Court of Appeals erred:

(1) In holding to the contrary:

(2) In attempting to finally dispose of this case on appeal from an interlocutory decree.

IN THE

Supreme Court of the United States.

No. 512 OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY, and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees in the Court of Appeals and Appellants here,

vs.

NORTHERN SECURITIES COMPANY, Appellant in the Court of Appeals and Appellee here.

On Appeal from the Decree of the United States Circuit Court of Appeals for the Third Circuit, by special allowance of a Writ of Certiorari.

Brief on Behalf of Appellants.

By the Bill in Equity filed in the Circuit Court of New Jersey, appellants aver they are entitled, on surrendering to the Northern Securities Company its certificates of its stock for $82,491,871.00 (par) which they still hold and own, and also the whole, or such portion as the court shall decide, of the sum of $8,915,871.00 cash received from the Securities Company, to have surrendered to them by the Northern Securities Company, 717,320 shares of the capitalstock of the Northern Pacific Railroad Company, which stock they assigned to the Northern Securities Company on November 18th, 1901:

That the Northern Securities Company has the identical Northern Pacific stock so assigned, and that these 717,320 shares of its common stock include certain shares of common stock into which (by agreement with appellants) the Securities Company turned the preferred Northern Pacific stock appellants assigned to it:

And appellants seek by said Bill to have the Securities Company enjoined from making a *pro rata* distribution of the said 717,320 shares of the capital stock of the Northern Pacific Railroad Company to and among the stockholders of the Securities Company and to have the Securities return such shares to appellants.

The case turns upon the following question:

> Did the Northern Securities Company lawfully purchase and become the lawful, absolute owner of the stocks in the Northern Pacific and the Great Northern Railroad Companies, (including appellant's,)so that it may now distribute them *pro rata* among its stockholders?

We say it did not, and aver that this is conclusively so settled by the decision of this court in the *Northern Securities Company vs. United States*, 193 U. S. 197, hereinafter called the Government Case.

The Northern Securities Company says it did become such owner and may so distribute such stock, and that the question was not decided against it in the Government Case.

The Court of Appeals held, (admitting the question to be as stated), that this question was not "*involved*" in the Government Case, nor was it there "*decided*" or "considered" even "*incidentally*."

That case in this court was an appeal by the Northern Securities Company and other respondents from the decree of the Circuit Court of the United States sitting at St. Louis, pursuant to a Bill in Equity filed by the United States in the Circuit Court for that circuit against the Northern Securities Company and others, in which the United States alleged that the respondents therein and others to be joined when ascertained, stockholders of the Northern Pacific and Great Northern Railroad Companies, had formed a combination to restrain trade and commerce contrary to the provisions of the Sherman Act, in manner as follows:

(a) Organizing under the laws of New Jersey the Northern Securities Company as a corporation of the State of New Jersey, solely as a holding company for the purpose and as an instrument of the combination:

(b) Assigning to the Securities Company in pursuance of the combination, at a fixed valuation, more than one-half of the capital stock of the Northern Pacific and Great Northern Railroad Companies, two parallel and competing railroads engaged in interstate commerce, and to have the Northern Securities Company issue in exchange for this railroad stock, the stock of the Securities Company at par:

(c) The Securities Company was to hold said stock,—to vote it and thus control the two railroad Companies; collect the dividends from both railroad companies and distribute the same indifferently among the stockholders of the Securities Company and thus eliminate all incentive to competition between the two railroad companies:

(d) The Securities Company was to be solely an instrument to carry out the scheme, and as a fact it was organized solely for that purpose, and in its charter claimed the right to hold and vote the stock in other

corporations. It was to and did acquire said railroad stock, not as a lawful purchaser and absolute owner, but solely as the representative and the instrument of the combination to carry out its unlawful purposes and held the stock as custodian for the individual stockholders of the two constituent railroad companies who so assigned:

(e) Solely in pursuance of the scheme and combination aforesaid, the railroad stocks in said two competing railroad companies were so assigned to the Securities Company, and among other stocks so assigned was the capital stock of the Northern Pacific Railroad Company owned by the appellants.

The Northern Securities Company and the other respondents filed an answer denying the allegations of the bill, and the issues under said bill, and answers were sharply framed, as above stated. Extracts from the bill and answer hereinafter printed will prove this allegation.

The Circuit Court at St. Louis entered a decree in favor of the United States, and from that decree the Northern Securities Company and the other respondents appealed to this court, but the United States did not appeal.

(I) *This court, in the Government Case decided that the Northern Securities Company was not the lawful purchaser or absolute owner of the capital stock of the Northern Pacific Railroad Company assigned to it by appellants, but held it as custodian for the appellants.*

The opinion of this Court in that case was delivered by Mr. Justice Harlan and in it he *inter alia* said as follows: P. 325, 326.

"Summarizing the principal facts, it is indisputable upon this record that under the leadership of the

defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive upon an agreed basis of value shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme, such holding corporation has *become the holder—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation."

This court expressly refused to consider what would have been the effect in the Government Case if the Northern Securities Company had been the lawful purchaser and the lawful, unconditioned owner of the railroad stocks, and you there said:

Pp. 334–335

"It is said that whatever may be the power of a State over such subjects, Congress *cannot forbid* single individuals from *disposing* of their stock in a State corporation, even if such corporation is engaged in interstate and inter-national commerce;

"that the holding or *purchase* by a State corporation, or the *purchase* by *individuals*, of the stock

of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution;

"that so far as the power of Congress is concerned, citizens of State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized.

"It is unnecessary in this case to consider such abstract, general questions. The Court need not now concern itself with them. *They are not* here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

"In this connection, it is suggested that the contention of the Government is that the administration and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of

the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."

P. 346.

"But to the end that effect be given to the national will lawfully expressed, Congress may prevent that company *in its capacity as a holding corporation and trustee from carrying out the purposes of the combination formed in restraint of inter-state commerce. The Securities Company is itself part of the present combination; its head and front; its trustee.* It would be extraordinary if the court in executing the Act of Congress

could not lay hands upon that company and prevent it from doing that which, if done, will defeat the Act of Congress." * * * *

P. 353–354.

"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, *a purchase of that stock*; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any Act of Congress, This view is *wholly fallacious and does not comport with the actual transaction. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies.* If it was in form such a transaction, it was not in fact one of that kind. *However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railroad Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.* If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished by the combination in question, it was the defendant, Morgan, In his testimony he was asked: 'Why put the stocks of both these (constituent companies) into one holding company?" He frankly answered: 'In the first place this holding company was simply a question of *custodian*, because it had no other alliances.'

"That disclosed the actual nature of the transaction which was only to organize the Northern Securities Company as a *holding* company in whose hands, *not as a real purchaser or absolute owner, but simply as custodian*, were to be placed the stocks of the constituent companies,—such *custodian* to represent the combination formed between the shareholders of the constituent companies; the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize inter-state commerce by suppressing or (to use the words of this Court in *United States vs. Joint Traffic Association*) 'Smothering' competition between the lines of two railroad carriers."

This opinion of the Court put the decision of the case flatly on the ground that the Securities Company was *not* the real absolute owner of the railroad stocks, but simply a holding company, the *illegal* custodian for an *illegal* purpose.

The significance of this plain language of the Court is emphasized when you remember that it was a conclusion arrived at after all the questions in the case had been discussed, and after the Court had considered the repeated ingenious methods by which the Northern Securities Company attempted to shield itself by alleging it was the lawful, absolute owner of the railroad stocks.

It alleged—

As we are such *purchaser*, the Sherman Act cannot forbid it, for that is our right under the Federal Constitution.

Again, it said, to deny us the right to buy is to limit the constitutional right of the individual to sell.

Again,—the Securities Company's right to existence and its right to buy and sell railroad stocks is a matter of State regulation with which Congress cannot interfere.

In the above quotation from pages 353-354 is the final deliberate conclusion of this Court, which put your decision squarely on the proposition that the Securities was *not* the lawful purchaser—real owner of said railroad stocks, but merely the agent—the custodian and trustee—itself a part of the combination—and took the stocks to hold the same as custodian, with the power to vote, and thus manage in one interest the two railroads, and by collecting and dividing the dividends among all stockholders of the Securities Co., eliminate all purpose of competition by the stockholders of either railroad company.

Mr. Justice Brewer concurs in the conclusion.

Mr. Justice Brewer concurred in the results reached by the majority of the court, including the finding that the Northern Securities Company was organized and used for an illegal purpose; that it was illegal for it to acquire a control of the stocks of the two competing railroad companies, and that in so doing it violated the Sherman Act. He not only did not express any dissent from those portions of Judge Harlan's opinion we have cited, but, we submit, he shows an agreement with them—and in fact puts his conclusions on the ground that the Securities Company was *not* the real purchaser and absolute owner of the railroad stocks.

He said:

P. 361, 362.

"Further the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of the stock in the Great Northern Company.

"Such was the ruling in *Pearsall vs. Great Northern Railway* (161 U. S. 646), in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Railway Company to purchase the stock of the Northern Pacific Railway Company: 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.'

"*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of

both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000., had no means of its own; $30,000. in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as well as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person and for the purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.*"

Mr. Justice White dissenting.

Mr. Justice White, for himself and the Chief Justice and Mr. Justice Peckham and Mr. Justice Holmes, *inter alia*, stated as follows:

P. 365.

"Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. * * * Under the arrangement, the Northern Securities Company came to be the registered holder of the majority of the stock in both the railroads.

"The Government, by its bill, *challenges the right of the Northern Securities Company to hold and own the stock in the two railroads.* * * *

P. 366.

"The court below sustained the contentions of the Government. * * * *

"The court recognized, however, the right of the Northern Securities Company to re-transfer the stock in both railroads to the persons from whom it had been acquired. * * * * *

"Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider *two questions of fact.* It is said, *first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner*

of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. * * * *

P. 367.

"If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress."

P. 371.

"It is said moreover, that the decision of this case does *not* involve the consequence above pointed out, since the *ONLY issue in this case is the right of the Northern Securities Company to acquire and own the stock.* The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, is an entirely different thing. * * *"

P. 372.

"Without stopping to point out what seems to me to be the confusion, contradiction and *denial of rights of property* which the decree exemplifies, let me see if in

effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

"Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monoply thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. *And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership.* * *"

P. 390.

"Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under State law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. * *"

P. 396.

"But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads, and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. * *"

P. 400.

"Being of the opinion, for the reasons heretofore given, that Congress was without power to *regulate the acquisition and ownership* of the stock in question by the Northern Securities Company, and because I think

even if there were such power in Congress, it has not been exercised by the Anti-Trust act, as is shown in the opinion of *Mr. Justice Holmes, I dissent.*"

These extracts prove that every Judge of this Court thought the question of the lawful absolute ownership of the stock by the Securities Company was important and controlling upon the decision.

Can there from these citations be any doubt that in this court the question of what, if any title the Securities Company took in the railroad stocks was a *material and controlling question?*

That the majority of the Court put its conclusion on the ground that the Securities Company was *not* the lawful purchaser—absolute owner of the railroad stocks, but simply the holding company, Custodian—Trustee—Agent—for, and one of the combination to hold the stock, and through this holding, control both railroad companies and eliminate competition:

That the Securities Company was a mere instrumentality of the combination—that its acquisition of the stock was illegal—for an illegal purpose, and even the continued holding was illegal:

That the minority dissented on the ground that

> "Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company"

Mr. Justice White recognized that in the Opinion of the majority of the Court the question whether the Securities Company was the real purchaser and absolute owner was a controlling one.

Indeed he stated that

"it is said * * the *only* issue in this case is the "right of the Northern Securities Company to acquire "and own the stock."

Facts Found by This Court.

This court having found, as we have seen, that an illegal combination was formed under the leadership of Hill and Morgan to control and restrict competition between the Northern Pacific and the Great Northern Railroad Companies, two parallel and competing lines engaged in inter-state traffic, and that the means of carrying out and perfecting the combination was the organization of, and placing in the possession of the Northern Securities Company as a holding Company, the majority of the stock in each of said railroad companies, *inter alia*, found specifically:

That the sole purpose of the organization of the Northern Securities Company was to act as agent or trustee of the Morgan-Hill illegal combination:

That the Northern Securities Company was to be solely a holding corporation, the custodian, for the combination:

That it was organized by the combination, Hill and Morgan, solely as a holding company:

That the Northern Securities Company was a part of the combination; its head and front; its trustee:

That it was a common, corporate trustee:

That as custodian it represented the combination formed between the shareholders of the constituent companies.

That it was the instrument of an illegal combination of which it was the master spirit:

That the Northern Securities Company acquired more than nine-tenths of the Northern Pacific stock and more than three-fourths of the Great Northern stock as custodian of the same; as trustee for those who assigned:

That the actual nature of the transaction by which the Northern Securities Company acquired the railroad stocks was *not* as a lawful purchaser or absolute owner, but simply as custodian for the combination;

If in form it was a purchaser of said railroad stocks, it was not so in fact.

That the Securities Co. *illegally* acquired said railroad stocks and *illegally* held the same.

Decree of the Court.

Having found these facts, and as a consequence from them you carefully considered and then affirmed the following decree:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that *all* of the stock of the Northern Pacific Railway Company and *all* of the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, was *acquired* and *is now held* by it *in virtue* of such combination or conspiracy in restraint of trade and commerce among the several States;

"That the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over

the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be, and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of the said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor."

"The judgment of the Court is that the decree below be and hereby is affirmed with liberty to the Circuit Court to proceed in the execution of its decree as *the circumstances* may require"

Conclusions From the Words of the Decree.

Speaking only from the words of the decree itself, it is indisputable that by that decree you adjudged—

(I) That the defendants, who included the Northern Securities Company, had entered into a combination in restraint of trade and commerce, such as the Sherman Act denounces as illegal;

(II) That *all* of the railroad stocks
"*now claimed* to be held and owned by the defendant, the Northern Securities Company,"
were both
"acquired",
and, in addition, are
"now held by it"
in *virtue* of such combination in restraint of trade and commerce.

(III) This identical combination, you had before held, was illegal, and you then held that *both* the *acquisition* and the *holding* of the stock was illegal.

The taint of illegality was in the title to the stocks which the Securities Company acquired, and it was illegal for it to further hold said stocks.

All said stocks were acquired and held as part of the scheme—a most material part—to restrict trade and commerce.

(IV) You emphasized the illegality of the acquisition or holding of such stock by restraining the Securities Company from

> "acquiring or attempting to *acquire* further stock of either of the aforesaid railroad companies."

(V) You restrained the Securities Company from voting or collecting dividends or exercising influence as the holder of such stock, and you restrained both the Northern Pacific and Great Northern Railroad Companies from permitting the Securities Company or its attorney—agent—officer—or servant—to so vote or collect dividends, or exercise influence.

(VI) In addition to thus adjudging the illegality of the acquisition and holding of the stock, and prohibiting its use and prohibiting the further acquisition of such stock, you described the title of the Securities Company to the stock as the stock

"which it now holds."—

"by virtue of its holding such stock:"

and in contradistinction, whenever you used the word "own" you qualified it as follows:

"now claimed to be held and owned."—

"which it now claims to own and hold."—

(VII) The decree did not in words authorize the sale of the stock or any other disposition of it save the return to the parties who assigned it to the Securities Company.

Authorization of Return of Stock to the Original Stockholders of the Constituent Companies.

(VIII) You then added as part of the decree:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This was the sole and only mode in which by the words of your decree, you permitted the Securities Company to *dispose* of the stock, freed from the taint and restraints upon it.

You did not in this decree permit the Securities Company to *sell* the said stocks freed from the taint and restraint.

You did not use one word in the decree from which it could fairly be inferred that the Securities Company

could in any way assign them freed from the taint and restriction, except the one method you in words permitted, *i. e.*, the return of the stocks.

Even the *return* to the original stockholders of these railroad stocks by the Securities Company, freed from the taint and restraint placed upon them, could not have been done save by the express consent of this court,

BECAUSE

(a) You put such *express* consent in your decree:
Why, if it was not necessary?
Why, if without it, such return could have been made?

(b) You prefaced said consent by saying:
"But nothing *herein* contained shall be construed as prohibiting the Northern Securities Company from *returning* and transferring"
such railroad stocks to the original assignors.

That is,—such return, even freed from the taint and restraint, is prohibited by the former part of this decree, but we now expressly allow it and except it out of the decree.

(IX) You authorized the Securities Company to *return* and transfer to the railroad stockholders such railroad

stocks as the Securities Company had received from each, and you included not only the actual persons who assigned to the Securities Company, but

> "such person or persons as may *now* be the holders and owners of *its* own stock."

(X) This was the sole and only method of transfer that the words of the decree permitted; and the words of the decree did *expressly* authorize such transfer.

In so doing you necessarily determined

(a) That such return was equitable and fair to all the then (and present) stockholders of the Securities Company, for you would not have given such authority if it was inequitable or unfair to any of the stockholders of the Securities Company;

(b) That it was based upon the proposition that the Securities Company did not really own, but merely held the stock—for an illegal purpose—for which purpose it was so assigned;

(c) The present proposed plan of the Securities Company to distribute said railroad stocks pro rata

among all its stockholders was not only not permitted by the words of the decree, but it is inconsistent with, and an evasion of, the decree,

BECAUSE

(1) It is necessarily based upon the proposition, that a return of said railroad stocks to the original assignors is inequitable and unfair; whereas, this decree expressly declares the contrary;

(2) It necessarily asserts that the Securities Company is the real, substantial owner of the stock; whereas this decree asserts the contrary;

(3) The decree adjudged that even the *holding* of the stock by the Securities Company was illegal—and this bound the stockholders of the Securities Company as well as the corporation itself.

Whatever interest the Securities Company had in the stock, it held as trustee for the stockholders of the Securities Company.

> "It is a trust fund held by the corporation as a trustee. * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership."
>
> *Farrington vs. Tennessee*, 95 U. S. 686.

If the corporation's *holding* as trustee for its stockholders was illegal, and because of that illegality it was stripped of its power to vote or collect dividends or exercise influence, how could its mere transfer of that stock without the leave of Court to all its stockholders put them in better plight or give them a better title than the corporation had?

> "* * A stockholder is bound by a decree of a "court of equity against the corporation in the en- "forcement of a corporate duty, although not a party "as an individual, but only through representation "by the company. A stockholder is so far an in- "tegral part of the corporation that in view of the "law he is privy to the proceedings touching the "body of which he is a member."
>
> *Hawkins vs. Glenn*, 131 U. S. 329.

By such transfer to *all* stockholders as such—the stockholders of necessity claimed by and through the Securities Company. The Securities Company held all the rights to the stock which they, as stockholders of the Securities Company had. As stockholders of the Securities Company they had no more superior title than the corporation had, *but solely the same as it had.*

By the *return* of the stock to those who had assigned, with the assertion that it was *illegal* for the Securities Company to have acquired the stock, and *illegal* for it to further hold it, the original railroad stockholder was reinvested with the entire title—legal and equitable—to his stock, which he had *before* he assigned to the Securities Company, with the same rights he *before* had of voting, collecting dividends and exercising influence. His title is not of and through the Securities Company, but superior to it. He receives

not as a stockholder of the Securities Company, but as the party who assigned railroad stock to it.

Your decree was to bring about, and, if carried out, it would bring about, the dissolution and suppression of the illegal combination by the undoing of what had been done, and the return to the original assignors of the railway stocks each had assigned to the Securities Company. This was a complete disintegration of the combination. It did not treat as legal or lawful the assignments of the stock to the Securities Company, but, on the contrary, denied that, and it did not only what would effect the dissolution and suppression of the illegal combination, but that which was eminently fair, that is, gave back to each individual exactly what he put into the combination, and thus allowed no one whatever to gain by reason of the illegal combination.

(XI) Your decree did as a fact tie up said stock and rendered it in the hands of the Securities Company unmarketable, so that no prudent person would have purchased the same for anything like its value.

You had declared that the acquisition and holding of the stock by the Securities Company were both illegal, and you denied to that Company the rights of an owner of the stock. You had taken care to give it permission to dispose of the stock in one way, and one way only.

Did not this prevent the Securities Company from selling the stock?

How could it have demonstrated to a purchaser that the purchaser would receive an absolutely good title, untainted by any illegality, and with full rights of ownership, when the Securities Company, who was the vendor, had been brought into court on account of its holding such stock, alleging that both the acquisition and such holding were illegal, and the court had decreed that it was illegal, and had taken away from the Securities Company the right to vote the stock or collect dividends thereon or in any way to act as its owner?

If it could not have given an untainted title, with all rights of ownership, to a purchaser, how can it possibly do this by distributing it to its stockholders?

(XII) *The Northern Securities Company cannot hold this stock and prevent our relief under the doctrine of in pari delicto.*

This court, in that portion of its decree which permitted and authorized the return of the stock to the original assignors, evidently ruled that that doctrine was inapplicable, because if it had been, the court would not have made the order that it did—would not have aided the assignors of the stock to regain them.

In pari delicto means that the court will not give assistance to either of the parties to an illegal scheme, when it is apparent that the plaintiff must rely upon the illegal scheme for his relief. It is enforced as if *sua sponte* by the court. It is never enforced to benefit a party to a scheme who has acquired possession of the property in dispute and thus enabled him to keep property which he honestly does not own, but it is applied by the court in certain cases on the ground that a court of equity will not aid any one who comes to it

with hands soiled with the marks of an illegal scheme, upon which illegal scheme he relies for relief.

The Decree Read in the Light of Your Opinion.

So far we have considered the words of the decree and have not used the Opinion of this Court.

The decree of itself seems clearly to demonstrate the foregoing propositions.

But now let us put this beyond controversy or dispute by referring to the Opinion:

Your conclusions and findings of fact in the Opinion under the early English practice of Courts of Equity would have been incorporated in the decree: under our practice they have the same weight as if they were in the decree.

We *should* then read the decree as if it recited the said *findings*. (*Putnam vs. Day*, 22 Wallace 66.)

You had already in your opinion decided:

p. 346 "In short, the Court may make any order "necessary to bring about the *dissolution* or "suppression of an illegal combination that "restrains interstate commerce."

And that

p. 360 "The Court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results —such results as law and justice demand."

You found:

pp. 325, 326.

> "Under the leadership of the defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railway corporations . . . combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should *hold* the shares of the constituent companies . . . . : that pursuant to such combination the Northern Securities Company was organized as the *holding* corporation through which the scheme should be executed; and under that scheme such holding corporation has become the *holder—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern , . . . "

p. 346

> "The Securities Company is itself a part of the present combination; its head and front; its trustee."

pp. 353, 354.

"It was said in argument that the circumstances under "which the Northern Securities Company obtained the stock "of the constituent companies

> "imported simply an investment in the stock of other corporations, a purchase of that stock, which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress.

"*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was, *not, in fact*, one of that kind.

"However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.

"*In his testimony he was asked, 'Why put the stock of both these (constituent companies) into one holding company?' He frankly answered. In the first place, this holding company was simply a question of custodian because it had no other alliance.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as* custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, * * *

You at length went over the decree—analyzed it and attentively considered it, and after so doing you said:

P. 354, 357.

> "The decree, if executed, will *destroy, not the property interests of the original stockholders* of the constituent companies, but the powers of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which if done, would restrain inter-state and inter-national commerce."

Conclusions.

From the foregoing—

(1) The words of the decree itself—

(2) The decree read as if it contained the findings of fact hereinbefore cited—

(3) The decree interpreted by this Court—

(4) The decree read in the light of your opinion—

can you doubt that—

the Court found:

> That the Securities Company was organized by the Combination solely as an instrumentality through which to carry out for them their illegal scheme to restrain trade and commerce:
>
> > That it was an indispensable part of the scheme that a majority of the stock of the two railroad companies should be assigned to the Securities Co. so that the Securities Company might manage both railroads, if it did not secure a majority of each stock it could not control said railroads:

That such stock was transferred to it, and the Securities Company became *not* the lawful absolute owner, but simply the holding company, the custodian or agent or trustee of the same for the persons who assigned it:

That the acquisition by the Securities Co. of such railroad stocks was illegal and that it was also illegal for the Securities Co. to even hold such stock:

That all of said stock was acquired and is now held by the Securities Company in virtue of the illegal combination:

That the Securities Company, being the illegal holder or custodian of this stock, the Court denied it the right to vote or collect dividends on the same or exercise any control over either corporation by reason thereof:

The Securities Company thus simply held—and even the *holding* was illegal—these stocks without the rights, however, which made them valuable—*i. e.*, vote; collect dividends; exercise influence.

That if in form it was a purchase of the railroad stocks by the Securities Company it was not so in fact. It received the stocks merely as a holding company, as custodian to carry out the scheme.

Authorization for Return of Stock.

Seeing the dilemma, this Court, following its own conclusions and its own interpretation of the effect of its decree, authorized the return of the stock to the persons who assigned it to the Securities Company.

This was the effective means to disintegrate and destroy the combination.

There would, when this was done, be no joint holdings of either of the railroad stocks—especially no joint holdings of the two railroad stocks by the same persons.

The majority of the stocks of both railroad companies would not be in the same hands.

While the railroad stocks were returned to their original owners, each held *only* the *original* stock in the one railroad he assigned to the Securities Company.

In so returning the stock, the title of each assignee to said stock was not by or from the Securities Company, nor did he rely upon any title of the Securities Company to the stock, but the title of each assignee was superior to, and independent of, and prior to, the holdings of the Securities Company, and the Securities Company simply handed back what each railroad stockholder had given it, and it did this with the authority of this Court to sanction and approve it.

(And from these facts is it not plain that the Securities Company cannot distribute these stocks to its own stockholders and give them an absolute title to the same?

To do so would necessarily be to contradict your foregoing conclusions that the Securities was *not* the absolute

owner of the stock—for only as such owner could it distribute. It would also be to take from the original stockholders of the constituent companies their right to a return of their stocks, and to give these stocks to others and compel us to accept in lieu other stocks.)

Interpretation by This Court of Its Decree.

The interpretation this Court, before its decree was promulgated, gave as the meaning of its own decree, and should now be absolutely controlling:

You then said that

> "The decree, *if executed*, will destroy, *not the property* interests of the original stockholders of the constituent companies, *but* the *power* of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which, if done, would restrain inter-state and inter-national commerce."

You anticipated something done in pursuance of the decree—for you in your mandate expressly gave power to the Circuit Court

"to *proceed* in the execution"

of it.

And you had just declared the consequences of it

"if executed."

Remember now your own finding of fact, that the Securities Co. was organized for an *illegal* purpose—that it acquired the stock *illegally* and held it for an illegal purpose, and that it *held it* merely as custodian, and not as lawful owner, and then read the above sentence.

It is simply incredible that this clause can be misunderstood if it is only given the meaning which all its words demonstrate. Read in the light of your opinion, no one can be excused if he seeks to minimize or change its import.

Let it speak for itself and no doubt exists.

(1) It speaks of the whole decree which includes the *return* of the stocks.

(2) It speaks of the "*execution*" of the whole decree which includes the return of the stocks.

(3) Such execution will *not* (it says) destroy "the property interests."

Whose property interests?

The decree says:

"The original stockholders of the constituent companies:"

What were the

"constituent companies"

referred to?

The Northern Pacific and the Great Northern Railroad Companies.

Who were the original stockholders?

Those who assigned to the Securities Co., including appellants.

As the case then stood, the Northern Securities Company was of record the apparent owner of these railroad stocks.

The Court did not deny that the decree would destroy the unlawfully acquired powers of the Securities Company, but only that it would not destroy the property interests of

"the original stockholders of the constituent companies."

Now what property interests had the original stockholders of the constituent companies in and to the stocks of those companies?

Evidently none, if the Court of Appeals is right that the Securities Company was the lawful, absolute owner of all the stocks of said constituent companies, and that the original stockholders therein had parted with their entire title to the same.

If the Securities Company was the lawful owner of the stocks, then it was senseless to talk about the decree not effecting the property interests of the original stockholders in these stocks. It is to convict this Court of error in its own construction of its own decree made prior to the promulgation of the same.

You say it will mean one thing:

The Court of Appeals says it means another.

If the Securities Co. was regarded as the lawful, substantial owner,it is inconceivable that this court could have said:

(a) *Its powers* as the owner of the stocks in these railroad companies was not destroyed when it struck down the right of the Securities Company to either vote or collect dividends on, or to exercise influence by reason of, the holding of such stocks, and rendered such stocks in its possession utterly valueless:

(b) But this court affirmatively said that the property interests of the original stockholders in the constituent companies were not destroyed by the decree, and it of necessity thereby declared that the original stockholders in the constituent companies were the *real* owners of said railroad stocks; and that,

(c) The Securities Company was nothing but their custodian with the illegally acquired powers to vote, collect dividends and exercise influence; and,

(d) It was these illegally acquired powers which the court struck down, and the striking down of which in the hands of the Securities Company did not destroy the property interests of the original stockholders; but,

(e) The court protected these interests in this decree, for it authorized the return of said stocks to the said original stockholders, reinvested with all the rights of ownership, including the right to vote, collect dividends and exercise influence, and it permitted no other disposition whatever by the Securities Company of such stocks.

What were the

"powers of the *holding* corporation"

which the decree admits were destroyed?

The *powers* incident to, and growing out of, the holding by the Securities Co. of the stock of the constituent companies for an illegal purpose.

These powers necessarily included:

(a) Continued holding of the stocks:

(b) Rights to vote—collect dividends on, and exercise influence by reason of, such railroad stocks.

If the Securities Company was the real, substantial owner of the railroad stocks, would not the decree and the denial of the rights to hold—or vote—or collect dividends on, or exert influence by reason of, so owning such stocks

"destroy property interests?"

What would be left of the stock if it could not be voted or dividends collected or influence exerted?

What would be its value?

If, on the contrary, the Securities Company was not the real, substantial owner of the railroad stocks, but held them as custodian for the members of the combination, *i. e.*, original stockholders of the constituent companies, with the powers as registered holder of the stocks to vote, collect dividends thereon and exercise influence by reason of such stocks on the said two corporations, in pursuance of the scheme of the combination, then the denial of the right of the Securities Company to so vote or collect dividends or exercise influence, but at the same time also authorizing the return of the stocks to the original stockholders from whom it received them, was not a denial of the property interests of the original stockholders.

Judge Dallas on your opinion and decree.

Judge Dallas' conclusions as to what this Court decided is in the following words:

> "Some phrases in that opinion, if considered separately, and without reference to the precise subject which was under investigation may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the require-

ments of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.' 193 U. S. 357. We have been asked to infer from this statement in the opinion that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed."

(A) What the learned judge calls "phrases in that opinion,"

were repeated statements of conclusions by this Court in a connected chain of reasoning which led up to what he calls another "phrase," but which you evidently thought was your final conclusion that

> "The actual nature of the transaction which was *only* to organize the Northern Securities Company as a holding company in whose hands, *not as a real purchaser or absolute owner*, but simply as custodian, were to be placed the stocks of the constituent companies."

This court sharply divided, as we have shown ante pp. 4 to 40, on this identical question of whether the Securities Company was the

"real purchaser or absolute owner"

or

"simply custodian"

of the stocks.

You put your decision on the ground that the Securities Company was *not* such

"real purchaser or absolute owner"

but

"simply custodian".

and the majority of the Court of Appeals speaks of this conclusion of yours as

"phrases"

"*considered* separately and without reference to the precise subject which was under investigation."

It says of that conclusion that considered separately it

"may seem to sanction the interpretation which the appellees have sought to put upon it:"

but that the opinion

"when read as a whole"

shows quite evidently it was not intended to solve such question.

Now reading Mr. Justice Harlan's opinion *as a whole*, which starts on page 317 of 193 U. S., that Judge, from page 317 to page 320, states the parties to the case and quotes in full the Sherman Act.

On page 320 he states:

"Let us see what are the facts disclosed by the record."

These facts, he then proceeds to find and state from page 320 to the bottom of page 325.

Then on pages 325 and 326 he states:

"Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants, Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railroad corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive on an agreed basis of value, shares in the holding corporation; and pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed.

"And under that scheme such holding corporation has become the *holder,—more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern. The stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation."

On pages 327 and 328 the court discussed the consequences resulting from this scheme and combination, and on page 328 asked the question:

"Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?"

It is thus plain that Mr. Justice Harlan called the preceding findings by him

"the case made by the record,"

and as showing

"the controlling questions raised by the pleadings and proofs."

From pages 328 to 334 is taken up with a discussion of the decisions of this court on the Anti-Trust Act.

At the bottom of page 333 the court took up the averment of the Northern Securities Company that Congress did not have the power to legislate in reference to the owhership of stock in a state corporation.

On page 334 the Judge said:

"It is unnecessary in this case to consider such abstract, general questions."

Then on pages 334 and 335 the contentions in reference to what constitutes inter-state commerce are discussed, and how far Congress may legislate in reference thereto:

The power of Congress under the Commerce clause is then discussed, and on pages 337, 338, 339, 340, 341 and 342 is a discussion of the cases on the question of a combination to control trade; on pages 342, 343, 344, 345, 346, 347, 348 and 349, the power of Congress to pass the Sherman Act.

On pages 351, 352 and 353, the consequences of an adverse decision are considered:

Then on pages 353 and 354 this court concluded as follows:

* * * * *

"It is said in argument that the circumstances under which the Northen Securities Company obtained the stock of the constituent companies.

"Imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden, by the charter of the company and could not be made illegal by any act of Congress.

"*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was *not, in fact*, one of that kind.

"However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.

"*In his testimony he was asked, "Why put the stock of both these (constituent companies) into one holding company?" He frankly answered. 'In the first place, this holding company was simply a question of custodian because it had no other alliances.' That disclosed the actual nature of the transaction, which was*

only to organize the Northern Securities Company as a holding company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing (or to use the words of this Court in the *United States vs. Joint Traffic Association*) "Smothering" competition between the lines of the two railway carriers."

These extracts are what the court below called

"phrases"

in that opinion.

The *whole opinion* is in harmony with such "phrases" and not as the learned Judge seemed to think in discord with and dissent from them.

Judge Dallas says:

(B) "The right of property in those shares was not effected by that decree";

it only effected the use of the stock.

But this is a singular inference:

The decree found:

(1) That the defendants, which included the Northern Securities Company entered into a conspiracy which the Sherman Act "denounced as illegal:"

(2) That all the railroad stocks now *claimed* to be held and owned by the Securities Company

"was acquired and is (are) now held by it in *virtue* of"

such conspiracy.

If so, the acquisition of the stock was illegal, for the decree included its

"acquisition."

So, also, was its holding, for the decree said

"and is now held in virtue of

such conspiracy,

To decree that the Securities Company acquired and held all its railroad stock

"in virtue of,"

that is, by reason of, and for the sake of and the use of an illegal conspiracy, is certainly to attack its title to that property.

If it was illegal for the Securities Company to acquire the stock and illegal to hold it, how could it have a title to it?

Did not such decree "affect" its property rights?

Then because the stock was so illegally acquired and held, the decree denied the Securities Company the right to vote or collect dividends on, or exercise influence.

All these are property rights of a stockholder.

To deprive one who holds stock of them is certainly to "affect" his

"property rights."

(C) The quotation from Judge Harlan's interpretation of the decree is said by Judge Dallas to mean only that—

"by that decree no property interests *had been* disturbed."

(1) Judge Harlan did not speak of what

"*had been* destroyed,"

but his language was:

"The decree if *executed will* destroy."

He was speaking of the effect the decree would have when it became the decree of the Supreme Court, and when executed as such Supreme Court decree.

(2) Judge Harlan did *not* say that

"no property interests had been disturbed"

but he identifies and particularizes.

He says:

"the property interests of the original stockholders of the constituent companies."

He then distinctly recognizes (does he not) that

"The original stockholders of the constituent companies"

had *property* interests in these stocks, else why would he say those property interests would not be destroyed?

Now what rights does he recognize that the Securities Company had in those railroad stocks?

His language is:

> "The *power* of a holding corporation as the instrument of an illegal combination, of which it was the master spirit, to do that which if done, would restrain inter-state and inter-national commerce."

It simply has a

"power,"

and such power is in

"the *holding* corporation as the *instrument* of an illegal combination."

What was the *power?*

To vote the stocks—

Collect dividends on them—

Exert influence by reason of them.

Now let me read your finding of fact that the Securities Company was

"not (as) a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies,—such custodian to represent the combination formed between the shareholders of the constituent companies."

As the Securities Company—

Was not the real purchaser—

Was not the absolute owner—

But simply the custodian for the original stockholders of the constituent companies,

Therefore

The Securities Company has simply powers—powers of a mere holding company—and as an instrument of an illegal combination it will exercise the powers.

Depriving the Securities Company of such illegal powers does not deprive the original stockholders of the railroad company of their property interests in these stocks, for this very decree authorizes the return of such stocks to them with all the attributes of ownership.

Judge Dallas uses the word

"disturbed;"

Judge Harlan uses the word

"destroy."

Judge Harlan knew the decree would *destroy* the *powers* of the Securities Company in and to the stocks.

How could Judge Dallas, with all these findings of fact —the finding by the decree of the *illegality* of the acquisition, as well as the holding of the railroad stocks—with this interpretation of that decree by Judge Harlan—the unlawful conspiracy staring him in the face, and also the unlawful purpose for which the Securities Company was organized, *actually find* that the Northern Securities Company was a lawful corporation—organized for a lawful purpose—and had lawfully acquired and lawfully, absolutely owns these railroad stocks?

How could he so misapprehend such plain language as this court used—which distinctly found exactly the contrary of his own conclusions?

I.

By the affirmance of this Court this decree in the Government case became the decree of the Supreme Court of the United States and binding upon all parties and privies and other courts.

The meaning of the decree is to be ascertained from its words and your own opinion, and the only liberty or authority any lower Court has is

"to proceed in the *execution thereof*,"

This has been distinctly ruled in different cases, but is perhaps nowhere more aptly stated than in

In re Potts, Petitioner, 166 U. S., 265, where the court said:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, *whatever was before this court, and disposed of by its decree, is considered as finally settled.* The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

In *Durant vs. Essex County*, 101 U. S., 555, you said:

> "On a mandate from this Court affirming a decree the Circuit Court can only require our order and proceed with the execution of its own decree as affirmed. *It has no power to rescind or modify what we have established.* Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the

appeal to us was an affirmance of what had been done below.

"*After the appeal had been taken the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down.*"

In *Sandford Fork & Tool Co.*, Petitioner, 160 U. S., 247:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. That Court cannot *vary it* or *examine it for any other purpose* than execution, or give *any other* or *further relief* or review it even for apparent error upon any matter decided on appeal; or *intermeddle* with it further than to settle so much as has been remanded. * * * *The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and * * * it is for this Court to construe its own mandate and to act accordingly.*"

This was cited and approved in *In re Potts*, 166 U. S. 265.

If there be a controversy over the meaning of your mandate and decree that is to be settled by the opinion.

"delivered by this court at the time of rendering its decree:"

If your mandate and decree needs construction, it must "be for this court to construe its own mandate:"

If the plain meaning of the plain words used by this court are to be departed from, it cannot be that any authority less than this court can authorize that.

To permit a construction by the lower Court which disregards and renders nugatory the plain language of your opinion, which finds the essential facts in controversy directly contrary to the finding of this court, and then approves of a mode of action by the defendant in disregard of, and different from, that pointed out by you, is to substitute the judgment of the lower court for your own and destroy the supremacy of this, the highest court in the land.

As was said in *Durant vs. Essex County*, 101 U. S. 555, the Circuit Court

"* * * has no power to rescind or modify what *we* have established,"

not even if as you said *supra*, there is

"apparent error"

in our decision.

II.

The opinion of the Supreme Court is part of the record and may be freely resorted to to determine what this court has decided.

This Court has itself so decided.

In re Potts, 166 U. S. 265 the Court said:

"The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by the mandate."

In the *National Foundry Company vs. Oconto Water Supply Company*, 183 U. S. 217, the Supreme Court considered the question whether the plea of *res adjudicata* applied in the case then pending, and then said, p. 234:

> "In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such case, it must be ascertained who were the parties to that case, what were the issues therein presented for adjudication and what was decided thereon. It is elementary that if from the decree in a case there be uncertainty as to what was really decided, resort may be had to the pleadings and to *the opinion of the court* in order to throw light upon the subject."

In *Baker vs. Cummings*, 181 U. S. 124, the court looked at the opinion of the lower court to determine the ground upon which the case had been decided.

To the same effect see

Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S. 683–690.

In the *Southern Pacific Co. vs. the United States*, 183 U. S. 519–532, the main question was whether a certain map had been filed, and the court examined the opinion of the court below to ascertain what the facts were:

"This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the cases were tried. That fact having been determined must be taken in the present suit as not open to dispute."

Whenever the question is as to what was decided in the prior case, and the decree is not clear, resort may be had to the opinion.

United States vs. Norfolk Ry. Co., 114 Fed. Rep. 686.

In *Russel vs. Russel*, 129 Fed., 434-438, (C. C. D., N. J., April 15, 1904,) J. Archibald said:

"But the appeal removed the case in its entirety to the higher court, and it is the judgment there rendered that must control, which has to be determined by the views expressed by the court in the opinion filed. * *

"The ultimate conclusion reached in the former suit, as expressed in the opinion of the Court of Errors and Appeals, must therefore determine how far it is a bar in this. Looking into the opinion, it unquestionably disposes of the complainant's right to reform by parol the anti-nuptial agreement, and have it specifically enforced."

To determine what questions were decided and on what the decree was rested, the opinion of the Court deciding the case may be examined.

West vs. Brashear, 14 Peters, 342.
DeSollan vs. Hanscome, 158 U. S., 221.
Cromwell vs. County of Sac, 94 U. S., 359.
Strong vs. Grant, 2 Supreme Ct. (D. C.) 222-223.

Indeed, under our practice, the opinion *must* be examined, for it, as a rule, and not the decree or judgment, shows on what the Court passed.

As the Supreme Court of Wisconsin said in the *Town of Fulton vs. Pomeroy*, 111 Wisconsin, 668:

> "The opinion of this Court is not a mere statement of reasons like an opinion of the trial court, but constitutes the findings of fact and conclusions of law upon which this Court bases its judgment; it is a decision as well as an opinion, and is the only paper from which it can be ascertained what are the conclusions of this Court either upon the facts or upon the law."

In *Barton's Suit in Equity*, page 150, he states that formerly in England the decree in equity included the pleadings and the evidence, but that now the decree in England

> "merely recites the substance of the pleadings and the facts on which the court founds its judgment. In the United States the decree usually contains a mere reference to the antecedent pleadings, without embodying them, *or any special facts* upon which it is rendered."

Rule 86 of the Supreme Court of the United States in Equity forbids the decree reciting the pleadings or report of master, and then gives the beginning of a form which indicates the order of the court alone.

In *Putnam vs. Day*, 22nd Wall. 66, the Supreme Court of the United States in speaking of what constituted the record in the case, said:

"It is true that in our practice the final decree does not contain a summary of the facts as it did in the English practice, which summary was examinable on a bill of review; but to countervail this absence of statement in the decree we have adopted the practice of looking back of the decree into the whole record of the pleadings and proceedings, including orders, masters' reports, &c., together constituting what is generally regarded as the record in the cause and necessary to be examined in order to a proper understanding of the decree itself. This makes the record similar to that of a common law action, the decree being the judgment of the law upon the allegations of the parties and the conclusion which the Court deduces from the proofs. But the conclusions of fact deduced from the proofs are not spread upon the record *in extenso* unless through the medium of a report made by a master or commissioner."

After citing the 86th rule in equity, the Court further said:

"The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the Court more clear and specific. The record thus made up constitutes the basis of examination on a bill of review, but it never contains the proofs adduced in the cause."

If the Court distinctly finds the facts in its opinion, as the Supreme Court did in Judge Harlan's opinion, why are not these as much part of the record as the finding of facts by a master?

It is believed that the practice in the Supreme Court of United States as evidenced by the opinions of that Court its form of decree and its mandate, conclusively show (as per the opinions hereinbefore cited) that the opinion of the Court

finds the facts, and this finding of facts is as conclusive as if it was formerly recited in the decree.

III.

As parties by representation in the Government Case, we are entitled in our own right to plead or give in evidence against, and as binding upon, the Securities Company, the conclusions in that case on the same questions which arise in this—

Even if—:

(a) The cause of action in the two suits is different:
(b) The scope of the prior action included other questions:
(c) The testimony in the two suits is different:
(d) The parties were different if the present parties were parties to the Government Case:
(e) The form or measure of relief in the two suits is different:

In *Cromwell vs. County of Sac*, 94 U. S. 352, the doctrine is thus stated.

> "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect is an estoppel in another action between the same parties upon a different claim or cause of action.
>
> "In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claims or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was of-

fered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for the purpose. * * If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence.

"But where the second action between the same parties *is upon a different claim or demand, the judgment* in the prior action operates *as an estoppel only as* to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In the *Lumber Company vs. Buchtel*, 101 U. S. 638–639, the Supreme Court of the United States said:

"The finding of the referee upon which the judgment (in the first action) was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no respresentations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every

defense requiring the negation of this fact is met and overthrown by that adjudication."

In *Southern Pacific Railroad Co. vs. United States*, 168 U. S. 48, the court elaborately reviewed all the cases and said:

"It is said, however, that under the pleadings and evidence in this *collateral* proceeding, it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872 filed by the Atlantic and Pacific Railroad Company and to show that they were not maps of definite location.

"Is this position consistent with the settled rule of law as to the conclusiveness between the parties and their privies, of the final determination by a court of competent jurisdiction of matters *put in issue by the pleadings?*

"The importance of this question, independently of the magnitude of the interests to be effected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, *cannot be disputed* in a subsequent suit between the same parties or their privies; *and even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to

secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

"Among the cases in this court that illustrate the general rule are *Hopkins vs. Lee*, 6 Wheat, 109-113; *Smith vs. Kernochen*, 7 How., 198-216; *Thompson vs. Roberts*, 24 How., 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co. vs. Sickles*, 24 How., 333, 340, 341, 343; *Russell vs. Place*, 94 U. S., 606, 608; *Cromwell vs. Sac County*, 94 U. S., 351; *Campbell vs. Rankin*, 99 U. S., 261; *Lumber Company vs. Buchtel*, 101 U. S., 638; *Bissell vs. Spring Valley Township*, 124 U. S., 225, 230; and *Johnson Company vs. Wharton*, 152 U. S., 252.

* * * *

"The latest expressions of opinions by this court on this question are in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S. 683, 691, and *New Orleans vs. Citizens Bank*, 167 U. S. 371, 396. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the boundaries of certain mining claims, alleged to have been legally located and to have belonged to the former company precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located—the court observing that 'a judgment

by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest,' the essence of estoppal by judgment being that 'there has been a judicial determination of a fact, and the question always is, has there been such determination, and not, upon what evidence or by what means was it reached?'

"In *New Orleans vs. Citizens Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue, duly raised by the pleadings, whether the bank was exempt by contract with the state from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: 'The estoppal resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of a second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.'

"*In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic and Pacific maps of 1872 as maps of definite location, was a matter in issue and determined as between the United States and the Southern Pacific Railroad Company. That that matter was in issue and was actually decided in the former cases, is too clear* to admit of doubt. That it was material is equally clear."

The rule is laid down in *Black on Judgments*, as follows, (Section 610, part 2):

> "But it often happens that some one point (such as the employment of an agent) may be put in issue in two suits between the same parties in which, nevertheless, the causes of *action are as widely different as it is possible to imagine them; and the first judgment will be held conclusive of that point in the second suit.*"

In *Burlen vs. Shannon*, 99 Mass. 202, the Supreme Court of Massachusetts said:

> "When a fact has once been determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties, without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done.
>
> "The estoppel is not confined to the judgment, but extends to *all facts* involved in it, as necessary steps, or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'"

Even if the prior case was actually decided on another ground which made unimportant the point or question passed on, yet this point or question raised by the pleadings and once passed on, is conclusive.

This was directly decided by this Court in the case of *Railway Co. vs. Schutte*, 103 U. S., 143, where you said:

> "The point was directly made by the pleadings and as directly passed on by the Court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

In *Black on Judgments*, Vol. II, section 609, the rule is laid down:

> "It is a fundamental and unquestioned rule that a former judgment when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was *directly* involved *within* the issues made in such former action, and which is shown to have been *actually* litigated and determined therein."

The former decree is not conclusive of any matter which was merely incidentally cognizable in the former action or of any matter to be only inferred by argument.

Duchess of Kingston case, 20 Howard State Trials, 538.

But it is conclusive, says the Supreme Court of Massachusetts, in *Burden vs. Shannon*, 99 Mass. 200 on

> "all facts involved in it as necessary steps or the ground work upon which it was founded."

It is conclusive on whatever was the matter in issue or points in controversy upon the determination of which the finding or verdict was rendered.

Black on Judgments, Sec. 614 and cases cited.

The appellants, as parties by representation in the Government case, are entitled in their own right to set up and assert the decree in that case as against the Northern Securities Company in this case.

Whenever a final decree is entered, especially by the court of last resort, every party to that decree, whether plaintiff or defendant, whether personally present or merely by representation, is of right entitled to set up and plead that decree in all subsequent litigation between the same parties affecting the same property. The decree fixes and forever settles certain questions, and such judgment, it is the right of each party or privy to set up as between himself and the plaintiff, and also between himself and any co-defendant:

Thus Mr. Justice Story in his work on Equity Pleadings, Sec. 372, says:

> "* * * for then (after decree) the rights of the parties are ascertained; and the plaintiff and the defendant *are equally entitled to the benefit of the decree* and equally have a right to prosecute it."—

Dan. Ch. Pl. Pr., Vol. 2,* page 1539 states the ruleas follows:

> "But although the general rule is strict, that, before decree, a defendant cannot sustain a bill of revivor, the case is different after decree, and the suit may be revived at the instance of a defendant, if the plaintiffs, or those standing in their right, neglect to do it; *for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.* o o o But it seems to be now held, that it is not in cases of account only that a defendant can revive, but that he may do so wherever he has an interest. He must, however, have some interest under the decree; that is an interest in the further prosecution of the suit."

In *Winton's Appeal*, 97 Pa. 393, a decree was entered and affirmed by the Supreme Court directing a conveyance to be made by the defendant upon the payment of certain monies by plaintiff. The plaintiff refused to carry out the decree, and the defendant filed a supplemental bill to enforce it. The Court sustained the bill, saying:

> "That a bill may be filed for such purpose is well settled. It is true it cannot vary the principle of the decree. Its province is to carry out the decree, and to give full and complete effect to it as it exists: *Hodson vs. Ball*, 1 Phil. Ch. 177, *Adam's Equity*, 416, where several authorities are cited."

In *Griffin vs. Spence*, 69 Ga. 397, the Court states the rule as follows:

> "The bill may be exhibited by one not a party, or deriving title under a party to the decree, if he has similar interests, and cannot, without an execution of the

decree, obtain a determination of his own rights. An instance of a bill of this description is *State vs. Mayor*, 24 Ala. 701. A decree has been rendered for the abatement of a public nuisance, on a bill filed by the Attorney General in the name of the State. Citizens whose rights and interests were affected by the nuisance, and who were, therefore, concerned in its abatement, were permitted to intervene for the revivor and enforcement of the decree. And a decree which the complainant has suffered to abate, may be revived at the instance of a defendant, if the complainant or those standing in his right neglect to do it; '*for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.*' 2 Dan. Ch. Pr. 1539. When an abatement occurs before decree, the suit can be revived only by the complainant or those claiming under him, since no one can be compelled to commence, renew or revive a suit against another. 2 Dan. Ch. Pr. 1539 *Griffith vs. Bronaugh*, 1 Bland Ch. 547. After decree, when the rights of the parties are ascertained, if the defendant has an interest in the execution of the decree, or if he has rights involved which require a revivor, he will be allowed to revive it. *Benson vs. Wolverton*, I. C. E. Green (16 N. J. Eq.) 110 *Peer vs. Cookerow*, 2 Beasley, (13 N. J. Eq.) 136."

It is not material whether the scope of the former action was wider or narrower than that of the present suit, the fact that additional stocks were involved in the former action does not effect the conclusiveness of the finding in the former action on the present Northern Pacific stock now in dispute and which was also in dispute in the former action.

Black on the Law of Judgments, paragraph 609, Section 1.

The former judgment is still conclusive though the evidence in the subsequent case may be different. If the question was once in issue and was actually determined by a competent court, it cannot be further litigated and it is equally conclusive when given in evidence as if it was specially pleaded by way of estoppel.

Black on Judgments, paragraph 609, Section 2.

As this Court said in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S. 691.

"* * *the question always is*, has there been such determination, and *not* upon what evidence or by what means it was reached."

Southern P. R. R. Co. vs. U. S., 168 U. S. 48.

It is not necessary that all the parties to the original litigation (*United States vs. Northern Securities Company*) should be the same in the subsequent litigation.

The only thing required is that the parties in the second litigation were parties to the litigation, the decree in which is relied upon. If this were not so, the effect of a former recovery could always be avoided by adding a new party.

Thompson vs. Roberts, 24 Howard 240.

Smith vs. Kernochen, 7 Howard 217.

Wilson vs. Buell, 117 Ind., 315-318.

Wells on Res Adjudicata, Sec. 35,

Lawrence vs. Hunt, 10 Wendell, 80.

This includes all persons who are privies and in whose interest the suit is brought or defended.

Freeman on Judgment, Sec. 154.

"Hence all privies whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

1 Greenleaf Ev. Sec. 523.

It is immaterial that a different form or measure of relief is asked in the second action.

Green vs. Bogue, 158 U. S., 478-502.

Where there are several grounds of recovery or defence on which the decree may have been rested, said decree will be conclusive on the specific findings, which led up to the proposition, on which the Court decided the case, and what that ground was may be determined by evidence *aliunde* where the decree itself is silent on it.

Russell vs. Place, 94 U. S. 606.

De Sollar vs. Hanscome, 158 U. S. 216, 221.

Flint Natl. Bk. vs. City of Covington, 129 Fed. Rep. 798.

Hawes vs. Water Co., 5 Sawyer, 287.

The conclusions of this Court in the Government case were as conclusive between the co-defendants—the stockholders of, and the Northern Securities Company itself, as if these stockholders had individually been parties plaintiff or defendant to the litigation.

In *Corcoran against the Chesapeake Canal Company*, 94 United States 741-744, this court said:

"It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

"The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the Court and passed upon by its decree. * * *

"It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. * * *

"But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee, vs. Stewart, et. al.*, 93 U. S. 155, and the authorities there collected."

IV.

The former opinion and decree of this Court is conclusive even on this Court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second.

This Court said in *Roberts vs. Cooper*, 20 How. 467–481:

> "It has been settled by the decisions of this Court that, after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the Court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. (See *Sizer vs. Many*,16 How. 173; *Corning vs. Troy Iron Co.*, 15 How., 466; *Himely vs. Rose*, 5 Cranch, 515; *Canter vs. The Ocean Insurance Co.*, 1 Pet. 511; *The Santa Maria*, 10 Wheaton, 431; *Martin vs. Hunter*, 1 Wheaton; and *Sibbald et al. vs. United States*, 12 Pet. 488."

In *Barney vs. Winona, etc. R. R. Co.*, 117 U. S. 231, the Court said:

> "We recognize the rule that what was decided in a case pending before us on appeal, is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition."

In the recent case of *United States vs. Camou*, 184 U. S. 574, Mr. Justice Shiras said:

> "Upon this second appeal we have only to consider whether the Court of Private Land Claims reached its final decree in due pursuance of the previous opinion and mandate of this court. The decision there made is the law of the case, and is not open for reconsideration in the subsequent appeal. This subject was recently considered in *Illinois vs. Illinois Central Railroad*, 184 U. S. 77, and it was there shown that it is the settled law of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances for changes in its members."

To the same effect are:
Thompson vs. Maxwell, etc. Co., 168 U. S. 456.
Yazoo, etc, Ry. Co. vs. Adams, 180 U. S. 7
Great Western Tile Co. vs. Burnaham. 162 U. S. 343.
Chaffin vs. Taylor, 116 U. S. 567.
Clark vs. Keith 106 U. S. 464.
Supervisors vs. Kenniott, 94 U. S. 498.
Tyler vs. Maguire, 17 Wall 283.

V.

The appellants were by representation parties and privies in the Government case, and therefore are in their own right entitled to set up the findings and conclusions of this Court in that case as res adjudicata in any subsequent litigation between themselves and the Northern Securities Co. so far as reyards the issues raised and decided in that case.

Though Judge Dallas did not discuss, he assumes the correctness of this position,for he says,if you did pass on the question here in dispute he would bow to that decision.

We were parties and privies in the Government case: As—:

(a). Stockholders in the Northern Securities Co. and thus represented by it:

(b). One of a class there represented by Morgan, Hill and others:

(c). As *cestuis que trustent* of the Northern Securities Co., apart from the trust attaching to its stockholders as such, and there represented in this way by the Securities Co:

(d). As a stockholder in the Northern Pacific R. R. Co., who was a party in the Government case:

(A). As stockholders of the Northern Securities Co.

There cannot be any doubt that a corporation ordinarily as plaintiff or defendant in a case represents all its stockholders, and that such stockholders are not only not indispensable, but neither necessary nor proper parties to the litigation, but are bound by a judgment or decree against the Corporation.

In *3d Cook on Corporations, Section 750*, it is said:

> "In general, a corporation represents and binds the stockholders in bringing and defending suits which involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts."

(Section 750, p. 1934:)

> "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding."

In *Hendrickson vs. Bradly*, 85 Fed. Rep. 516, the C Court of Appeals (8th Circuit) said:

> "A stockholder of the company is equally bound and concluded for the reason that *he is an integral part*

of the coporation, as, *in contemplation of law*, 'he was before the court in all the proceedings touching the body of which he was a member.' *Sanger vs. Upton*, 91 U. S. 56; *Wilson vs. Seymour*, 40 U. S. App. 567, 22 C. C. A. 447, and 76 Fed. 678. As aptly said by Jackson, J., in *Stutz vs. Handly*, 41 Fed. 537:

'It cannot be relitigated in this case for the reason that the defendants, as shareholders, being represented by the corporation in that suit, have already had their day in court on this question.'"

In *National Foundry & Pipe Works vs. Oconto Water Company*, 68 Federal Reporter, p. 1007, the Court held:

"A stockholder of a corporation is so far a privy to a judgment against a corporation that he cannot attack the judgment in any collateral proceeding."

In *Wilson vs. Seymour*, 76 Fed. Rptr., 681, Circuit Judge Thayer, considering the question of *res adjudicata*, said that it was

"the well established doctrine that the stockholders of a corporation are in privity with the corporation as to all corporate matters, and in the absence of fraud are bound by a decree against the corporation * *."

In *Herman on Estoppel and Res Judicata* the law is thus stated, pp. 154-165:

"Every person whom the parties plaintiff and defendant represent in the suit are bound as privies by the

judgment. A corporation represents and binds the stockholders in all matters within the limits of its corporate power. * * *Among the fundamental powers of a corporation are those of bringing and defending suits affecting the rights and obligations of the corporation, in which it represents and binds the stockholders as fully as in the making of contracts.* In any ordinary action or suit against the corporation to establish and recover a debt the stockholders are neither necessary or proper parties; they are represented by the corporation; *and if they in their individual capacities are allowed to intervene at all, it can only be in the name of the corporation.* * * * *Hence, whatever concludes or affects a corporation binds and concludes all of its stockholders who compose the corporation,* and therefore a judgment against a corporation, unless it was procured by fraud or collusion, is conclusive upon the stockholders, as well as against the corporation and its property."

Secor vs. Singleton, 41 Fed. Rep. 725.

In the *Great Western Telegraph Co. vs. Purdy*, 162 U. S. 329, the facts were that the court had made a decree for a call or assessment upon all the stockholders of the corporation. Purdy was a stockholder, but he was not a party to the litigation except through the corporation which was a party, and in which suit the court decreed that there was necessity for, and there should be an order for a call or assessment upon all the stockholders of the company. The Supreme Court of the United States held that such a decree,

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> "was conclusive evidence of the necessity for making such assessment and to that extent bound every stockholder without personal notice to him."

This left the stockholder free in the action against him for the assessment to set up any individual defense or equity he might have against the suit which did not involve the consideration of the necessity of the assessment which the court had already determined, and which was conclusive upon him.

So in the case at bar. The Supreme Court of the United States settled finally the title which the Northern Securities Company held to the stocks of the Northern Pacific and Great Northern, and to the further fact that it was an equitable and proper mode of the practical dissolution of the Northern Securities Company to retransfer the stocks to the original parties who assigned them to the Northern Securities Company. The decree did not, however, pretend to settle any individual claim which any one stockholder as an individual, and not merely as a stockholder, might have, which did not contradict or impair the decree of the Supreme Court settling the question of title and authority to retransfer as aforesaid.

A like case in the Supreme Court of the United States, is *Hawkins vs. Glenn*, 131 U. S. 319. In a case to which Glenn was not a formal party a decree was made that the stockholders of the corporation should be assessed, and Glenn pleaded that he was not a party to the litigation and therefore was not bound. The court said:

> "Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is

bound by a decree of a court of equity *against the corporation* in enforcement of a corporation duty, although not a party as an individual, but only through representation by the company.

"A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body in which he is a member.

"*Sanger vs. Upton*, 91 U. S. 56, 58, in which case it is also said: 'It was not necessary that the stockholders should be before the court when it (the order) was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose.' As against creditors there is no difference between unpaid stock 'and any other assets which may form a part of the property and effects of the corporation,' (*Morgan County vs. Allen*, 103 U. S. 498, 509) and the 'stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained.' "

Glenn vs. Williams, 60 Maryland 93, 116,

In *Hancock National Bank vs. Farmers*, 176 U. S. 640, the court held that a judgment against the corporation bound the stockholders, even where they resided in different States,

and the individual liability of each stockholder might be enforced.

Same effect.

Whitman vs. Oxford National Bank, 176 U.S. 560.
Flack vs. Conn., 109, U. S. 371.

In *Hall vs. Hardon*, 95 Fed, Rept., 759, the doctrine is thus stated:

> "* * * the stockholder is so far an integral part of the corporation as to be privy to the proceedings against it. * * *"

and is conclusively bound by a judgment against the corporation.

Central Fruit Co. vs. Western R. R. Co.. 89 Fed. Rept. 24.

VI.

That the complainants in the present case were to some extent through the Northern Securities Campany represented in the Government case is undoubted, and appellees admit. Now how far and for what purpose were they so represented? The following shows the appellees' position:

> "In regard to such rights and interest as were or might have been held by the said plaintiffs as stockholders of this defendant in common with all other stockholders of this defendant and in proportion to their respective holdings of this defendant's stock, but not in regard to anything which might be the subject of claim by the plaintiffs herein or any of them adversely to this defendant or to its other stockholders."

According to this only

(1) As to such rights and interests as were "or might have been held"

by the plaintiffs as stockholders of this defendant in common with all other stockholders of this defendant:

(2) In proportion to their respective holdings of this defendant's stock:

(3) Not in regard to anything that may be the subject of claim by any one stockholder against the corporation:

Is this a correct statement of the rule?

One of the fundamental common law rights and duties of a corporation is to sue and be sued. When it sues or is sued the litigation involves corporate property rights or duties. In so far as its property or its rights or duties are concerned the corporation represents all its stockholders, and in one sense all the stockholders have one and the same interest in common and in proportion to their stock.

Where one becomes a stockholder in a corporation he and the corporation, by virtue of their relation as such, agree that the corporation shall defend for him all attacks on the corporate property rights or duties, and he virtually appoints the corporation as his agent with full authority to so do.

For example, replevin is brought against the corporation for personal property, or ejectment for real estate; here the question involved is the ownership by the corporation of the property, real or personal, and the judgment in favor of or against the corporation finally determines the title of the corporation to the property, and through it also of its stockholders who were prives and represented in the suit by the corporation. This must always be so, else after a judgment obtained against the corporation any one stock-

holder could again raise the question of title and there would be almost interminable litigation.

But if this be so as to the ordinary judgment in a controversy where the alleged individual owner of the property sues, it is evident, it must be equally true whatever the judgment be that the Court enters, provided it relates to the title of the property, the subject matter of the litigation. Thus, if in a suit of A. B. against the corporation, the Court determines that the corporation holds the property merely as trustee for A. B., the stockholders of the corporation are still just as surely bound as if the judgment had been flat against, or in favor of the corporation. The qualified nature of the judgment does not in the least detract from its finality or binding effect through the corporation on the stockholders. And whoever the plaintiff in the suit against the corporation touching its property may be, the result must always be the same as to the finality of the judgment against the corporation and its stockholders, provided always such plaintiff may rightfully raise the question of title to the property.

As the stockholders' claim to the property in the possession of the corporation must always be *through* the corporation, it does follow in ordinary cases where A. B., alleging to be an outside owner, sues, the corporation represents all the stockholders in common, and to the extent of their respective holdings and by one and the same title.

But if the suit last suggested be brought by one who does not claim title to the property, but who is lawfully entitled, as was the United States in the Government Case, to raise and have decided the question of how and by what title the corporation holds the property—whether as real owner or as trustee—here too of necessity the question of title when settled, necessarily binds the corporation and the stockholders.

Who the *cestuis que trustent* are can make no difference, for the court will have before it all persons who

through the corporation claim the property, whether they be stockholders or other persons.

The decision of the question, Did the Northern Securities Company hold these stocks as the owner or as trustee for A. B. C., of necessity raised the question of what the trust was and who are the *cestuis que trustent*, and that A. B. C. turn out to be not only the *cestuis que trustent* of the corporation, but also its stockholders, can make no difference. In both respects the judgment concludes all the stockholders and all persons claiming through the corporation as trustee of the stocks.

As it happens all the assignors of the Northern Pacific and Great Northern stocks are also stockholders of the Northern Securities Company, and hence are doubly bound by this decree.

In the case at bar the stockholders of the Northern Securities Company are all concluded, because the Northern Securities Company for them set up that it was the lawful *bona fide* owner of the stocks, and the Court held it was not, and here the question was a corporate one and within the scope of the power of the corporation.

But as the issues raised by the pleadings distinctly and emphatically raised as part of the one question, whether the Northern Securities Company was or was not the Trustee or Custodian of the stocks for A. B. C. who originally assigned the stocks and became stockholders of the Northern Securities Company, the decision of the Court that the Northern Securities Company was the mere Trustee of A. B. C. who were also stockholders of the Northern Securities Company, was equally conclusive and binding on all the stockholders of the Northern Securities Company, because the case distinctly raised that issue, and on it the stockholders were represented by the Northern Securities Company.

The corporation under the pleadings which distinctly charged it was a mere trustee, represented not only all its stockholders as such, but all its *cestuis que trustent*. As to

such *cestuis que trustent* it, as representing all its stockholders, denied in the pleadings the *cestuis que trustent* title, and thus was in hostility to the *cestuis que trustent* as such, though representing them as stockholders of the corporation aside from their trust relation to them.

The Northern Securities Company in the Government suit was defendant in two aspects:

(a) As a corporation representing its stockholders; and,

(b) As a corporation trustee, as charged in paragraph XI of the Bill.

Harriman and others, the original assignors of Northern Pacific stock, were also in two relations to the corporation:

(a) As stockholders in the corporation;

(b) As *cestuis que trustent* of the corporation.

The decree against the corporation that it was a trustee is not only a personal decree against it individually, but also against it as Trustee.

So far as the present case is concerned, it is unnecessary to prove that the Northern Securities Company was in court as trustee as well as individually, for that it was in court individually is certain. It is so charged in the Bill and it so answers. It now still so avers. As all the *cestuis que trustent* of the Northern Pacific and Great Northern stocks were also its stockholders, and became such by virtue of the certificates it issued to them, and which were based on, and really issued for, the Northern Pacific and Great Northern stocks, the judgment against the corporation binds them as stockholders, and as the decree was that it did not own ,but was custodian of the stocks, that is conclusively settled. The stockholders through the corporation denied the trust rela-

tion, and the Court decided against them, and in this respect undoubtedly the corporation represented them, and they through the corporation were in court, and therefore bound by the decree.

No one of the stockholders or *cestuis que trustent* of the Northern Securities could, after the Government case, maintain as against the Company that the Company really owned the Northern Pacific stock, because the Supreme Court on the issue joined found and decreed it did not so own it.

When one set of those stockholders, who also happen to be *cestuis que trustent* of the corporation, on a bill filed against the corporation, set up that the corporation holds a certain portion of the Northern Pacific stock as their trustee, the corporation cannot deny it, because in the Government case where the corporation represented its stockholders and its *cestuis que trustent*, the Court decreed that it did so hold.

Hence, we also clearly see that the latter portion of the qualification as to the extent to which the Northern Securities Company represented its stockholders like the first two is at least misleading.

This qualification is—

> "but not in regard to anything which might be the subject of claim by the plaintiffs herein, or any of them adversely to this defendant or its other stockholders."

This is not a correct statement of the rule.

A corporation always is a *trustee* for all its stockholders of all the property it owns, and this is a *trust* which arises solely from the relations between the corporation and its stockholders.

> "It is a trust fund held by the Corporation as a trustee. * * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership."

Farrington vs. Tennessee, 95 U. S. 686.

Now in one sense the claim of each stockholder as a *cestui que trust* is adverse to the corporation, his trustee, or at least it may be so—certainly will be so if the trustee denies his title or misuses the property.

But still using our former illustration of the litigation between A. B. and the Corporation which raises the question whether A. B. or the Corporation owns certain land or certain personal property, the decision, as we have seen, is conclusive on the Corporation as well as on the stockholder. If the decree be that the Corporation owns it, then as between the Corporation and the stockholder the relation of trustee and *cestui que trust* is raised, and if the Corporation afterwards seeks to deny that it, the Corporation, owns the property, the stockholder may plead as conclusive against the Corporation the above decree.

Equally, if the decree is that the Corporation does not own the property, this is also conclusive on the stockholder, and if he afterwards attempts to charge the Corporation as the owner, the decree would be conclusive against him.

So we see that the question of what the future respective positions of the Corporation and the stockholder may be does not at all affect the proposition that where the question is,—Does the Corporation own certain property?—the decree in the case binds conclusively both.

The defendant's view that where among the stockholders there may be different classes hoping for different results and having different views as to the nature of the title to the property which stands in the name of the Northern Securities Company, *there* the decree finding the facts on the original controversy is not conclusive on all these stockholders, is novel but not sound.

On the question of what title the corporation has to the stocks, it necessarily represents all its stockholders, (even if among them there be rival hopes as to the nature of the title,) for that is a corporate matter. If in such case the Northern Securities Company did not represent all its stockholders, then the decree left such stockholders free to again litigate, even with the United States, the same question. This no one will claim, and yet if it is not so, how can one say that the same question may be litigated between the defendants themselves which includes the stockholders?

If the rival claims of the stockholders were not *as* stockholders but as distinct and independent personalities, depending on claims to the property, which did not arise through the corporation or under its title, or by reason of its holding the stocks, there might be some justification for so claiming, but such a case does not arise on this record.

In the case at bar we are the *cestuis que trustent* of the Northern Securities Co. and as such *cestuis que trustent* we are the real owners of this Northern Pacific stock.

Our title to that stock grows out of our original ownership of the same. We made the Northern Securities Co. our trustee or custodian of it.

We however do claim in addition that as stockholders as well as *cestuis que trustent*, we can set up the Supreme Court decree as conclusive in this case between ourselves and the Northern Securities Co. as to the nature of the title the Northern Securities Co. has to the stock.

In the Government case the Northern Securities Company for the complainants and all its other stockholders, denied it was a mere trustee or custodian for the Northern Pacific stocks, and set up that it really owned them.

The Court held that it did not own, but held them as trustee or custodian, and the mere fact that Harriman, one of the stockholders, was also a *cestui que trust*, under the trust so found, cannot restrict or destroy the binding effect of the decree. Assume for arguments sake

(which we deny), that as between all the Northern Securities Company stockholders it is conclusive, not of who were the certain *cestuis que trustent*, but only of the fact that the corporation was not the bona fide owner, but trustee, and it still remains to find out who the *cestuis que trustent* are, the result in this case is the same. We prove that we are the *cestuis que trustent* in other and conclusive ways.

The Northern Securities Company in the Government case was in Court not only as a corporation, representing as such all its stockholders, but in addition as trustee, as we have before seen, and the present plaintiffs were in Court as stockholders and as *cestuis que trustent*, and they were represented in each capacity by the Corporation.

Indeed even where one is a party only in one capacity yet if his interests in both capacities are before the court, the decree will bind him in both and can be pleaded in both. If this Court in the Government case had before it the rights of the Northern Securities Co. as our trustee, and also of the Securities Co. as a corporation representing us as stockholders, the decree would conclude us and could be used by us in both capacities.

Black on Judgments, Sec. 536.
Corcoran vs. Chesapeake Canal Co., 94 U. S., 741.

As certui que trust of the Northern Securities Co. under the charge in paragraph XI. of the Bill.

In *McElrath vs. P. & S. R. Co.*, 68 Pa. 40, on a proceeding to foreclose a mortgage which was given to a trustee to secure the bondholders, the Court *inter alia* said:

"Hence the trustee is the party to be summoned to defend the interests of those who claim under the mortgage. The bondholders are privies in interest and may come in to defend *pro interesse suo*, but their rights are effected by the decree against their trustees. Chapman, therefore,as a holder of the bonds of the second mortgage, is not a stranger claiming collaterally but must come in under the mortgage. He does not stand in the attitude of another creditor claiming a right to attack the decree or judgment of an opposing creditor upon the ground of collusion or fraud between the plaintiff and defendant in the judgment, but he is affected by the decree itself against his own trustee."

Shaw vs. Railroad Company, 105 U. S. 605.

"The trustee (in a mortgage) is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment unless it is impeached for fraud or collusion between him and the adverse party."

Kerrison, Assignee, vs. Stewart, 93 U. S. 160.
Vetterlein. vs. Barnes, 124 U. S. 169.
Beals vs. Railway Co., 133 U. S. 290.
Kent vs. Lake Superior Co., 144 U. S. 90.
Manson vsD. uncannon, 166 U. S. 542.

(b) *One of a class represented by Morgan-Hill and others.*

In Paragraph II of the Government Bill the charge is against the defendants named,

> "And certain other persons who are unknown to the Complainant but whom it prays to have made parties to this action when hereinafter ascertained, hereinafter referred to as James J. Hill and his associate stockholders."
>
> (As to Great Northern.)
>
> "And certain other persons whose names are unknown to the Complainant but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders.")
>
> (As to Northern Pacific.)

It is a well recognized rule, forming indeed an exception to the general rule in courts of equity, that several representative persons may be selected to represent a class, and that a decree against those persons binds the entire class, though the other members of the class were not actually in court or formally made parties to the litigation.

The class in this case was a combination formed by the stockholders of the two constituent railroad companies to restrict trade and commerce:

Morgan, Hill and the other stockholders named were the representatives of the class:

The appellants, as the owners of the Northern Pacific stock in dispute which they assigned to the Northern Securities Company, were members of the class:

They are, therefore, bound by the decree and consequently may enforce the decree in any subsequent litigation

with any other person who was a party to the Government Case including the Northern Securities Company.

The practice of the Government in thus naming part of the class to represent and bind the whole, was based upon the settled practice in equity recognized by the Supreme Court in the case of *Smith vs. Swormstedt*, 16 How. 288, sec. 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

The reasoning in the familiar cases of litigation by or against property owners affected by special taxes or assessments is also pertinent to the question now before the court.

In *McIntosh vs. City of Pittsburg*, 112 Fed. Rep, 705, 707, Buffington D. J., among other things, said:

> "It is clear the interests of the present complainant and that of the appellants in the common pleas case

were identical. It was one common to both as members of a class. Where such common interest exists, one or more of a class may litigate such interest without making all class members parties. Story on Equity Pleadings, cited in *Smith vs. Swormstedt*, 16 How. 302. Such facts constitute an exception to the general rule in courts of equity that all persons in interest must be parties to a bill, and where *bona fide* bills are filed and litigated by representatives of a class, and the subject matter of a suit is common to all, the decree binds the entire class as fully as if all were before the court. *Smith vs. Swormstedt, supra.* This well settled principle of equity procedure has been applied in municipal litigation. A judgment against a municipality or its legal representatives in a matter of general interest to all its inhabitants—for example, respecting the levy and collection of a tax—is conclusive not only upon the municipal defendant, but upon all its inhabitants, though not made parties. Such inhabitant cannot collaterally attack such judgment, or re-litigate the subject matter. *Sauls vs. Freeman*, 24 Fla. 222; *Clark vs. Wolf*, 29 Iowa 197; *Gaskill vs. Dudley*, 6 Metc.(Mass.) 546: *Terry vs. Town of Waterbury*, 35 Conn. 526; *Cromwell vs. County of Sac.*, 94 U. S. 351; *Lyman vs. Faris*, 53 Iowa 498; *Ashton vs. City of Rochester*, 133 N. Y. 193."

Willoughby vs. Chicago R. R. Co., 50 New Jersey 609.

(c). As a stockholder in the Northern Pacific Railway Company—

The appellants always were, as found by this court, the equitable owners of the Northern Pacific stock here in dis-

pute. They therefore were stockholders of the Northern Pacific Railroad Company, and as that Company was a party to the Government Case and was concluded by the finding and decree in that case, the appellants as stockholders were; and hence appellants may use these findings and decree as conclusive in any subsequent litigation between parties who were parties to that suit:

VII.

We are in this case entitled to set up and plead as res adjudicata the findings, conclusions and decree of this court in the Government Case as hereinbefore enumerated, even if the cause of action in the Government Case was differenl from the cause of action in the present case.

BECAUSE—

(a). The present case is a sequence of and from the Government Case. This case would not have arisen unless the Government Case had been decided. The two cases are closely connected and related.

(b). The parties in the present case were parties in the Government Case and in the same capacity.

(c) The subject matter in the Government Case included the identical subject matter in the present case, being the 717,320 shares of the Northern Pacific stock involved in this case.

(d) Among the issues involved in the Government Case was the identical issue involved in the present case, *i. e.*, the lawful, absolute ownership by the Northern Securities Company of the Northern Pacific stock in dispute. The mere fact that in the Government Case there may have been other issues is not material, because the issue in this case was also in the Government Case, and this issue in the present case was also in the Government Case.

Especially did this court have before it in the Government Case both questions as to the Northern Securities Company, i. e:

(a) Did it become the lawful purchaser and lawful owner of the stock; or,

(b) Merely its custodian or trustee for the original assignors of the same, holding it for an illegal purpose.

(e) The issue in this case was distinctly raised by the pleadings and decided in the Government Case.

(f) The issue in the present case was a material issue in the Government Case. Indeed it was *the* question upon which this Court divided.

This is put with the qualification that while the materiality of the issue in the Government Case is undoubted, and we therefore for the sake of argument concede it, yet as a fact, under the decisions of this court, it does not seem to be necessary that the issue should be material in the prior case, if the issue was formally made by the pleadings and the court decided the question in the prior case.

(See *Railroad Co. vs. Schutte*, 103 U. S. 143).

Let us prove each of these propositions:

(a) That the decision in the Government Case caused the present litigation is beyond doubt. This case is the child of that parent.

(b) *The parties to the present case, the appellants and the Northern Securities Company, were parties to the Government Case, and in the same capacity.*

The Northern Securities Company was a party to the Government Case and appeared and answered and defended the litigation. In doing so it appeared and defended the litigation for and on behalf of its stockholders and each one of the stockholders was thereupon a party to the Government Case through and by reason of the Northern Securities Company, who represented them. Each one of the stockholders was a privy to the Northern Securities Company, for the Northern Securities Company, as to all the property it owned absolutely or otherwise, held that property for its stockholders, and there was

a privity of estate between them as well as a privity by representation that existed between the stockholder and the corporation.

But in that Government Case the bill charged (paragraph XI) that the Northern Securities Company acquired possession of the stocks as the trustee or custodian or agent for the original railroad stockholders of the two constituent companies, and that this trusteeship and custodianship and agency arose out of the relations between the original railroad stockholders, and as a consequence of their actions, with the Northern Securities Company. This was charging the Northern Securities Company, a party actually in court, as a trustee,and the Northern Securities Company in that capacity represented its *cestuis que trustent*. Now the *cestuisque trustent* of the Northern Securities Company were the identical persons (or their assigns) who were also the original stockholders of the two constituent railroad companies, who had assigned their stock to the Northern Securities Company.

The same individuals then were represented by the Northern Securities Company in the Government case in two capacities, to-wit: in the capacity of a stockholder and in the capacity of *cestui que trust*.

When an individual brings an action in a court of justice he centers in himself all the right and all the title and all the claim which he has to relief in reference to the thing in dispute, and this entirely irrespective of the question as to the manner in which he acquired his different rights and claim and title. For example: if he claims title to personal property, it is entirely indifferent whether he got it by will or by deed or by gift or by purchase or by all combined, provided he owns it. So also, if he has any right or title as to the thing in dispute which arises by reason of his former relations to the other party to the litigation, such as between the stockholder and the corporation, he has just as much right to assert the title or right thus acquired as a

stockholder as he had to assert title or right acquired by will or gift or purchase; and therefore, in the present suit the appellants are entitled to assert the rights that come to them by reason of the fact that they were stockholders of the Northern Securities Company, just as certainly and as fully as if they were asserting a right which came to them by purchase.

A stockholder's rights are rights to him individually.

We were also represented in the Government suit as one of a class, the class being the original railroad stockholders of the two constituent companies, to wit, Messrs. Morgan, Hill, Clough and others. We were of the class with them, and they were sued in their representative capacity as a class. We were therefore through them parties to the litigation. The class was those who composed the combination, no matter at what time they had joined it,—whether they were the originators or whether they joined afterwards in carrying it out.

We were also represented in the Government suit as stockholders of the Northern Pacific Railroad Company, who was a party to, and appeared in, the Government suit, and was concluded by the decree in that suit. While our stock had been assigned to the Northern Securities Company, who appeared of record as a stockholder of the Northern Pacific, as a fact the Northern Securities Company was our trustee, and we were therefore represented by the Northern Pacific Railroad Company, who represented all its stockholders, notwithstanding their title may have been merely equitable.

In our present suit we include all our rights in the Government litigation, however we gained them.

(c) *The subject matter of the present litigation is 717,320 shares of the capital stock of the Northern Pacific Railroad Company, and this identical capital stock was the stock which the complainants assigned to the Northern Securities Company for the purpose of carrying out the combination.*

See in proof of this *infra*—pages 118–127 of this brief.

The appellants assigned to the Northern Securities Company 370,230 shares common stock of the Northern Pacific Railroad Company and 410,850 shares preferred stock, with the agreement between the appellants and the Northern Securities Company that the Northern Securities Company would convert the preferred stock into common stock of the Northern Pacific, which was done, and this common stock the Northern Securities Company holds to-day as the equivalent of, and the thing into which the preferred stock was changed by agreement. It is plainly ear-marked. In equity it is practically the same as the preferred stock we assigned. Even if there had been no agreement and the preferred stock had merely been converted by the Northern Securities Company and the Northern Pacific, it was merely changing the class of the stock. Both the preferred and the common stock were still stock of the Northern Pacific Railroad Company, and that the Northern Securities Company saw fit to change the classification by surrendering the preferred and taking out the common, did not change the real identity of the stock.

Judge Dallas said:

"The present suit is an independent one and as its *subject matter* is distinctly different from that of the suit in which the United States was complainant the duty of this Court to independently consider it has seemed to us to be both plain and imperative."

Let us test the correctness of this:

What is the subject matter of a suit?

Evidently the subject about which the suit is brought.

If there is a distinction between the "cause of action" and the "subject matter" of a suit, possibly the "cause of action" may be defined as—the injury done to the plaintiff which he resents and for which he seeks relief, and the "subject matter" is the property or thing concerning which the relief is sought.

If we follow up the supposed distinction, the cause of action in the Government Case was the injury resulting to trade and commerce by the Securities Company holding the stocks in both railroad companies, while the cause of action in this case is the injury resulting to appellants by the holding by the Northern Securities Company of a part of said identical stocks.

The difference is that the Government Case included the entire holding of the Securities Co. in both railroad companies. While in this case is involved only our Northern Pacific stock which was a part of the whole involved in the Government Case.

It is, however, believed that the subject matter and the cause of action are interchangeable and denote the same thing.

Anderson's Law Dictionary,—Title, *Subject Matter.*

It will thus be seen that the cause of action in the Government Case embraced as an essential step in the combination, the acquisition and holding of our Northern Pacific

stock, and *that* acquisition and holding was one of the things which made the combination and therefore a part, and a most important part, of the thing which caused the injury to the Government for which it sought relief. The possession of our stocks by the Securities was necessary to give it control of the Northern Pacific Co. It was a part of the combination. It, with other parts, made up the combination.

What is the subject matter of the two suits—the Government and the present suit?

The thing about which the Government suit was brought was the holding of the railroad stocks by the Securities Company and thus give control of the two railroad companies and eliminate competition. This combination was made up of parts and steps and acts:

One of the parts was the organization of the Northern Securities Company as a holding corporation and an instrument of the combination:

Another of the parts was the acquisition and holding by the Northern Securities Company of the railroad stocks, including the Northern Pacific stock in dispute.

Such organization of the corporation, its acquisition and holding of the stocks, each parts of the combination and indispensable to its success, and, indeed, the main feature of it.

When the case came to this court, you emphasized that, because you considered at length as the questions most material and controlling:

By whom and for what purpose had the Northern Securities Company been formed?

How and for what purpose had it acquired the railroad stocks, including appellants'?

How and for what purpose did it hold such stocks?

Was it a mere ordinary case of a corporation organized for a lawful purpose and lawfully purchasing railroad stocks, or was it the case of a corporation organized for an illegal purpose, illegally acquiring and illegally holding for such illegal purposes such railroad stocks.

At least five of the members of this Court refused to commit themselves on what the consequences would be if the Securities Co. was the lawful purchaser and lawful owner of the railroad stocks.

Four dissented because the question of ownership of the stocks by the Securities Co. being the material question in the case the Act of Congress had not power to regulate that—that belonged wholly to the States and not to Congress.

This Court held that the Securities Company did not hold as such lawful purchaser and lawful owner, but that it illegally acquired and illegally held for an illegal purpose such stocks, and merely as custodian for the assignors.

This illegal acquisition and holding of the railroad stocks then was THE thing which in this court was an essential and controlling part of the illegal combination, and to succeed in the Government Case the United States had to prove that the acquisition and holding of said stock was each illegal and for an illegal purpose.

Now, to say, as the Court of Appeals did (Judge Dallas), that the *subject matter* in the Government case and in the present case were entirely different and independent, when the proof of the illegal acquisition and illegal holding of such railroad stocks, including our Northern Pacific stock, for an illegal purpose was a condition precedent to the success of the United States in that case, and when it was the very point upon which the case in this court turned, is, we hasten to admit, wholly incomprehensible to us.

(e f) That the issues in this case were raised and were material, and were decided in the Government Case we have hereinbefore proven and hereinafter consider.

VIII.

The averments of the bill and answers in the Government Case distinctly raised, inter alia, as material questions upon which the controversy turned, the following, which are in substance, the same hereinbefore stated, (pages 3, 4) *but now re-stated in somewhat different form.*

(a) Did Morgan, Hill and other stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, two parallel and competing lines of railroad, engaged in inter-state commerce, enter into an unlawful combination to effect a virtual consolidation of the two railroads, contrary to the provisions of the Sherman Act?

(b) Was the organization of the Northern Securities Company planned by Morgan, Hill *et. al.* as a holding company in whose possession a control of the stocks of said railroad companies was to be placed, and solely as an instrumentality through, and by means of which, their combination in restraint of trade and commerce was to be carried out?

(c) Was the Northern Securities Company actually organized by Hill, Morgan and others solely as an instrument under the control of Hill, Morgan and others to effect the unlawful purposes of the combination?

(d) After such organization of the Securities Company, was the larger part of the capital stock of the Great Northern and Northern Pacific Railroad Companies (including complainants') assigned to said Securities Company in exchange for the stock of the Securities Co. at par and in furtherance and in pursuance of, and to make effective the unlawful combination aforesaid?

(e) Did the Securities Company by such assignment of said railroad stocks to it become the lawful purchaser and lawful, absolute owner, with right to sell, of said stocks, or did it become the mere custodian, depositary, holder and trustee of the same for the origina stockholders in said two constituent railroad companies?

At least this court evidently thought that all said questions did arise in the Government Case, else why did the opinions of Mr. Justice Harlan, Brewer and White discuss them?

Why was the decision put by the majority of the court expressly on the ground that the Northern Securities Company was *not* the real, substantial owner of the stock, but its mere custodian for the original stockholders in the two railroad companies?

That it was so put, our quotation from the opinion of the court, by Mr. Justice Harlan, *supra*, demonstrates.

Not only that, but he declined to discuss what the consequences would be if the Northern Securities Company was the real, substantial owner—saying that the question was not in the case *because* the Securities Company was not such owner.

It is true that all of our questions as propositions center in, and lead up to, and in one sense make a part of, the last one, which, put as a proposition, is—

> That the Northern Securities Company was not the lawful purchaser and lawful, absolute owner of said railroad stocks, but held them as custodian for the individuals who formed the combination.

Mr. Justice Brewer, after asserting the right of an individual to buy the majority of the stock of each of the two railroad companies, said:
P. 362.

> "But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee

to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

"If the parties interested in these two railroad companies can, through the instrumentality of a *holding* corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation."

He thus explicitly states that the transfer of the stocks to the Securities Co. was

"the *manner* in which the *unlawful* combination to de-
"stroy competition and thus unlawfully restrain trade
"was carried out."

That the Securities Co.

"was a *mere instrumentality* by which separate railroad properties were combined under one control."

That the question was not one of

"*investment* by a single individual."

Mr. Justice White evidently thought that the question of whether the Northern Securities Company was the real owner of the stock was material in the case, for he dissented on the express ground that Congress could not

"regulate the acquisition and ownership of the stock in question by the Northern Securities Co."

Among other things he said:

P. 365.

"The Government, by its bill, *challenges* the right of the Northern Securities Company to *hold* and *own* the stock in the two railroads."

Again he said:

P. 366.

"Two questions arise: Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership?"

Again on the same page he said:

"It is said first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the *real owner* of the stock in the railroads since the effect of the transaction was to cause the Securities Company to become merely the *custodian* or *trustee* of the stock in the railroads."

P. 400.

"Being of the opinion for the reasons heretofore "given that Congress was without power *to regulate the* "*acquisition and ownership* of the stock in question by "the Northern Securities Company, and because I think "even if there were such power in Congress it has not "been exercised by the Anti-Trust Act as is shown in "the opinion of Mr. Justice Holmes, I dissent.

"I am authorized to say that the Chief Justice, Mr. "Justice Peckham, and Mr. Justice Holmes concur in this dissent."

Averments of the Bill in the Government Case.

The bill was by the United States as complainant and against the Northern Securities Company, the Great Northern Railway Company,—The Northern Pacific Railway Company,—Hill—Clough—James—Kennedy—Morgan—Bacon—Baker and Lamont as defendants.

"and certain other persons whose names are un-
"known to the complainant but whom it prays to have
"made parties when ascertained, hereinafter referred
"to as J. Pierpont Morgan and his associate stock-
"holders."

Briefly epitomized it alleged as follows:

(I) That the Northern Pacific and Great Northern Railway Companies were common carriers engaged in inter-state commerce:

(II) The individual defendants on and prior to November 13th, 1901, owned or controlled a majority of the stocks of the Northern Pacific and Great Northern Railway Companies; the Hill people the Great Northern, the Morgan people, the Northern Pacific:

(III) Gives the routes of the Great Northern and the Northern Pacific Railways and alleges they were on and prior to November 13th, 1901, two independent and competing lines engaged in inter-state commerce:

(IV) Gives history of the Northern Pacific insolvency in 1893 and the attempted consolidation with the Great Northern described and ruled on in *Pearsall vs. The Great Northern Railway Company*, 161 U. S. 646:

(V) The purchase in 1901 by the Great Northern and the Northern Pacific Railway Companies of the Chicago, Burlington & Quincy Railway Company, and the effect of the same;

(VI) After the attempt in the Pearsall case to turn over control of the Northern Pacific Railway Company to the Great Northern was defeated, Hill and his associates

owning or controlling Great Northern, and Morgan and his associates owning the Northern Pacific Railway Company stock

"contriving and intending unlawfully to restrain the trade or commerce among the several States * * * and * * * unlawfully to monopolize or attempt to monopolize such trade * * * entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive inter-state and foreign trade or commerce carried on by them * * * through the instrumentality and by the means following, to wit: A holding corporation to be called the Northern Securities Company was to be formed under the laws of New Jersey with a capital stock of $400,000,000,—to which in exchange for its own capital stock upon a certain basis and at a certain rate was to be turned over and transferred the capital stock or a controlling interest in the capital stock of each of the defendant railway companies with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks,

(VII) "In *pursuance of the unlawful combination* or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November 1901, the defendant, the Northern Securities Company, was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the pur-

pose and power, not only 'to purchase' and 'hold' 'shares' of the capital stock of any other corporation or corporations, under which said company wrongfully claims and is exercising the power to acquire by exchange and hold the stock of the Northern Pacific and the Great Northern Railway Companies, but the purpose and power, while owner thereof, 'to exercise all the rights, powers, and privileges of ownership;' that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power 'to aid in any manner any corporation * * * of which any bonds * * * or stock are held * * * and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds * * * or stock,' meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway Companies, or to preserve or enhance the value of their stocks or bonds."

(VIII) "In further pursuance of the unlawful combination or conspiracy aforesaid *and solely as an instrumentality through which to effect the purpose thereof*, on or about the 14th day of November, 1901, the defendant, the Northern Securities Company was organized by the election of a board of directors."

Hill and Morgan assigned capital stock of the Great Northern and Northern Pacific to it at certain valuation:

"In further pursuance of the unlawful combination or conspiracy aforesaid * * * the Northern Securities Company has acquired an *additional amount*

of the stock of the defendant railway companies issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding as owner and proprietor substantially all of the capital stock of the * * * (Great Northern and Northern Pacific Railway Companies) and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof. * * * By reason whereof a virtual consolidation under one ownership and source of control (of the two systems) * * * has been effected."

The conspiracy has, through the Northern Securies Co., gained control, and is in actual operation, restraining trade and commerce contrary to the Sherman Act.

(IX) If the Northern Securities Company has not formally acquired a majority of the stock of the Northern Pacific and Great Northern Railway Companies, it is a mere device whereby part is withheld by the conspirators.

(X) Unless restrained by injunction the Northern Securities Company will secure all the stocks of the Northern Pacific and the Great Northern Railway Companies.

(XI) "*No consideration whatever has existed, or* will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company other than the issue of the stock of the Northern Securities Company to them in exchange thereof for the purpose, after the manner and upon the basis aforesaid.

"*The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was or-*

ganized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depository, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

(XII) "If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and *act as the owner* of the stock of the Northern Pacific and the Great Northern Railway Companies, as aforesaid, not only will a virtual consolidation of two competing transcontinental lines with the practical pooling of their earnings be effected, * * *"

but a system will be devised by which in the future all the railroads of the United States may be merged into one control.

(XIII)—The defendants named have combined with one another and with other persons to use various other schemes and devices to carry out the conspiracy.

Prayers.

Prays the Court:

"to order, adjudge and decree that the combination or conspiracy hereinbefore described is unlawful, and that *all acts done in* carrying it out are in derogation of the common rights of all the people of the United States, and in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' "

And that the defendants may be enjoined from carrying it out.

FIRST. That the Northern Securities Company and its officers, stockholders and directors

"be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, (whether by proxy or otherwise) or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificate of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued."

SECOND. That the Northern Pacific Railway Company be enjoined from recognizing the Northern Securities Company as a stockholder or allowing it to vote.

THIRD. That the Great Northern be likewise restrained.

"FOURTH. That the individual defendants named and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each respectively perpetually enjoined from in any manner voting, holding or acting as the owner of any of the stock of the Northern Securities Company issued in exchange for the stock of either of the said railway companies unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept therefor the stock of the defendant railway company in exchange for which the same was issued."

FIFTH. To restrain all the defendants "and their associate stockholders" from any further combination or conspiracy.

Prayer for general relief.

Answer of Defendants.

The answers of all the defendants were in substance the same. Briefly epitomized the answer of the Northern Securities Company, was as follows:

Denied conspiracy,—alleged that Hill and others, holders of Great Northern stock, organized the Northern Securities Company, but not Morgan or Bacon; admits transfer to Northern Securities Company of majority of Northern Pacific Railway stock and a large interest in Great Northern stock, but denies that it was done in pursuance of a conspiracy.

Its answers to Paragraph XI of Complainant's Bill, which paragraph directly and distinctly charged that the Northern Securities Company held the stocks of the Northern Pacific and the Great Northern Railway Companies merely as custodian and trustee for the conspirators and to carry out the conspiracy, and not as the real owner thereof, was as follows:

> "This defendant says it has *bought and paid for* and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths (5-12) of the shares of that company's stock and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths (4-12) of the total amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise or understanding between any of the holders of said stock con-

cerning the sale thereof to it, and it denies that any such agreement, promise or understanding was ever made. *All the sales and transfers of said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.*"

"This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of Forty millions ($40,000,000) Dollars cash in the making of such purchase. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. *There has been and is no agreement, promise or understanding between any of the holders of said stock so acquired by this defendant, or between any* of them and any other person or corporation, that any of said *shares should at any time be held, used or voted* by *this defendant* for the purpose of *combining or consolidating or placing under one common management* or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many stockholders of the said companies have not sold,

and may never sell, their shares to this defendant; and the said railway companies have not, nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This *defendant was organized in good faith*, and it denies all the allegations in sub-division XI. of the petition."

Paragraph V., part 2nd, of the answer of the Securities Co. is in these words:

"This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organizing of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

"And this defendant says:

"(1) The 'Anti-Trust act' was not intended to prevent or defeat an enterprise in aid of a great competitive inter-state and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

"(2) Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock.

"(3) Otherwise construed, the act would be unconstitutional, because:

"The power to regulate commerce with foreign nations among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because,

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest."

ISSUES RAISED BY THE BILL AND ANSWER.

Here are all the issues raised hereinbefore stated and on which the present case turns.

See *Ante* pages 3, 4, 90, 91.

All of these issues really center in, and are parts of, and lead up to, the controlling question in the present case:

Was the Northern Securities Company the lawful purchaser and lawful, absolute owner of the railroad stocks, or was it the mere instrument of the combination to hold the stocks as custodian for the members of the combination?

If any one will but read these pleadings,—then your opinions—and then your decree,—is it possible he could be so misled as to say that you did not even "incidently" consider the above question of ownership, and (though the present case is an offshoot from the Government case, and an understanding of what you did is absolutely essential to understand this case) that it was his duty to decide the present case independently of, and as if the Government case had never arisen?

IX.

These stocks in the two railroad companies which, as averred in the Bill in the Government Case, and as found by this Court, were transferred by Hill, Morgan and other stockholders to the Northern Securities Company in pursuance of, and to perfect the illegal combination to restrain trade and commerce, included the stock owned by the Oregon Short Line Railroad Company and held in the name of Harriman and Pierce as Trustee, being the identical stock in controversy in this case.

The combination absolutely required a majority of the capital stock of the Northern Pacific Railway Company; such majority was indispensable to success, and without it the combination must fail, because it could not control the Northern Pacific Railroad Company.

Paragraph VIII of the Government Bill alleged that

> "in further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purpose thereof"

the Northern Securities Company was organized, and

"in further pursuance of the unlawful combination or conspiracy aforesaid"

there was

"assigned and transferred to the defendant, the Northern Securities Company, a large majority of the capital stock of the defendant, the Northern Pacific Railway Company."

The Northern Securities Company admitted (See paragraph VIII of the Answer, Government Case) that it had acquired

"a majority of the stock of the Northern Pacific Com-Company."

The Answer of the Northern Securities Company in the Government Case, Part Second, Section 2, said that—

"But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interests of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred to the amount of about seventy-eight million ($78,000,000.00) dollars, being a clear majority of the entire capital stock of that company."

In the same paragraph of the Answer, the Northern Securities Company further said:

"After its organization, this defendant bought and still holds about one hundred and fifty million dollars ($150,000,000.00) of the stock of the Northern Pacific Company."

Again in the same section it said :

"About May 1st. 1901, their (Hill and other Great Northern shareholders) aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,-

000.00) of the eighty million dollars ($80,000,000.00) common stock of the company, which also had a preferred stock amounting to seventy-five million dollars ($75,000,000.00), with the same voting power as the common stock."

The entire capital stock of the Northern Pacific was one hundred and fifty-five million ($155,000,000.00) dollars. (See answer of the Northern Securities Company, Part II, Section 2; Answer of James J. Hill, Part II, Section 2; Answer of J. P. Morgan, Paragraph 14 ; Answer of Daniel S. Lamont, Paragraph 14; Testimony of Jacob Schiff, p. 272).

Mr. Justice Harlan said that—

" Such holding corporation (Securities Company) has become the holder, more properly speaking, the custodian, of more than nine-tenths of the stock of the Northern Pacific."

It is perfectly evident that even to make a majority of the stock of the Northern Pacific, it required the Oregon Short Line stock, represented by Harriman and Pierce, which is the identical stock included in the present litigation:

That the present stock included in the present litigation was not only a part of the *majority* of the Northern Pacific stock, alleged in the bill and admitted in the answer in the Government case, but a part of the nine-tenths of the capital stock of the Northern Pacific Railroad Company spoken of by Mr. Justice Harlan in his opinion, is not denied in the present case, and was before this Court in the Government case, under the pleadings and testimony just cited, and also, as shown by the following additional extracts from the testimony before this Court in the Government case:

W. P. CLOUGH, then and now one of the directors of the Northern Securities Company, testified in the Government case as follows (pp. 657–658, Government Record):

"Q. Were all of these certificates paid for by the transfer of stock of the Northern Securities Company?

"A. No, sir.

"Q. What certificates were not?

"A. On the 18th day of November, 1901, the Northern Securities Company purchased $37,023,000. of the common stock and $41,085,000. of the preferred stock of the Northern Pacific Railway Company, making a total of $78,108,000. of the stock of the Northern Pacific Railway Company, in one lot, for which it paid the lump sum of $91,407,500. Of this price the Northern Securities Company paid $8,915,629. in cash and $82,491,871. in its own stock at par. That is one transaction. * * *

"Q. From whom did you purchase this large block of common and preferred stock—thirty-seven millions of common and forty-one odd millions of preferred?

"A. That is the block of stock referred to in the testimony of Mr. Steele and Mr. Perkins as having been purchased from E. H. Harriman and Winslow S. Pierce, trustees, and afterwards turned over to the Northern Securities Company.

"Q. Who carried on the negotiations for the purchase of that stock from Harriman and Pierce?

"A. J. P. Morgan & Co., or some members of that firm. I don't know of my own knowledge which one of them. It appears from the evidence of Mr. Perkins and Mr. Steele that they were the members that conducted the negotiation; that is the source of my information.

"Q. Do you know how the price paid for this large block of stock was reached; upon what basis the computation, if any?

"A. I have not the slightest idea and have never been able to form one.

"Q. The stock was purchased by J. P. Morgan & Co., and then turned over to you and you carried out the terms?

"A. Yes, sir.

"Q. The purchase as arrived at between J. P. Morgan & Co. and Harriman and Pierce was transferred to the Northern Securities Company, and the Northern Securities Company carried out the sale by direct dealing with Harriman and Pierce on the 18th day of November of last year.

"Q. It issued to Harriman & Pierce some eighty-two millions of its own common stock?

"A. Yes, sir.

"Q. And paid them over $8,000,000 in cash?

"A. $8,915,629 in cash.

"Q. Does the stock of the Northern Securities Company thus issued to Harriman & Pierce still stand in their names?

"A. It stands in their names on the books of the Securities Company. That is the extent of my knowledge about its present ownership."

Mr. HARRIMAN, in the Government Case, (see p. 292) of the record in this case, testified as follows:

"Q. You *finally* agreed to turn in your holdings and receive from the Northern Securities Company upwards of $82,000,000.00 in stock of this company?

"A. Yes, sir.

"Q. Did you know at that time on what basis this holding company was to take in any other Northern Pacific or Great Northern stock?

"A. Yes, sir.

"Q. On what basis?

"A. $115.00.

"Q. For the Northern Pacific?

"A. Yes, sir.

"Q. And what for the Great Northern?

"A. $180.00."

And again on Record p. 293:

"Q. Did they represent to you that that was the basis on which they were going to take in the stock?

"A. The statement was made to me that they would put this Northern Pacific stock into a *holding* company, and give us—not this Northern Pacific stock—but that they would give us in part payment a *holding company's stock*, on the basis of $115.00 for Northern Pacific, and if Great Northern were taken in, on the basis of $180.00 for Great Northern."

Again on Record p. 294:

"Q. No, but what I want to get at is this: Didn't you understand from their statements that the *basis of exchange*, if any was made, was $115 and $180?

"A. Yes, sir."

And on Record, p. 294:

"A. All I remember is just what I stated; statement made to me that if this *trade* went through they would *pay* us in the shares of a *holding* company which would issue *its stock in exchange* for Northern Pacific at $115.00 and Great Northern at $180.00, *and I agreed to take that stock in exchange for the Northern Pacific we held—all the Northern Pacific we held.*"

GEORGE W. PERKINS, a member of the firm of J. P. Morgan & Company, who were the promoters of the Northern Securities Company and the combination, testified in the Government Case as follows: (p. 232.)

"Q. Mr. Perkins, you purchased the common and preferred stock of the Union Pacific interests, amounting to between $75,000,000 and $80,000,000, shortly after the organization of the Northern Securities Company?

"A. Yes, sir.

"Q. Now, what did you ultimately do with all of that stock?

"A. We sold it to the Northern Securities Company.

"Q. And when?

"A. I should say two or three weeks after the company was organized."

(Page 234.)

"Q. And all negotiations with reference to the subsequent disposition of that stock—common and preferred—to the Northern Securities Company were had after the conclusion of the deal with the Union Pacific interests.

"A. We did not CLOSE any deal with the Union Pacific interests.

"Q. Well, at the time you purchased from the Union Pacific interests did you pay part cash?

"A. No, sir.

"Q. Did you pay any cash at the time you made the deal with them?

"A. *We undertook to get them a certain amount of stock from the Northern Securities Company—a certain sum of money in exchange for their holdings,*

"Q. Was this stock absolutely transferred by the Harriman or Union Pacific interests to your firm, or

simply transferred to you for the purpose of making a disposition of it to the Northern Securities Company?

"A. I do not know what the transfer books will show.

"Q. Well, what was the fact?

"A. I do not know. That would simply be a matter of clerical work.

"Q. What was your understanding or arrangement in case you had failed to make a deal with the Northern Securities Company for the *turning in* of all this stock to it; would you have had it on your hands—$78,000,000 or $80,000,000 of preferred stock?

"A. No, sir; the Union Pacific would have had it."

CHARLES STEELE, another member of the firm of J. P. Morgan & Company, testified in the government suit (pp. 291-292.)

"Q. What did your firm have to do with the purchase of the Harriman interests in the Northern Pacific, Mr. Steele?

"A. My impression is that it was my firm that conducted that negotiation entirely.

"Q. Will you state what those negotiations were?

"A. I think it was a little after the middle of November, after the meeting of the Northern Pacific board at which it was resolved to retire the Northern Pacific stock. They expressed a desire to be allowed to part with their stock. It had become, by the retirement of the preferred stock, a minority interest, and it was rather an unsaleable commodity, as the stock had been practically withdrawn from the market, and they asked

us if we wouldn't undertake—I say they asked us, it came up between us, I am not sure which one suggested it—undertake to get the Northern Securities Company to buy their stock. We finally agreed upon a basis by which they agreed to sell their stock for a lump sum, which was to be payable partly in cash and partly in stock of the Northern Securities Company. At that time, Mr. Harriman—I shall have to apologize whenever I say Union Pacific, because I never really knew whether that was so—Mr. Harriman and his friends held both common and preferred stock, in the proportion, I think, of about 37,000,000 common to 41,000,000 preferred, in round figures, and their proposition was to sell us that stock in one block for a fixed sum, which was to be paid partly in cash and partly in Northern Securities Company stock, and we undertook to try and get the Northern Securities Company to buy that stock on those terms, we acting as bankers between them.

"Q. You acted then in that transaction, as I understand it, as middlemen?

"A. As bankers.

"Q. That is, it was not a purchase outright by your firm?

"A. No.

"Q. Or a purchase in which your firm obligated themselves to pay a fixed amount of cash?

"A. No; it was only a purchase by us if we succeeded in getting the Northern Securities Company to take it, and the terms were that we were to turn over just exactly what we got.

"Q. You were really then, in negotiation with the Northern Securties Company,—you were really negotiating for the Union Pacific or Harriman or Short Line interests?

"A. We were bankers in between. I wouldn't say we represented either side particularly. We were very often put in that position."

X.

This Court had before it in the Government Case all the testimony which was before the Court of Appeals in the present case as to the manner in which, and the purpose for which, the Northern Securities Company acquired the Oregon Short Line stock in the Northern Pacific Railroad Company, and this included the evidence of Mr. Harriman.

The only possible exception to this is the *ex parte* affidavit of Mr. J. J. Hill and the affidavit of Mr. Harriman filed in the present case.

But this Court had before it all of Mr. Harriman's evidence, and the affidavit now filed does not contradict that evidence, properly and fairly understood.

This Court had also before it the whole of Mr. Hill's evidence, and also the copies of the resolution of the Board of Directors of the Northern Securities Company which he annexed to his *ex parte* affidavit in the present case.

This Court then had before it the fact that for the Oregon Short Line stock in the Northern Pacific Railway Company the Oregon Short Line received in stock certificates of the Northern Securities Company, $82,491,871.00 at par, and cash $8,915,629.00.

Nine-tenths (9-10) of the total exchange value for the Oregon Short Line stock was given in stock of the Securities Co. at par. The fact that one-tenth (1-10) was given in cash is of itself, and as far as it goes and unexplained, some evidence against the exchange theory, but when it is remem-

bered this cash was connected with our preferred stock which was to be converted into common by the Securities Co., and it was only one-tenth (1-10) of what the Oregon Short Line received, and nine-tenths (9-10) was in stock at par, it cannot overcome all the other evidence in the case, including the evidence of J. J. Hill, (P. 96), that the Oregon Short Line stock was

"exchanged the same as other stock."

Whatever significance there was in the cash received by the Oregon Short Line was before this Court in the Government Case and allowed by it:

Whatever significance there is in Mr. Harriman's evidence was before this Court in the Government Case.

On the question of the ownership of the Northern Pacific stock by the Securities Co. there is nothing—absolutely nothing—which this Court did not have before it in the Government Case.

XI.

Not only did the pleadings sharply raise the issues (ante pp. 3, 4, 90, 91) in the Government Case,—and this court discussed these issues and decided them, but the evidence in the Government Case, including all of Mr. Harriman's, supported the conclusions of this court on those issues.

The respondent endeavored in the court below, by selecting isolated statements from the testimony of Mr. Harriman in the Government suit, without showing the context or connection in which the statements were made, to show that the Securities Company took an absolute title to the Harriman stock. It thereby utterly ignored the fact that this precise testimony was before this Court in the Government suit, and from it and the other evidence in that case

this Court found that the Securities Company was not a purchaser but a mere custodian or trustee for the original stockholders.

The Northern Pacific stock of appellants was indispensable to the success of the combination. Without it the Securities Company would not have had control of the Northern Pacific and the whole conspiracy world have failed. It was an integral, absolutely necessary part of the scheme.

Mr. Justice Harlan, 193 U. S. page 353, discussing the contention of the Securities Company, that its acquisition of the Railway stocks was a purchase, an investment by it, said:

> "This view is wholly fallacious and does not comport with the *actual transaction*. There was no *actual investment* in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. *If it was in form such a transaction, it was not in fact one of that kind.* * * *
>
> "That disclosed the actual nature of the transaction which was only to organize the Northern Securities as a *holding* company, in whose hands *not as real purchaser or absolute owner*, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the *shareholders* of the constituent companies."

This court plainly said that the Securities Company merely represented the combination formed between the shareholders, and it took their stocks,

> "not as a real purchaser or absolute owner, but simply as custodian."

Nevertheless, the respondent, citing portions of the testimony already passed upon by this Court, in which Harriman says that he "sold"—that the Securities Company "purchased"—that the "sale" was without "conditions," &c., now asks this court upon consideration of these fragmentary extracts from this same testimony, to make a finding in direct contradiction to its finding in the Government Case, and to do so in the present case to which the Government is not a party, and in which this Court cannot change or alter what it decided in the Government case.

Whether or not a transaction is a purchase or a sale is a conclusion of law, and Harriman's testimony in reference thereto was merely his opinion of what was the legal effect of the acts of the parties. It best subserved the purposes of Morgan and the others who promoted the Securities Company in depositing their stock, to go through the form of a sale and to call it such in their testimony, and Harriman, influenced by what Hill, Morgan and others may have called it, no doubt thought, as a matter of law, that the transaction was a sale when he so testified, but this Court has said it was so merely in form—not in substance—the actual transaction was not a sale or purchase. The Court will always look at the substance of a transaction—what the parties actually did, uninfluenced in any respect whatever by any name they have called it.

To show how conclusively this finding of the Supreme Court is supported by the evidence, we give below extracts from the testimony of Messrs. Harriman, Morgan, Hill, Clough, Steele, Perkins, and Kennedy, in the Government case and extracts from their answers.

EDWARD H. HARRIMAN testified: (p. 631, record in Government suit)

"Commissioner Prouty. I think what Mr. Day wants and what the Commissioner would like to know, if it is material at all, is what agreement was made, what understanding was had, as to the organization of the Securities Company, of which you agreed to take the stock at par.

"Mr. Harriman. *We agreed to take the stock at par if the Securities Company was formed, and the Northern Securities Company stock issued in payment for Northern Pacific stock not to exceed 115, and if the Great Northern stock were put in that should not exceed 180. That is the plan.*

The Chairman: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the secuties of the Northern Securities Company, if organized on a certain basis.

"Mr. Harriman. Yes, sir.

"The Chairman. Subsequently it was organized on that basis?

"Mr. Harriman. And the stock was delivered and recieved.

"The Chairman: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

"Mr. Harriman. Yes, sir. * * *

P. 901.

"A. * * * *It was only towards the end, when the thing crystallized that the suggestion was made that payment should be made partly in cash and partly as a holding company stock.* * *

P. 904.

"Q. You FINALLY agreed to *turn in* your holdings and receive from the Northern Securities Company upwards of 82 millions in stock of this company?

"A. Yes, sir.

"Q. Did you know at that time on what basis this *holding company* was to *take in* any other Northern Pacific or Great Northern stock?

A. Yes, sir. * * *

Pages 905 & 906.

"Q. Did they represent to you that that was the basis on which they were going to *take in* the stock?

"A. *The statement was made to me that they would put this Northern Pacific stock into a holding company and give us—not this Northern Pacific stock—but that 'they would give us in payment a holding company's stock on the* basis of $115 for Northern Pacific, and, if Great Northern were taken in on the basis of $180 for Great Northern.

The statement was simply made that they were going to form a holding company, or had formed a holding company, and would pay us in this stock, and that those were the terms on which it was to be bought.

"A. * * * It was a simple statement *that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.*

"Q. That is what I want to get at. They told you, then, that certain holders of the Great Northern and the Northern Pacific were going to exchange their stock for the stock of the Northern Securities Company, on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

"A. They didn't say certain ones, *but they were going to form this holding company*, and that they

would pay me in the *holding company's stock*, which should be issued on that basis.

* * * *

"A. All I remember is just as I have stated; a statement made to me that if this TRADE went through they would pay us in the shares of a *holding company which would issue its stock in exchange* for Northern Pacific at 115 and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

This portion of Mr. Harriman's evidence was not even noticed by Judge Dallas.

JAMES J. HILL testified as follows:
(Pages 82, 83 and 84).

"A. The Northern Securities Company, or a company of that character, has been considered by the large shareholders of the Great Northern Railway Company for several years.

"Q. And for what purpose, Mr. Hill?

"A. *For the purpose of combining their interest in the property.*

"Q. And what was the object or purpose of the combination?

"A. Some of them were very old men, and they had always acted together and in harmony, and *they desired to perpetuate that action.* . . .

"Q. *And was that the purpose and object, Mr. Hill, of your organizing the Northern Securities Company?*

"A. *That was the purpose*

"Q. And at the time of the organization of the Northern Securities Company were these things that you have told us the only objects or purposes that you had in mind at that time?

"A. *The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning making their holding together permanent.* * * * The relations growing out of the large purchases by the Union Pacic interests of the Northern Pacific, and suggested whether we should not include in our *holding company* our holdings in the Northern Pacific.

"Q. *And for the same purpose?*

"A. *For the same purpose, so that we would all act together and no one would sell out or leave the others.* We would all act together.

"Q. For the purpose of *unifying* the interests that you had in the two roads?

"A. *Yes, sir; for the purpose of unifying the interests in each road.* * * *"

P. 86.

"Q. Well, then at the time you formed the Northern Securities Company, organized the Northern Securities Company, had you agreed upon the basis at which the Northern Pacific stock should be *turned into* the Northern Securities Company *in exchange for* Northern Securities stock, as well as the basis on which the Northern Pacific stock should be turned in in exchange?

"A. My recollection of that is that possibly in my interview with Mr. Kennedy, early in June, soon after his return from Europe, that the question came up

as to how, *if we put our own holdings into a company, upon what basis this stock would go in, and he asked me to turn it over.* Maybe I wrote him and maybe I saw him; but I think the basis—I think, after consulting with two or three of the shareholders, I fixed the rate upon which each, the Northern Pacific and the Great Northern, would be *taken* or *purchased* by the *holding company* when such *holding company* was organized. * * * *"

P. 96.

"Q. Mr. Hill, do you know that as a part of the consideration for the sale of Harriman stock, so called, to J. Piermont Morgan & Co., a large block of Northern Securites Company's stock, which was to be issued later, was to be turned over to Harriman or his associates?

"A. *I knew that the stock was exchanged the same as other stock. Now, that is all the exact information I had on the subject.*" * * *

P. 689.

"A. * * * That had been considered for a long time, although in view of what happened, Mr. Kennedy said *we must devise some plan to prevent hereafter such raids as have occurred.*"

P. 693.

"Q. * * * *What was the purpose* after that time of youg entlemen who promoted the Northern Securities Company *in forming that company and putting into it a majority of the stock of the Northern Pacific Company?*

"A. We were particularly anxious to put a majority of that stock *where it could not be raided again as it had been.* We wanted to put it in a corporation that was not a railroad company—a company that *would hold it as an investment*, and the larger the company

the more difficult it would be to secure a majority of it."

Letter of James J. Hill to Great Northern stockholders (p. 703):

"November 30th, 1901.

"Replying to you letter of the 23d asking for further information about the Northern Securities Company, I beg to say * * * *These men have deemed it wise to make PERMANENT arrangements for the protection of their interests and for securing a CONTINUOUS policy in the management of their properties. Believing the Northern Securities Company will secure the objects named, they have generally sold to it their holdings of Great Northern shares, on the terms stated in the circular.*" * * *

P. 705.

"Q. You state in this letter: 'The organization of such a company has been considered for many years by the original promoters of the St. Paul, Minneapolis & Manitoba Railway Company, and its successors, the Great Northern Railway Company, who have always remained the largest shareholders therein. These men have deemed it wise to make *permanent arrangements for the protection of their interests and for securing a continuous policy in the management of their properties.* What did you mean by that?

"A. The protection of their interests; *protection from raids like the one which had been made in May previous* on the Northern Pacific. Some such raid might be made on the Great Northern. And for the *making permanent* the general policy."

The answer of the Northern Securities Company (page 42) and the answer of James J. Hill (page 62) contains the following paragraph:

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon

the policy, which, under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means THEIR HOLDINGS COULD BE KEPT TOGETHER, so as to secure the continuance of such policy in the management of the company.*"

Answer of Northern Securities Company, p. 43:

"In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of *putting their holdings of Northern Pacific stock into the proposed holding company*, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company, and that its capital stock should be made large enough to enable it to buy such holdings."

Answer James J. Hill, p. 67:

"*The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies.*"

JOHN S. KENNEDY testified as follows:

Page 192, * * *

"Q. Do you mean to say, Mr. Kennedy, that the plan has matured, so far as it related to the Great Northern road was concerned was to form this securities

Company and give every stockholder a chance to *turn in* his stock to the Northern Securities Company?

"A. *Yes; if he chose to do so.*

"Q. *And to take in return therefor stock of the Northern Securities Company?*

"A. *Yes, sir;* that was not the original plan.

"Q. I understand.

"A. *But as finally consummated.* * *"

P. 194.

"Q. Now, at the time the suggestion came up of making a securities company, organizing a securities company *for the purpose of carrying the stocks of you gentlemen* in both roads, did it not?

"A. Yes, sir.

"Q. And later on it was decided to throw the privilege open to *any and all the stockholders* of the Great Northern, was it not?

"A. Yes, sir; I think that was it." * *

P. 195.

"Q. *You wanted to have a majority of the stock of the Northern Pacific where you could ABSOLUTELY CONTROL it?*

"A. *Yes, sir.*

"Q. *Under all circumstances?*

"A. *Under all circumstances.* * * *

"Q. Well, why did you distinguish? *You say you wanted a majority of the Northern Pacific where you could absolutely control it so as to prevent another such occurrence as that of May 9th?*

"A. Yes. * * *"

Page 196.

"Q. *You were just as anxious to prevent an attempt to buy up a majority of the Great Northern by a rival interest as you were to prevent an attempt to buy up a majority of the Northern Pacific, weren't you?*

"A. I *didn't want an attack in either case.*

"Q. That is what I am getting at—that is, a purchase by a rival interest of a majority of the stock of either *the Great Northern or the Northern Pacific was a thing which you were trying to prevent, was it not?*

"A. Yes, sir; that was our idea; at least, that was my idea; I speak for myself. * * *"

Page 197

"Q. Now, you gentlemen, Mr. Morgan, Mr. Hill, and his associates and yourself, at the time you conceived and agreed upon the plan of organizing the Northern Securities Company, agreed among yourselves to *turn in* a majority of the stock of the Northern Pacific into the Securities Company, did you not?

"A. I don't remember of any special agreement made on that subject. I think it was understood they would *turn it in.*

"Q. *So as to place a majority of the Northern Pacific ABSOLUTELY in the Northern Securities Company?*

"A. *Yes, sir; that was my idea.*

"Q. And so far as you know that was the idea of the other gentlemen associated with you?"

"A I suppose it was. I have no information on that point.

* * * * *

Page 223

"Q. Didn't Mr. Hill state to you and give you to understand so that you felt practically sure that a majority of that stock was *going in* before the Securities Company was organized.

"A. The impression I got was that a majority would *go in*, but when you ask for knowledge, I don't know."

* * * * *

GEORGE W. PERKINS testified as follows:

Page 234

"Q. Did you pay any cash at the time you made the deal with them?

"A. *We undertook to get them a certain amount of stock from the Northern Securities Company—a certain sum of money in exchange for their holdings.*

* * * * *

"Q. What was your understanding or arrangement in case you had failed to make a deal with the Northern Securities Company for the turning in of all this stock to it; would you have had it on your hands—$78,000,000 or $80,000,000 of preferred stock?

"A. No, sir; the Union Pacific would have had it. * * * "

Page 240

"Q. When was there first brought to your attention the adoption or the formation of any company, whether called the Northern Securities Company or any other name, to hold the stock of the Northern Pacific or the Great Northern Railway Company?

"A. The idea of a *holding company* to *hold* the stock of the Northern Pacific Company was brought to my attention after my return from Europe in the autumn of 1901."

CHARLES STEELE testified as follows:

Page 290

"A. * * * *The question of forming some sort of a holding company* to *hold* the Northern Pacific stock, which we had bought and which was held by our friends at that time, was discussed about then.

* * * *

"A. * * * I said in the summer of 1901 the matter of *putting* the Northern Pacific stock which we held into a securities company was first brought up."

Page 296

"Q. When was the time that the ratio at which the stocks of the Northern Pacific and Great Northern were to be *turned into* the Northern Securities Company first brought to your attention?

"A. The only time it ever came to my attention was when the suggestion was made that the stocks which *we hold*—the Northern Pacific which *we hold*, or our friends, should *go in*."

Page 299

"A. * * * *I knew a holding company was to be formed, into which I assumed that Mr. Hill and his friends were going to put their Great Northern stock. The first time that my attention was called to the* fact that the Northern Pacific stock would be *taken in* as well was when we made our negotiations to *put in* our Northern Pacific stock which our friends held, as to which I have testified. * * * "

Page 301

Mr. Stetson:

"A. The question of a *holding company* for the stock of the Great Northern Railway Company was brought to my attention, I think, in the spring of 1900, almost the first time I went into the firm of J. P. Morgan & Co. The idea of a *holding company* to *hold stock* of the Northern Pacific Company was brought to my attention along the latter part of the summer of 1901."

Pages 303 & 304.

"A. * * * It was understood that our friends by which I intend to mean the same persons that I tried

to describe to Mr. Boutelle, were to have the right to *put their stock in* at the same figure."

J. P. MORGAN testifies as follows:

Pages 344 and 345

"Q. And then you had that in your own mind to have a holding company for the Northern Pacific?

"A. That came up after I came back. *When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger:* that is to say, our property being absorbed by a competing line without our knowledge or consent. *It occurred to me something ought to be done to prevent that,* because, while we chose to defend the property, I *did not want it to go on indefinitely, and I thought the best plan was to go to some trust company. My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

"Q. That is, to *hold* control?

"A. *Hold control, of the stock. Just to surrender it to them and take their receipt.*

"Q. For the purpose of keeping control in one place?

"A. No; not alone to keep it in one place, *but to keep it so that the policy of the company upon which its future depended could not be continued. We didn't want convulsions going on.* You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put*

that stock so that it could be protected—to maintain the policy of the company as it then existed."

Page 347

"A. * * * *My idea was I can't live forever, and J. P. Morgan & Co. may be dissolved. I wanted this effected, so that the policy we have incorporated and created shall be continued on that property if the stockholders chose to put the stock there.*

"A. * * * I don't remember talking with him, Hill, until when we came to discuss this question when I made up my mind to do this thing. He was a large stockholder of the Northern Pacific, and I said I think that has got to be done. *I will not take the responsibility of going through anything of this kind again.* If a man has got 10,000 shares of stock, and acts with you, and he is your friend, to-morrow somebody comes on and offers him 100 per cent. profit, and he will sell his stock, and you will find yourself left in a box. *The consequences are too serious. I said, 'it can't go on that way.'*

"Q. What was the result of your talk with Mr. Hill?

"A. The result of it was that we decided that the Northern Pacific, so far as I was concerned as a stockholder in the Northern Pacific, I would *put my stock in* provided that he would *take everybody else's into this thing* that he had proposed to arrange for the Great Northern.

"Q. That is, this Northern Securities Company?

"A. Yes.

"Q. That is, provided he would *go in* himself?

"A. Yes, of course. Well, I didn't care whether he went in or not. We had a majority without him. I

wanted a majority of the Northern Pacific stock in that securities company. *I didn't care who went in, provided there was enough there to protect the Northern Pacific.* * * * "

P. 349

"A. * * * *I wanted simply to keep the stock of the Northern Pacific safe beyond question.*"

P. 351

"Q. Did you see a circular sent out by Mr. Hill to the stockholders of the Great Northern advising them to *turn their stock into* the Northern Securities?

A. Oh, yes; I got one of those as a stockholder, and *I turned mine in.*"

P. 352

"A. * * * I knew what the price of the two stocks were to be before I *put in* my stock, but whether it was before or after the organization—legal organization of the company—I don't know."

P. 354

"A. He was acting for his stock and I for mine, with the condition that if the Northern Securities Company was organized the holders of the Northern Pacific stock should have the right to *put in their stock* the same as we did. * * *"

P. 355

"A. I have already said to you that the Great Northern Company and a holding company was a thing of Mr. Hill's plan. The question simply was whether J. P. Morgan & Co. should select the Northern Securities Company as the CUSTODIAN for *our* Northern Pacific stock or not, so that it was really Mr. Hill's plan, and the Great Northern went in before I did. I told you before he had arranged that for his road and subsidiary companies, at least that or *some holding company*, so that was long before this thing came up."

"Q. You have explained that it was your idea that it would be a good plan to put the control of the Northern Pacific into a trust company or into a *holding company*, and Mr. Hill apparently held the same theory as to his stock.

"A. Not at the same time.

"Q. No; not at the same time; he had worked that out some years ago in his mind. You had both been working the same thing out. Why was it agreed to put the stock of both these companies in one *holding company?*

"A. *It seemed to me the better way of putting it.*

"Q. *But why?*

"A. *Why, on the face of it, it did not make any difference to me.*

"Q. Why put the stocks of both these companies into one *holding* company?

"A. *In the first place this holding company was simply a question of custodian, because it had no other alliances.*"

XII.

The so-called permissive portion of the decree certainly did authorize the return by the Northern Securities Company to the individual stockholders who assigned to Securities Company the identical stock so assigned. If it was Northern Pacific stock, then Northern Pacific stock was to be returned.

This return was to the individual.

It was not a return to the combination. By returning to the individual, the combination was disintegrated and the individual stood as before the combination, with the prohibition of entering into a combination,

If, on the contrary, the return was to the combination, that is, that the assignment had effected an actual pooling and transfer of the title of the stock, then the combination would have held the control of both the railroads instead of the intermediary, the trustee, the Northern Securities Company. Such result would have been diametrically opposite to the opinion and decree of this Court, and would have perpetuated the combination.

You did not at any step of the case admit that a legal title passed to the stocks. The illegality of the acquisition —the illegality of the holding—were both predicates for your conclusions. Therefore, the trusteeship of the Securities Company necessarily was for the individuals, not for the combination.

The individuals *before* each assigned, each owned his stock, and the Securities Company merely handed back his own. In this return he did not rely on the title of the Securities Company. But if the assignment to the Securities pooled all the stock and gave to each of the combine an interest in the joint pool, then it is obvious the title passed out of the assignors and into each member of the combine through the Securities Co. In no other way could the *pool* of the stocks be effected—

This would be to affirm the legality of the assignment—

It would be to contradict the affirmation by Mr. Justice Harlan, that the decree did not destroy property rights, for if our Northern Pacific stock is vested in the Combine and we are to take from the Combine for our Northern Pacific, stock in the Great Northern, and that is the meaning of your opinion and decree, our property rights are certainly affected.

Judge Harlan's language was

> "The decree, if executed, will destroy *not the property interests of the original stockholders of* the constituent companies but the power of the holding corporation."—

XIII.

Judge Thayer's St. Paul Opinion.

The court below, (Judge Dallas), quoted largely from the opinion of Mr. Justice Thayer at St. Paul when the application of the appellants to intervene was denied, and the lower court (Judge Dallas) instead of reading the opinion and decree of this court, and especially reading your decree in the light of your opinion, read your decree solely in the light of the opinion of Judge Thayer at St. Paul, and as we respectfully urge, misapprehended his meaning.

Properly understood and read, we think that the St. Paul opinion of Judge Thayer as to the meaning of the St. Louis decree, and the St. Louis decree itself, are perfectly consistent with the meaning which we urge should plainly be given, to the decree of this court, read in the light of your opinion.

Other counsel, (Mr. Guthrie) has fully treated this in his brief, and it is not here intended to re-state what he has there so well said.

The present Brief assumes (for the sake of argument) that the court below, (Judge Dallas) and the appellees in this case correctly construed the meaning of the opinion of Mr. Justice Thayer at St. Paul. What we purpose to show is that if they have so correctly construed the opinion of Mr. Justice Thayer at St. Paul, then such St. Paul opinion should not be allowed to effect, and especially not to control the conclusions of this court as to the meaning of its own opinion and decree.

That St. Paul opinion, we submit, is open to the following just criticism:

(A) Among other things it said—

"The decree was wholly prohibitory."

We submit this is not correct, because—

(1) The decree itself affirmatively found—
"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade or commerce among the several states such as an act of Congress, approved July 2nd, 1890. * * * denounces as illegal."

(2) "That all of the stock of the Northern Pacific Railway Company and all of the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states."

These findings of fact are parts of the decree which authorized the return of the stocks, and this authority should be read in the light of those findings and of the opinion of this Court.

(3) The court overlooked the fact that by the prior portions of its own decree it had tied up the Northern Pacific stock in the hands of the Northern Securities Company in such manner that it was impossible for the Securities Company by the mere assignment of the stock without the leave of this court to vest in the assignee an absolute title with the rights of ownership in the stock, including the right to vote, collect dividends and exercise influence.

We refer to the argument in the prior portions of this brief in support of this proposition.

(4) Affirmatively, not negatively, the court permitted the return to the original stockholders of the specific railroad stock assigned to the Securities Com-

pany, and gave authority to the Securities Company to so part with the stock.

Why, if it was not fair and equitable did the Court do this?

(B) This return, the St. Paul opinion, called

"merely permissive,"

and as being one that was

"tentatively suggested,"

and that the fact that the directors of the Securities Company

"have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree."

As we have hereinbefore shown, the present plan proposed by the directors to the stockholders of the Securities Company is a plan diametrically opposite to, and entirely inconsistent with, the findings of fact in the St. Louis decree, and the mode of the disposition of the stock by the return to the original stockholders. The carrying out of such a plan, therefore, must contradict the decree in two respects:

(a) To carry it out it must be affirmed that the Securities Company became the lawful purchaser and the lawful, absolute owner of these railroad stocks, but the decree itself had already found that it had acquired them in virtue of the illegal combination, and it held them in virtue of that, and that therefore, both the acquisition and the holding were illegal.

(b) The return of the railroad stocks to the original assignors necessarily was based upon the proposition that the Securities Company had not received a lawful, absolute title to the same.

If the Securities Company had received a lawful, absolute title, then the stockholders of the Securities Company would have had an interest through the Securities Company in that stock, and the St. Louis decree would not have taken from those stockholders property to which they were entitled, and especially not as the St. Louis Court, Judge Thayer said in his St. Paul opinion, doubted

> "its power to compel stockholders of the Securities Company who had not been served with process and were not before the court otherwise than by representation, (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof."

Even the permissive portion of the decree *gave authority* to the Northern Securities Company to make such exchange, and the court therefore necessarily determined that such exchange would be fair and equitable to all the stockholders of the Northern Securities Company.

If so, that which was directly opposite—as the present plan—and necessarily founded on a state of facts which contradicts the former decree, as does the present plan, is certainly an evasion of the St. Louis decree, and plainly an evasion and disregard of the decree of this court.

In the Government Case in this court you had before you solely the record which included the opinion and decree at St. Louis. By that opinion and that decree and the pleadings in the case you alone knew what was decided by the court at St. Louis:

You did not have before you the opinion of Judge Thayer at St. Paul, which was not delivered until after your opinion and decree, and in which your Opinion does not seem to have been studied.

Your opinion, and especially the findings of facts in it upon which you founded your decree, do not seem to have been considered by Judge Thayer. He seemed to refer wholly and only to the proceedings at St. Louis and not those in this Court.

You did not have before you the question, whether what is called the *permissive* portion of the decree should be made mandatory. The Government had not appealed from the St. Louis decree, and whether that portion of the decree should be allowed to remain as it was or be made mandatory, was not assigned for error, and was not before this court:

You did not have before you any of the sugggestions by Judge Thayer at St. Paul, as follows:

> "The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential".

The assertion in the St. Paul opinion that the mandatory prayer for the return of the stock was denied by the St. Louis court:

The averment in the St. Paul opinion that

> "When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make a disposition of the stock, which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity.
>
> "It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Northern Securities Company, and that, if any controversy arose in the discharge of this function, in view of the

situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

That the portion of the decree authorizing the return of the stocks was tentative merely and permissive, and the fact that the directors of the company had proposed a plan somewhat different from that outlined in the decree, was not a failure to obey the decree:

That the St. Louis court expressly refused to make the decree when entered mandatory for the return of the stocks.

It is suggested that these remarks of Mr. Justice Thayer at St. Paul in reference to the St. Louis decree should be read in the light of the fact, (as the opinion at St. Louis when read will disclose), that the court in St. Louis decided the case on the ground that even if it could be held that the Northern Securities Company was the lawful purchaser and lawful owner of the stock, *still* the Government was entitled to recover. The St. Louis court did not in its opinion sharply distinguish as to whether the Northern Securities Company had purchased or held the stock merely as custodian. In whichever capacity it had acquired the stock, the court in its opinion held that the Government was entitled to a decree.

This court, however, when the case came here, as we have seen, sharply divided on the question as to whether the Securities Company had *really* purchased and become the absolute owner of the stock; the majority of this court held that it had *not*, but was merely the custodian or agent or trustee for the combination. Upon that finding your decree was based. Your decree must always be read in the light of that finding; so read, there can be no question whatever but what this court passed definitely and distinct-

ly upon, and found affirmatively that the Securities Company did not purchase, but became merely the custodian for the assignors of said railroad stocks.

Judge Thayer's St. Paul remarks should be read in the light of the suggestions made. To read your decree in the light of the St. Paul opinion, instead of in the light of your own opinion, would entirely overlook the distinct ground upon which you put the decree.

We think that the St. Louis decree did adjudge and decree what we have hereinbefore argued—and we do insist that the St. Louis decree itself is misconstrued by the St. Paul opinion, if that opinion bears the construction appellees put upon it.

We suggest as a possible explanation of Judge Thayer's St. Paul opinion the reason above given.

The St. Louis court did not make, as the controlling question in the case, the distinction between the real, substantial ownership and the mere holding of the railroad stocks as custodian that this court did.

XIV.

Error of the Court of Appeals in Deciding that this Court did not even "incidentally" consider the question of ownership and deciding this case as if the Government case had not arisen.

How could the Court below in view of the foregoing and after admitting, as it did, that the question in the present case was:

> *Does the Northern Securities lawfully and absolutely own the railroad stocks?*

say as it did—

"If the question before us had been involved and "decided in the suit of the *United States vs. The North-* "*ern Securities Company*, or if it had been passed "upon,

"*though but incidentally*,

"by the Supreme Court of the United States in dispos- "ing of the appeal in that case, we of course would "not regard it as an open one. But it was neither "decided *nor considered* at any stage of that litiga- "tion."

The very corner stone of the opinion of this court, reiterated, and emphatically reiterated (supra), was that:

The Northern Securities Company was *not* the *real purchaser* or *real owner* of these railroad stocks, but *merely* the custodian or trustee for the individuals who made up the combination

By your decree you denied that the Northern Securities Company was such real purchaser or real owner, for you there adjudged that all the railroad stock was

"acquired and is now held by it *in virtue* of such combination,"

which you had denounced as illegal.

To hold

"in virtue of"

an illegal combination is certainly not to hold as a real, substantial owner.

You took pains to explain in your opinion that when you deprived the Northern Securities Company of its rights which it would have had if it had been the real owner of the stock, that you did not strike down the property interests in the stock, because, as you explained, these property interests really belonged to the original stockholders, and not to the Northern Securities Company.

A careful reading of the opinions of Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice White emphasizes the fact that this court divided sharply on the question—

> Was the Northern Securities Company the real, substantial purchaser and owner of the railroad stocks?

And the majority of the court held that it was not.

As we have seen, Mr. Justice Brewer concurred, and Mr. Justice White, while dissenting on the grounds that Congress could not legislate in reference to the ownership of stock in a state corporation, did not assert that the Securities Company was the real, substantial owner of the stock.

To any one who has read and studied these opinions, it is simply incomprehensible how the court below could have made the statement and decided this case in the court below on the grounds that this court had never even *incidentally* considered the question of whether the Northern Securities Company really owned the railroad stocks.

If it had not been for the decision in the Government case this controversy could not have arisen. It is a sequence from that. It is closely bound up with, and influenced by, that decision. No one can understand or would pretend to discuss *this* case unless he carefully studied the other.

Yet the Court below (Judge Dallas) said:

> "The present suit is an *independent one*, and as its "subject matter is *distinctly different* from that of the "suit in which the United States was complainant, the "duty of this Court *to independently consider it* has "seemed to us to be both plain and imperative."

And he decided the case as if the Government case had never arisen.

If the Court of Appeals is correct in this statement, why did all the Judges in this Court consider the question of ownership of the stock such an important one that Judge Harlan used pages in its discussion?

Judge Brewer considered it and drew a distinction between the rights of an individual and of a corporation as to the purchase and ownership of such stocks.

And Judge White, while stating the question of ownership of such stock as held by Judges Harlan and Brewer, dissented expressly because Congress had not the power to regulate such ownership.

XV.

Equities.

It requires no elaboration in statement or argument to prove the inherent and controlling equities of complainants which loudly appeal to the chancellor in this case.

A simple statement of facts suffices.

Morgan, Hill & Co. organized the Northern Securities Company to control the Great Northern and Northern Pacific Railways and pool their earnings by acquiring a majority of the stocks of each railway. They themselves trans-

ferred large blocks of those stocks to the Northern Securities Company. The continued control of those two railways and the poolings of such earnings were the reasons why the Northern Securities Company was formed, and to it the railway stocks were assigned, and such purpose necessitated the continued holding of the railway stocks by the Northern Securities Company. If that company parted with either stock, the whole purpose of acquiring the stock and the inducement to the assignors to assign the stock would be defeated.

As a fact the Northern Securities Company never has parted with one share of the Northern Pacific or Great Northern stock.

Morgan, Hill & Co. induced, indeed, compelled the complainants to also transfer their Northern Pacific stock to the Northern Securities Company as part of, and to perfect the scheme aforesaid.

Record pages 157-158.

No consideration whatever was paid by the Northern Securities Company for such railway stocks—the Northern Securities stock being fixed at a figure which practically equalled both the Northern Pacific and Great Northern stocks—except that $82,491,871 in stock of the Northern Securities Co. and $8,915,629 in cash was issued to us for our Northern Pacific stock.

All parties fully believed this plan to be lawful and really beneficial to commerce, but the Supreme Court of the United States adjudged it was a violation of the Sherman Act, and made a decree which restrained the Northern Securities Company from carrying out the scheme and rendered the railway stock worthless in its possession.

This necessitated a dissolution of the Northern Securities Company, as the Supreme Court foresaw.

Now, waiving for the present the question of the title the Northern Securities Company took to such railway stock, it certainly took such title, whatever it was—and such title

was assigned to it by Morgan, Hill and Harriman—to accomplish a defined, well understood purpose—which was the continued control of the Great Northern and Northern Pacific railways, and the pooling of their earnings. Except for such purpose the railway stock would not have been assigned. If to the Northern Securities Company such control and pooling were and now are no longer possible, it is quite evident the inducement which procured the assignment of the stocks failed and rendered the continued possession of the stocks by the Northern Securities Company useless. What would the plain, ordinary man who allows his conscience to rule his action, do?

Evidently, the scheme having failed, put every one in *statu quo, ante* the transfer to the Northern Securities Company of their respective stocks—and this could only be done by re-transferring to each his stock, the Northern Securities Company still holds it—each still holds his Northern Securities Company stock. The re-transfer is simple. If there be strangers who came in afterwards and who have equities, do what is fair to them.

This would do even and exact justice to all and be inequitable to no one. It would forbid any one benefitting by the illegal scheme and give to each his own.

The scheme having failed and the continuation thereof being forbidden, why should the complainants who assigned to the Northern Securities Company at a comparatively low valuation their Northern Pacific stock, to carry out the scheme aforesaid, now when the scheme has failed, be compelled to part with a large portion of their stock without any consideration to them (complainants) to Morgan, Hill *et al.* and be compelled to take from Morgan, Hill *et al.* Great Northern stock then and now of comparatively less value than Northern Pacific? And especially, why should this be allowed to Morgan, Hill *et al.* merely because they happened to be in control of the Northern Securities Company and could dictate its action in their own favor?

What possible equities have Morgan, Hill, *et al.* to allege that through this failed scheme they acquired an interest in the Northern Pacific stock of the complainants?

When we add to this natural equity the fact that both the Circuit Court and the Supreme Court of the United States authorized such a return in *statu quo* and suggested it, it would seem as if the question should be considered as closed.

But let us consider more in detail the exact situation in this case of this question, and the contentions of the defendants below, appellants here.

The bill is filed by complainants who are the *cestuis que trustent* of the Northern Securities Company against their trustee, and they charge the Northern Securities Company as their trustee in two respects:

(1) The trust adjudged by the Supreme Court of the United States in the acquisition by the company of our Northern Pacific stock as our trustee for certain purposes:

(2) The Trust which always arises incidentally out of our relation to the Northern Securities Company as stockholders therein, and in the present also arises by implication after the rescission:

(3) Morgan, Hill & Co., in control of the Northern Securities Co., equally with that company, are our trustees and must act with extreme good faith to us.

The charge made is that our trustee threatens to take our Northern Pacific stock, which is our property and which the company holds as our trustee, and divide it among themselves, Morgan, Hill & Co. The trustee comes into court, acknowledges it can no longer act as trustee and carry out the purposes for which the stock was assigned to it, and that it must distribute the stock, but denies our title to the stock, and says it owns the stock *bona fide* and in-

tends to distribute it to themselves. Such a case peculiarly appeals to the Chancellor.

> "Courts of equity from their inherent jurisdiction assumed from the beginning the exclusive control over trustees in the discharge of their duties, whether effecting real or personal estate."
>
> Hill on Trustees, *42.

When we prove, as we have, that the existence of the trust and of our title to the trust property has been finally adjudged by the Supreme Court of the United States, then our trustee resorts to a defense which no Chancellor ever listened to from a trustee as against his *cestui que trust* In plain English, the Northern Securities Company (really Hill-Morgan group), our trustee says:

> I did receive your property from you with the agreement that I was to hold it as your trustee to accomplish certain results. I can no longer so hold or use it, for the Court has held such to be in conflict with the Sherman Act. But I am in possession of the property, and as the purpose for which the property was assigned was illegal, in which illegal purpose you and I each joined, you cannot maintain any suit against me to enforce the trust *and I will* keep or give away as I choose your property.

Need I discuss either the iniquity of such a defense or the necessity of this Court by its peculiar remedies compelling these people to be honest.

The very relation of trustee and *cestui que trust* implies the existence on each side of honor, conscience and good faith.

Story's Eq. Jur., Sec. 1268.

The trustee may not acquire a title adverse to his *cestui que trust* (*ibid.*, Sec. 1273 e), and if the title of his *cestui que trust* be assailed he must defend it (*ibid.*, Sec.

1275). Want of fidelity by the trustee to his *cestui que trust* is ground for his removal (Sec. 1289). *Uberrma fides* is the rule governing their relations.

But the trustee says: I represent all the stockholders of the Northern Securities Company, and *some of these* purchased my stock believing I was the real *bona fide* owner of this Northern Pacific stock and *these* stockholders have superior equities to yours, for you at least stood silent and allowed such purchases to be made, knowing of such belief, and also knowing that I proclaimed myself the real *bona fide* owner of such stock.

If any such question could arise it would be an individual or separate claim by each purchaser where the facts of each would be proven by separate and independent testimony, and in which the claims would be as separate individuals, and not as stockholder.

But let us show how groundless any claim of that nature is:

Please notice that to support this alleged superior equity of these alleged purchasers, the following proof would be required.

(I) That they were induced to purchase by reason of their belief that the Northern Securities Company *bona fide* owned the Northern Pacific stock as its property, and that they never knew the question of whether they did so own it was in dispute;

(II) That these purchasers were led to so believe by the Northern Securities Company asserting that it did so *bona fide* own the stock and did not hold it as trustee;

(III) That the complainants knew that the Northern Securities Company had so asserted, and

that there was no dispute about the title, and knowing this, allowed these new stockholders to buy, and hence are now estopped as against them to set up their own title.

We deny the truth of these averments, and the case is barren of proof to sustain them. Where are the affidavits supporting such averments?

Not a single one is on file.

In no way is Mr. Harriman connected with the sale of any of the Northern Securities Company stock to outsiders, nor did he know of, nor in fact were any representations made by the Northern Securities Company as to its ownership of the railway stocks.

The affidavits of Nichols (p. 279) and Schley (p. 275) do in general language aver that sales of Northern Securities stocks were made, the purchaser believing that the Northern Securities Company owned the railway stocks, but it is obvious that the individuals who made these affidavits are using a phrase prepared for them and that they are testifying merely to their opinion as to what the purchaser of the stocks believed, and not what actually operated upon the mind of the purchaser to induce him to acquire the stock.

Not only is it not true that any single new stockholder bought relying upon such supposed *bona fide* title, but every one of them who bought stock of the Northern Securities Company after March 10, 1902, knew that the question of title to this Northern Pacific stock was in dispute. On March 10, 1902, in the Government suit the allegation was broad and express that the Northern Securities Company did not really *bona fide* own this Northern Pacific stock, but held it merely as trustee and custodian. Here was express notice given of the trusteeship.

It was a case where the Government might lawfully raise the question; where the Northern Securities Company was a party as well as the Northern Pacific Railway

Company, and where the Court had jurisdiction of the persons and the property and the question. The Northern Securities Company denied the averment, and the question how the Northern Securities Company held this stock became a matter in dispute and pending in the court.

Whoever after this March 10th, 1902, bought stock, had notice *pendente lite* of such attack on the title and was and is concluded by the decree in that case.

> "A purchaser of property *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto."
>
> *Tillon vs. Cofield*, 93 U. S. 163.

But see what a sham this plea of superior equities is: Who are these new purchasers of Northern Securities Company stock, and what are their names? When did they buy —before or after March 10th, 1902?

What did they buy?

Why do they not personally come into court and assert their superior equities? Such equities (if they exist) are personal to the individuals themselves.

How and when did they hear that the Northern Securities Company alleged it was the *bona fide* owner of the stock?

Who told them?

How was it that assertion induced them to purchase, when the fact was obvious that whether the Northern Securities Company held as trustee or owned the majority of the stock of the Northern Pacific and Great Northern was immaterial so long as it did control both railways—pool their earnings—and allow all its (Northern Securities Company) stockholders to share in this pool? The mere possession of such railway stocks with its power to vote and collect dividends insured the success of the scheme. What the title was the Northern Securities Company had to the railway stocks was relatively unimportant. It must hold the

stocks, for if it sold them the very purpose of the organization of the Northern Securities Company was defeated, *i. e.* control of both railways and pooling of earnings. As it had to hold them to effect its purpose, the title back of possession was not material.

Such title only became material when the Northern Securities Company desired to sell or distribute the stock, and this question did not arise until after the Supreme Court decision in 1904.

Even if we admitted (which we do not) that one or more persons bought stock of the Northern Securities Company under such circumstances as would give them equities, yet such equities are efficacious for the select few who may have them, and if they do possess them and they are of a nature to be set up in this case, a Chancellor would have no difficulty in the final decree in our favor to amply provide for them.

But that Hill, Morgan and others who hold a large majority of all the stock of the Northern Securities Company other than our own, and who are thus in control of the Northern Securities Company, can set up possible equities of a very few new purchasers behind which to hide, and under cover of which they can take our property, is preposterous. Hill, Morgan and Company themselves have no such equities, and they cannot masquerade as such using the marks of the meritorious few.

It is Hill, Morgan and Company who are taking our property and who now seek shelter behind the alleged one or two innocent holders:

And see how vicious this whole defence is:

Who is it, that so far as this stock distribution is concerned, are in control dictating it—and outlining the action of our Trustee?—

Hill, Morgan and Company.

They control the Northern Securities Company, and by reason of such control they owed to us extreme good faith.

Their position analyzed shows not a reliance on their own title or equities and not good faith to us, but they seek shelter behind the alleged title and equities of a few who, it is said, are *bona fide* purchasers of Northern Securities Company stock, believing and having good reason to believe it was owned by the Northern Securities Company.

And they do this, why—

Simply to make money for themselves.

They were the men who organized the Northern Securities Company for the purpose aforementioned.

They of all men knew the Northern Securities Company did not own the railway stocks.

They arbitrarily originally unfairly fixed the comparative value of $115.00 a share on the Northern Pacific, and $180.00 on Great Northern. In this we had no voice.

Record page 306.

They sat in the seat of authority and induced,—aye—compelled us to put in our Northern Pacific stock at an unfair valuation as compared with the value they arbitrarily put upon Great Northern. This, however, under the scheme only really effected the extent to which we would share in the pool dividends, for the Northern Securities Company was to hold as our trustee the Northern Pacific stock we put in.

Now that the Northern Securities Company can no longer carry out the purpose of its organization and the very inducement to us for turning in our Northern Pacific stock has failed, these same persons, Hill, Morgan and Company, calling themselves the Northern Securities Company, intend to dissolve the Northern Securities Company. They see that now the Northern Pacific stock is as it always was, if it and the Great Northern must be separated, of

greater comparative value than the Great Northern, and so what do our trustees do?

Seek to take the trust property belonging to us and put it into their pockets. They say that the Northern Pacific stock has increased in value, and the Great Northern decreased since the fall of 1901, when they were assigned to the Northern Securities Co. Now, these men who are actually our Trustees being in control of the Northern Securities Co., actually propose to take our Northern Pacific stock to make good their losses in Great Northern.

The facts need but be understood to have any Court of equity eager to prevent such iniquity.

The present proposed action of our Trustees, we regret to say, is in accord with their prior action. Morgan, Hill & Co. were our Trustees in the fall of 1901. They were then in control through the Board of Directors and officers of the Northern Pacific Railway Company.

In the fall of 1901, notwithstanding we were the owners of $78,108,000. par value of the Northern Pacific stock, of which $41,085,000. was preferred and $37,023,000. common, and which constituted a clear majority of the total capital stock of the Northern Pacific which was $80,000,000. common, and $75,000,000. preferred, our Trustees being themselves the owners of slightly more common stock than we owned, determined to disfranchise us and take our property for less than its fair value, and threatened to do so in this ingenious way: they had passed a resolution by which the Railway Company would retire all the preferred stock by paying for it at par, and they schemed to raise the money to pay for it by issuing bonds of the Railway Company, which bonds were convertible into common stock of the Company, and in order to deprive us of our fair share of those bonds *they restricted the subscription list to holders of the common stock of the Railway Company.*

Thus they largely increased their own holding of common stock of the Company at the expense of our holding of

preferred, and denied us our plain moral right as the owners of a majority of its stock to control the same.

It is true that this scheme was only in process of completion when the Securities Co. was formed, and it is not denied that appellants were forced into a situation in which aquiescence in this plan became a necessity, but its moral taint is not lightened thereby.

The whole case, and all the depositions and answers in this case and in the Government case, including the St. Paul application, overwhelmingly prove that, however the Northern Securities Company acquired the two railway stocks, and whatever was the title assigned to it, it still acquired and held the stocks for the purpose of promoting and perfecting the control of the two railways and the pooling of their earnings. To aid this purpose, which was supposed to be lawful, all these railway stocks were assigned to the Northern Securities Company; and, without the assurance that this was the purpose for which the same were assigned, the stocks would not have gone to the Northern Securities Company at all. The Northern Securities Company paid nothing for the Northern Pacific stock, issuing merely its certificate of stock in lieu thereof. Therefore, when the scheme has failed and the dissolution of the Northern Securities Company is compelled, no road seems so plain as the one that leads to the placing of each assignor of the railway stocks in *statu quo*. That Morgan and Hill, parents of the scheme which, in the end was declared illegal, should be allowed to fatten off of our stock which was assigned to the Northern Securities Company with the belief of the legality of their scheme and with the assurance of the continuation and perfection of the scheme, seems incredible now that the scheme has failed. Why should Morgan and Hill be given an interest in that stock?

Why should we be compelled to take Great Northern stock instead of it? No one that owned Northern Pacific

stock supposed when the Northern Securities Company was organized and the stocks assigned to it that the person who assigned the Northern Pacific stock was really acquiring an interest in the stocks of the Great Northern Railway, and *vice versa*, the owners of the Great Northern stock surely could not have thought that they were acquiring an interest in the Northern Pacific stock. Both these stockholders did acquire an interest, after the assignment was made, in the pooling of the dividends of both railway companies, and they did share indifferently in that pool. That was because such pooling was necessary to carry out the scheme and enable the respective assignors to benefit from the scheme; but it was not necessary to the scheme that the Northern Pacific stockholder who assigned to the Northern Securities Company his stock should receive an interest in the Great Northern, or that the Great Northern stockholder should receive an interest in the Northern Pacific. All that was necessary was that the Northern Securities Company should receive a majority of the stock of the Great Northern and Northern Pacific Railway Companies and be enabled to vote and collect dividends on the same, and hold the same, thereby controlling the two railways and making certain the pooling of their earnings.

XVI.

The Northern Securities Co. Cannot Compel Us to Accept Great Northern Stock in Lieu of Our Northern Pacific.

The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind.

Post vs. Beacon, etc. Co. 84 Fed. 369, 375. (C. C. A.)

"The minority has a lawful right to maintain that the contractual relations which it has established with

a corporation whose shareholders they became does not include a contractual relation with any other corporation; and there is no right in law to compel it to elect between such new contractual relation and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give. The underlying principle was stated in *Clearwater vs. Meredith*, 1 Wall. 25, 39, and the rule seemed to have been clearly recognized in *Mason vs. Mining Co.*, 133 U. S. 50, 10, Sup. Ct. 224."

Mason vs. Tewabic Mining Co,, 132 U. S., 50, 58.

In this case Justice Miller in discussing the right of the majority stockholders of a corporation to sell all of the assets of the company to a new corporation for stock in that corporation and to distribute this stock among its own stockholders, said:

"They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation. * * *

We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject,

Lindley on Partnership says, Book 3, c. 10; Sec. 6, sub-div. 4, page 555, original edition.

'In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners, and even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen realization of the property by a sale is the only alternative which a court of equity can adopt."

The authorities cited by Lindley for this proposition amply support it.

XVII.

When May the Circuit Court of Appeals on an Appeal from an interlocutory decree enter a final one?

From what this Court said in *Forsythe vs. Hammond*, 166 U. S. 512, it would seem that where the Judges below were divided as they were in this case, the two who happened to be the majority of the Court of Appeals should not finally decide it when the case is before them merely on appeal from an interlocutory decree.

Judge Kirkpatrick, District Judge (since deceased), granted the preliminary injunction, but without argument.

Judge Bradford, District Judge, sitting as Circuit Judge, after a full hearing and arguments, continued it.

Judge Gray, Circuit Judge, sitting in Court of Appeals, agrees with Judges Bradford and Kirkpatrick, and dissents from the action of the Court of Appeals.

Judges Dallas and Acheson alone concur in the opinion.

Of the five Judges before whom the case came, three thought it should go to final hearing.

Only two thought it should then be finally decided.

You have considered the question in the following cases:

Smith vs. Vulcan Iron Works, 165 U. S. 524.

Mast, Foos & Co. vs. Stover Mfg. Co., 177 U, S. 494.

Britt vs. Peckham Motor Co., 189 U. S. 58.

The *Vulcan Iron Works* was a patent case.

This was followed in 1899 by the case of *Mast, Foos & Co. vs. The Stover Mfg. Co.*, 177 U. S. 494.

The points ruled by this case are:

(1) *Smith vs. Vulcan Iron Works* was decided only after

"*answer and replication filed, a full hearing had upon pleadings and proofs.*"

(2) Circuit Court of Appeals may enter final decrees in a patent case where the temporary injunction is granted in a case where—

(a) The bill be *obviously* devoid of equity upon its face;

(b) And such defect be *incapable* of remedy by amendment:

(c) If the patent *manifestly* fails to show a patentable novelty in the invention:

(d) If there is no doubt of the existence or date of anticipating devices which destroy the patent:

But if—

(a) The showing made by the plaintiff be incomplete; or

(b) *If the case involves a question of fact.*

in either event, (p. 495)

"the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity cases."

In other words, before the Court of Appeals can on appeal from an interlocutory decree enter or direct the entering of a final decree, it must be certain and sure that it has before it *all* the facts and *all* the evidence either side can offer to sustain their respective allegations.

If the bill be devoid of equity, it must, this case says, be

"*obviously* devoid."

and so much so that the court can clearly see that the defect is

"*incapable* of remedy by amendment."

If the patent

"*manifestly* fails to show a patentable novelty,"

if there is

"*no doubt* of the existence or date of anticipating devices:"

If there be a question of fact, *presumably* both parties have a right to be heard and introduce all the evidence each desires, and unless the court absolutely knows all such evidence has been introduced, it cannot enter a final decree.

Brill vs. Peckham Motor Co., 189 U. S. 58, was decided in 1902.

There the Circuit Court of Appeals on an appeal from a decree of the Circuit Court granting a preliminary injunction reversed the lower court and directed the dismissal of the bill in equity.

The court below relied upon the decision in *Mast, Foos & Co. vs. Stover Mfg Co.*, just considered, as authorizing such drastic action, but the Supreme Court quoted largely from its own opinion in that case, and among other things said:

> "The *merits of the case were fully before the court*, and the patent in suit related to the use in a windmill of an old and simple mechanical device for the purpose of converting a rotary into a reciprocating motion. It was held that the case fell within the rule *sometimes* applied when there is no dispute upon the facts and there appears to be no reasonable *possibility* that complainant may succeed. But this court took care to define the class of cases in which that might be done, and speaking through Mr. Justice Brown said: * * *."

The court adds that though the hearing below was merely on a preliminary motion, the complainants (p. 62)

> "were subjected on appeal to the same consequences as if the preliminary hearing had been a final one."
>
> "Complainants, if the case had been retained for final hearing, could have *cross examined* defendants' *ex parte* witnesses as to the actual construction of defendants' various trucks * * *
>
> "and could have introduced evidence on these subjects, as also on the question whether complainants' invention antedated the Peckham and Mainer patents. * * *"

One of the defenses was the delay of the inventor in applying for a patent, and the court say:

> "If the matter of delay were of importance as assumed, it was open to the inventor to explain the reason of the delay, if any, and complainants were entitled to make proof of such explanation. * * *
>
> "*If complainants in every case must understand that a motion for a preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made.*"

The Court concludes its opinion thus:

> "Considering the peculiar attitude in which the case is presented, we prefer not to discuss the question how far the Appellate Courts are justified in reversing orders of the Circuit Court granting preliminary injunctions when their discretion has not been improperly exercised. * * *"

The conclusions from this case would plainly seem to be:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

> "when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Circuit Court on appeals from preliminary decrees to enter final decrees is limited to cases where

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed:

(b) If a question of fact is involved, the complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits,*the complainant was entitled to cross examine the party who made them.*

(c) The preliminary hearing and injunction has a well defined, useful purpose, and a complainant is entitled to go into such hearing without being compelled in the Appellate Court to treat it as final hearing with all proofs in. To do so is unfair to the lower court and most unfair to the complainants and gives undue advantage to the defendant.

From all these cases we deduce the following rules:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

"when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Court of Appeals on appeals from preliminary decrees to enter final decrees is limited to cases where—

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed.

(b) If a question of fact is involved, the Complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits *the complainant has the right to cross examine the party who made them.*

(c) Unless the case, as stated in the bill, is

"obviously devoid of equity"

and such defect

"be incapable of remedy by amendment"

as where the case stated does not give jurisdiction to the court in which the bill is filed, or where the relief asked is obviously such as the court cannot grant, and it is apparent the defect cannot be cured by amendment:

(d) In patent cases where the validity of the patent is necessarily raised and involved and a decision against its validity is final, the entry of a final decree seems obvious.

(e) The power to enter such final decree is exceptiona and unusual and should be exercised with great caution, and only in cases free from doubt, and where it is plain and certain that there is no

"reasonable *possibility*"

of the complainants' recovering on the whole or any part of their claim.

(f) The practice puts the complainant at a disadvantage. Heretofore in other than patent cases he did not on a motion for a preliminary injunction ordinarily develop his entire proof. This was often impossible and often inexpedient, and sometimes beyond his reach, as when he relied on the books and papers in the hands of the opposite party, or on cross examination of defendants' witnesses.

If he is in the Court of Appeals to go really to final hearing, he is practically denied his preliminary motion which is often absolutely essential to his relief, as where in this case, the subject matter of the litigation will be hopelessly scattered and the complainant practically remediless.

As Chief Justice Fuller said *ante:*

"If complainants in every case must understand that a motion for preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made."

So far as we have been able to find there is *not a single case holding where the Bill stated a cause* of action and the defendant did not demur, but disputed the averments of fact, that the Court of Appeals may, on an appeal from an interlocutory decree where the motion was for a preliminary injunction, and the hearing was on Bill and *ex parte* affidavits, dispose of the case on the merits and enter practically a final decree.

(1) *The present case was one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a preliminary injunction, could not enter what is practically a final decree, and finally dispose of the case on the merits.*

It is not disputed that the present bill stated a case for equitable relief. This is demonstrated by the fact that the defendant did not demur to the bill, and after the appeal was taken in this case filed an answer to the same.

The motion in the Circuit Court was for a preliminary injunction and was heard on the bill and *ex parte* affidavits. The opinion of Judge Bradford, who granted the preliminary injunction merely stayed the distribution until final hearing.

The action of the Court of Appeals was in effect final.

It will permit, the court admits, the dissipation of the stock in suit by its division among, say twenty-five hundred persons, so that if your petitioners were finally held to be entitled to recover, their victory would be a barren one.

The decision avers on its face that it is, and is intended to be a determination on the merits and a complete adjudication on the essential questions of law and of fact involved in the case. It renders hopeless any further proceedings in the Circuit Court by proofs or arguments to sustain your petitioners' case.

The Circuit Judge held that the case was one which should go to a final hearing, where both of the parties to the controversy would have an opportunity to cross-examine the adversary's witnesses, to compel the attendance of hostile witnesses and the production of all books and papers that may throw light upon the case, and the intelligent consideration by the Court, in disposing of the question of fact, of all the circumstances surrounding the transaction. The right to do these things was denied to your petitioners by the decision of the Circuit Court of Appeals.

That decision disposed of the question of fact, wholly ignoring the circumstances under which the Northern Securities Company acquired the Northern Pacific stock of your petitioners; wholly disregarded the purposes for which all of the railroad stocks were acquired by the Northern Securities Company: wholly disregarded the purposes for which the Northern Securities Company was organized, and the combination against trade and commerce, of which it was the head and front. It did not even mention the fact that the Northern Pacific stock in dispute was assigned to the Securities Company, and is now held by the Securities Company in furtherance and in virtue of the illegal combination and as an indispensable means to perfect an illega scheme. That it was illegally acquired and is illegally held.

It did not even notice that when it held the Securities Company was a real purchaser and became the absolute, law-

ful owner of the stock, it distinctly contradicted the decree which held to the contrary; that when it authorized the present *pro rata* distribution of the stock it was of necessity adopting a scheme diametrically opposed to the return allowed in the decree; and that it was allowing that which this Court in its decree did not allow. Most of these facts were admitted on the hearing for preliminary injunction, but were entirely disregarded by the Court of Appeals in passing upon the question of fact as to the nature of the title the Northern Securities Company acquired to the railroad stocks, though, in our judgment and heretofore in the judgment of this Court, they had a most material and important bearing.

We insist that the Court of Appeals erred in entering what was practically a final decree in this case, because—

(a) There were seriously disputed and substantial questions of fact;

(b) There were seriously disputed and substantial questions of law:

(c) The Northern Securities Company had not demurred to the bill of the petitioners and the hearing in the Circuit Court on the motion for preliminary injunction was on bill and *ex parte* affidavits and before an answer had been filed. And the Court of Appeals found the facts *directly contrary* to the averments of the Bill;

(d) The Circuit Court in issuing the preliminary injunction, did not exceed its discretion, and this the Circuit Court of Appeals admitted in its opinion, though it misunderstood the purpose for which the injunction was issued, saying that the injunction was issued with the understanding that the Circuit Court of Appeals would on a hearing from the interlocutory decree in the case, enter what was practically a final decree in the case,

though of this intention by the Circuit Judge the opinion of the Circuit Court contains no evidence, but, we respectfully submit, points to the contrary,

(e) The Court of Appeals erred in its disposition both of the question of fact and the questions of law in the case; and

(f) The Court of Appeals overlooked material questions of fact which were involved in the case, and the determination of which in favor of your petitioners would have entitled them to equitable relief.

XVIII.

Questions of Fact and of Law.

Among the questions of fact and law insisted upon in the Court of Appeals and which arise on this record, are the following:

Among the questions of facts in the case were these:

(1) Was the Northern Securities Company the lawful owner with the right to sell, of the Northern Pacific stock owned by the Oregon Short Line Railroad Company, or, did it acquire the said Northern Pacific stock in pursuance and in furtherance of the unlawful combination against trade and commerce (and in conflict with the Sherman Law,) by which unlawful combination it was sought to place in the possession of the Northern Securities Company, the agent of the unlawful combination, the control of the Northern Pacific and Great Northern Railroad Companies, and thus restrict trade and commerce, and that *thereafter* the Northern Securities Company held such railroad stocks really only as trustee and custodian?

We alleged that the Northern Securities Company was not such lawful owner.

(2) What were the terms of the contract under which the Northern Securities Company acquired the Northern Pacific stock from the Oregon Short Line? Were they similar to the terms of the contracts under which the Securities Company acquired its other Great Northern and Northern Pacific stock, or did they differ?

Was the Northern Pacific stock assigned by the Oregon Short Line in furtherance of the combination to further which the Securities Company was formed to enable the combination the more certainly to control two parallel and competing railroads engaged in interstate commerce, and with this stock in connection with that of Great Northern *permanently* hold and manage the two railroads in one interest and thus prevent competition between them; and was this to be carried out by a collection of dividends from both roads and a distribution of these dividends among the stockholders of the Northern Securities Company, without regard to who assigned the respective railroad stocks to the Securities Company?

Was a *permanent* holding, and thus control of the two railroad companies by the Securities Company, the

main consideration to petitioners for assignment of its Northern Pacific stock to the Securities Company?

As we show in our petition, the bill alleged that it was, and of this there was no contradiction by the defendants, unless indirectly so by Mr. Hill's affidavit, which affidavit was strangely at variance with Mr. Hill's evidence in the Government Case (Record of that case, page 96) where he testified:

> "I know that the (Harriman) stock was *exchanged* the same as other stock. Now that is all the exact information I had on the subject."

In support of the bill, we add the affidavits of Mr. Harriman, the two affidavits of the bill and extracts from the testimony of Messrs. Hill, Morgan, Clough and others as set forth in our petition.

(3) Is it true, as averred by the appellants, that the original parties forming the combination, (Morgan, Hill & Company) still control the Northern Securities Company and own a majority of its stocks? Did these parties, originally in control of the officers and Board of Directors of the Northern Pacific Railroad Company, inequitably and unlawfully, through that control, threaten the Oregon Short Line to retire the Northern Pacific preferred stock, of which the Oregon Short Line was the owner of a majority, in such manner that the Oregon Short Line would be deprived of the same and be compelled to take par, though it was selling in the market

at a much greater rate, and Morgan, Hill & Company, as the owners of a majority of the common stock of the Northern Pacific Railroad be greatly benefitted by being the sole subscribers to the new common stock which the Northern Pacific under the management of Morgan, Hill & Company, determined to issue at par for the purpose of retiring the preferred stock? And is it true that at the time when the Northern Securities Company was formed by Morgan, Hill and others, and at and before the time when the Oregon Short Line assigned its Northern Pacific stock to the Northern Securities Company that it was induced to do so by the threats of Morgan, Hill & Company to carry out this scheme of retiring the preferred stock of the Northern Pacific, and with the inducement to the Oregon Short Line that by the assignment of its preferred stock in the Northern Pacific and its common stock in the same to the Northern Securities Company, that company would with this stock have a majority and control of not only the Great Northern, but the Northern Pacific, and would permanently hold said stocks and manage and control both roads, and divide indifferently the dividends from the two among the holders of the stock of the Northern Securities Company. (See affidavits of Harriman and extract from Hill, Clough, *et al.*, in our main Brief). Did Morgan, Hill and others unfairly value and too high their Great Northern stock and unfairly value and too low our Northern Pacific stock as a basis of exchange for Northern Securities stock?

If the facts be as stated and as we allege, then Morgan, Hill & Company now in control of the Northern Securities Company and operating in the name of that company cannot, to the disadvantage of the Oregon Short Line, make a present distribution of its Northern Pacific stock in such way that Morgan, Hill & Company will be greatly benefitted at the expense

of the Oregon Short Line and the Oregon Short Line will be compelled to take the Great Northern stock of Morgan, Hill & Company at a high value, and Morgan, Hill & Company will take the Northern Pacific stock of the Oregon Short Line at a low value. And this conclusion follows irrespective of the title which the Northern Securities Company took to said Northern Pacific stock, whether as purchaser or custodian.

On these facts then, at least as against Morgan, Hill & Company and so far as their interest in the same goes, we are entitled to our Northern Pacific stock even if there be, which we deny, other Northern Securities Company stockholders whose equities are superior to ours.

We allege these facts and this result.

(4) Is it true that the railroad stocks originally assigned to the Securities Company are still held by it, and that the certificates of stock of the Northern Securities Company issued for the railroad stocks so assigned can be traced through and into the hands of the assignees, so that a return of the original railroad stocks can be accurately and definitely made?

Petitioners allege that this can be done.

Questions of Law.

(1) As a question of law (likely to frequently arise before this Court in the adjudication as to trusts), what title did the Northern Securities Company take to the Northern Pacific and Great Northern Railroad stocks assigned to it which this Court has held were so assigned in furtherance of a combination against trade and commerce, and contrary to the provisions of the Sherman Act?

Did the Northern Securities Company, though acquiring the stocks in an illegal manner and for an illegal purpose, take a good indefeasible title as purchaser to said stocks as if it acquired them lawfully in the open market?

(2) Did this court, in the case of the *Northern Securities Company against the United States*, 193 U. S. 197, decide that the Northern Securities Company in acquiring the railroad stocks in the Northern Pacific and the Great Northern Railroad, including the stock of the petitioners, only acquired a title as custodian or trustee thereof, and did not become by such acquisition the real, substantial, unconditional owner?

If it did the Circuit Court of Appeals in the majority opinion admits that its present decision is wrong.

(3) Did this court in the said Government suit above cited, tie up in the hands of the Northern Securities Company the railroad stocks of the Northern Pacific and the Great Northern so that the same could not be sold in the market, they being deprived of the right of collecting dividends or voting the same, this Court having decreed that the Securities Co. illegally acquired and illegally held the same, and did this Court then decree one and only one mode of the Northern Securities Company's disposing of that stock, to wit, the return and re-assignment of the same to the persons who originally assigned said stocks to the Northern Securities Company?

If it did, as we allege, then confessedly the decision of the court below must be wrong, for it approves another and wholly different distribution, and based on the Securities Co. being the lawful unconditional owner of said stock.

(4) May the Circuit Court of Appeals on an appeal from an interlocutory decree where the case in the Circuit Court went to hearing on a bill and *ex parte* affidavits, and the defendant did not demur to the bill, and the Circuit Court granted a preliminary injuction, on an appeal from such interlocutory decree, decide as if it was a court of original jurisdiction, disregard the discretion which was admittedly properly exercised by the court below, enter what is practically a final decree in the case, and this when there are disputed questions of fact and of law, part of which questions of fact and of law the Circuit Court does not even mention in its opinion?

(5) Has the doctrine of *in pari delicto* anything to do with the decision of the question involved in this case?

Both in the Circuit Court and the Circuit Court of Appeals it was most elaborately argued that it had, and a brief covering several hundred pages was filed in each court on that question alone. We claim that it has nothing whatever to do with the case, and that that was decided and disposed of in the decree of this court in the Government case.

(6) Have the petitioners, as parties to the litigation in the Government case, a right independent of the action of the Attorney General or of the United States Government to insist upon the finality of the findings and decree in that case on all questions of fact and of law that arise in the case at bar?

We assert that they have.

XIX.

Answer of the Court of Appeals.

Answer to the Questions of Fact.

(1) It answered that the Northern Securities Company was the *bona fide* purchaser and the absolute owner of the Great Northern and Northern Pacific railroad stocks.

In doing so it did not take into consideration or give any weight to the circumstances surrounding the acquisition; the purpose for which the stocks were acquired; the fact that the Northern Securities Company had not a real, independent existence but was merely the representative of the railway stockholders; it overlooked the extracts from the tes-

timony of Messrs. Hill, Clough and others (see our Brief); it relied upon the *ex parte* affidavit of Mr. Hill, but wholly disregarded the fact that Mr. Hill in the Government Case, page 96, of that record testified as follows:

"Q. Mr. Hill, do you know that as a part of the consideration for the sale of the Harriman stock, so called, to J. Pierpont Morgan & Co., a large block of Northern Securities Company's stock, which was to be issued later, was to be turned over to Harriman or his associates?

"A. *I knew that the stock was exchanged the same as other stock. Now, that is all the exact information I had on the subject.*"

It stated results from the testimony of Mr. Harriman which overlooked other portions of his testimony, and disregarded the circumstances under which that testimony was given, and the fair meaning of the words used by him; it made the question of fact turn upon the *words* and not upon the real substantial fact and thus it gave a semblance of purchase where in reality there was no real sale or real purchase; it overlooked and never considered whether it was possible in the transfer of stocks to one of several of the combination to accomplish an illegal purpose, that the agent of the combination acquired a good independent title as purchaser; it never even referred to the opinion of this Court as to the circumstances under which, and the purposes for which, the Northern Securities Company acquired the railroad stocks; because the word *purchaser* was used it relied upon this mere form, and wholly overlooked the substance, as shown by all the surrounding circumstances.

In addition to these, the Northern Securities Company has by its charter the express power *inter alia* to

"hold * * * shares of capital stock created or issued by any other corporation or corporations."

It has not disposed of a single share of the stocks of the two railroad companies acquired by it.

The purposes of the organization of the Securities Company would be utterly defeated by disposing of the railroad stocks or either of them. Hill, Morgan and others testified that the purposes of the Securities Company were: (see *supra* pp. 131 to 145)

"To prevent such raids"

"Absolutely control a majority of the stock of the Northern Pacific"

"Making their holding together permanent"

"Making permanent the general policy"

"To keep the stock of the Northern Pacific safe beyond question"

"Combining their interests in the property"

"Unifying the interests in each road," etc.

It was solely and only by holding the railway stocks that these purposes could be accomplished.

All these things the Circuit Court of Appeals entirely overlooked as unimportant.

(2) The only answer to the second proposition was the finding of an unqualified contract of sale, and the statement in the opinion as follows:

"Undoubtedly, it was anticipated by the complainants, as well as by all concerned, that the rights ordin-

arily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. An expectation is not a contract; and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration."

This was a strange misapprehension of our position as to permanent holding.

The Court reached this conclusion by overlooking the positive averments of our bill, sworn to, and which were not contradicted unless indirectly by Mr. Hill's affidavit, and also overlooked the proofs we submitted in support of the averments as to permanent holdings. to-wit: the affidavit of Mr. Harriman and extracts from the testimony of Messrs. Hill, Morgan, Clough and others, as set forth in our Brief.

(3) This question of fact the Court never even noticed in its opinion. It was a material one upon which we were entitled to relief even if the Securities Co. was a purchaser.

(4) This question of fact was not noticed in the opinion, though it is agreed that it was a subsidiary question and not necessary to be noticed in the manner in which the Court below decided the case.

Answer to Questions of Law.

(1) The Court did not discuss or consider or seem to think that this question was raised in the case. It decided the case as if the Northern Securities Company had been organized for a lawful purpose, acquired the stock for a lawful purpose, and there never had been an unlawful combination of which it was the trustee and a member.

(2) It held that this Court had not even

"incidentally"

considered the question.

(3) It held that the portion of your decree referring to the return by the Northern Securities Company to the original assignors of the railroad stocks assigned was permissive only and was entirely consistent with another mode of distribution, which other mode was a denial of the facts on which this Court reached the conclusion and made the decree that it did, and in direct contradiction of your decree that the Securities Company had illegally acquired and illegally held such stock.

(4) It answered this point in the affirmative.

(5) It did not consider it necessary to pass upon this question.

(6) It did not consider this question, though it probably assumes in the opinion that your petitioners had the right to set up the opinion and decree of this court *if* you had passed upon the same.

XX.

Oversight of Court of Appeals.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case, but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Thus the Court of Appeals held,

> "The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its Board of Directors at a meeting *at which Mr. Harriman was present* as a member of the Board, and the only authority conferred was 'to purchase said stock * * * at an aggregate price of $91,407,500 payable as to $82,491,871 thereof in the full paid and non-asessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash.' It is obvious that this resolution contemplated a 'purchase' and not a bailment or trust".

The Court fell into error. Mr. Harriman was not present at the meeting of November 15, 1901, when this resotion was passed, as will be apparent by an examination of a

certified copy of it on page 382 of the record. Mr. Harriman was present at the meeting of the Board of Directors on November 19,1901, when it is said the minutes of November 15th were read and adopted, but what, if any, action was taken by him at the time is not stated.

The Court said that the circumstances following the resolution demonstrated the transaction to be a purchase, and then added this:

> "The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) used for the purchase of other property and for corporate purposes."

The Court here again fell into error. Paragraph VI. which was referred to, page 4, relates to the receipt of money by the Northern Securities Company and not by the Oregon Short Line Railroad Company:

An entire, indeed with due respect, a grotesque misapprehension of our position.

A careful analysis of the opinion of Judge Dallas will show repeated proofs that he did not grasp our views of the case, and felt it his duty to wholly eliminate from his consideration all views of what you had said or decreed in this Goverment case; to wholly overlook the combination which was illegal, and that organized and used the Securities Company merely as its tool, and assigned the stock solely to carry out and perfect the illegality, and to regard the subject matter of the suit as an ordinary contract of purchase by a lawful corporation for a lawful purpose, of personal property.

When we urged that even if (which we denied) the Securities Company had purchased and acquired title to the

railroad stocks, yet all the circumstances of the case irresistibly demonstrated that it was *permanently* to hold the same and thus manage the two railroads—that this was the real *consideration* for the arrangements—that it was incredible that any one would have assigned his railroad stocks to the Securities Company and take merely the stock of the Securities Company in payment, for the Securities Company had no property (except $30,000 spent for organization) and its stock had no value except that which the assigned railroad stock gave it,—that while it is true in connection with our preferred stock we did receive $8,915,629 cash, yet, 9-10 of our consideration, $82,491,871, was in the Securities Company stock.

The only answer we receive is that it was *anticipated* that the Securities Company should have the right to vote and receive dividends on the stock, but *expectation* is not *contract*.

XXI.

The Court of Appeals misapprehended the opinion and decree of the Circuit Court (Judge Bradford) in that the Court of Appeals determined that Judge Bradford did not grant a preliminary injunction to hold the STATUS QUO until all the testimony and proofs could be put in and a final hearing could be had, but granted it ONLY UNTIL the Circuit Court of Appeals on an appeal from an interlocutory decree granting the preliminary injunction, could finally pass upon and determine the case.

In the opinion Judge Dallas said:

"It appears from the opinion of the learned Judge of the court below that in granting this injunction he

was *materially influenced* by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, be determined upon the merits and without further delay. *Western Union Telegraph Co. vs. Pennsylvania Railroad Company*, 123 Fed. Rep. 33, 36. There have been cases, it is true, in which it has been held that where the court in the first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court 'unless there is some strong reason for it.' *Massey vs. Buck*, 128 Fed. Rep. 27.

"But to the circumstances of this case those rulings are inapposite.

"Attentive reading of the opinion of the learned Judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie upon the denial of the injunction as 'of controlling importance,' and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court. * * * "

If this opinion of the Court is correct, why Judge Bradford filed the elaborate opinion he did—why he considered

the facts and the questions of law and went so fully into the authorities is inexplicable.

An examination of Judge Bradford's opinion we now propose to make, and thus show the misapprehension of the same given in the majority opinion of the Circuit Court of Appeals.

The opinion of Judge Bradford begins at page 395 of the record and extends to page 423, and how it is possible to say that Judge Bradford granted the preliminary injunction,

> "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy in this Court"

and that he was wholly controlled in the granting of the injunction by the fact that an appeal could not be taken by the complainants in the bill if the injunction was refused, is certainly not found in *words* in the opinion of Judge Bradford. On the contrary, that opinion seems undoubtedly to have been based upon the fact that Judge Bradford believed there were serious and doubtful questions in dispute, both of law and of fact, and that it was his duty as a chancellor to hold the *status quo* until the case could be disposed of on final hearing.

Among other things, Judge Bradford says, after a full recital of the averments of the bill, as follows:

> "The defense controverts material allegations in the bill, some of which embody averment of facts and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the Bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and

against the awarding of a preliminary injunction, counsel on both sides have, with strong insistence, urged, and with elaboration and signal ability, discussed a number of legal propositions, important and far-reaching in their scope and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have, during a hearing of nearly *three days*, pressed them with a zeal and with manifest reliance upon their soundness and materiality."

Again discussing the question of the convenience and inconvenience and the cases where injunction should be issued, the court said, p. 414:

"But this court has power to require of the complainants as a condition precedent to the issue of the injunction, a bond in such form and amount as fully to indemnify all persons who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned.

"A *pro rata* distribution under the proposed plan of the $39,661,450.00 par value of the stock of the latter company (Northern Pacific), included in the amount now sued for, among all stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty, entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder and embarrass, and probably or possibly defeat them in their effort to recover large quantities of such stock from per-

sons purchasing the stock in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution through the creation of new equities on the part of such purchasers.

"In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly, or in a large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor. * * *"

Judge Bradford, now referring to a number of questions in the case, said:

"It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the Court. *They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master.*"

* * * *

"The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact ultimately determined are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

Judge Bradford so far has not even mentioned the question that the complainants could not appeal if an injunction were refused—has not even mentioned it, much less relied upon it.

So far the case has been put that it was the duty of the Judge to grant the injunction because there were grave and doubtful questions of fact and of law, and it was a case where in the accustomed mode, evidence should be taken before a master.

Just at the end of his opinion Judge Bradford did add this:

> "An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. *While this consideration is entitled to no weight* where, on the application for an injunction, if it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where on such application there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound, judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals."

To say that Judge Bradford merely granted this preliminary injunction

> "with the understanding that"

it tied up the case until the Circuit Court of Appeals on an appeal from his decree would render practically a final judgment, is, we submit, not proven. It overlooks the extracts we have cited; it is inconsistent with his own lan-

guage; it is not justified by the opinion, and with great respect it is said it is on a par with the declaration of the Court of Appeals that the decision of the Supreme Court of the United States in the Government case, 193 U. S. 197, did not even "incidentally" consider the question involved in the present controversy, *i. e.*, the title of the Northern Securities Company to the stocks of the Northern Pacific Railway Company.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF ON BEHALF OF COMPLAINANTS.

WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
JOHN F. DILLON,
D. T. WATSON,
R. V. LINDABURY,
BAINBRIDGE COLBY,
Of counsel for petitioners and complainants.

WASHINGTON, February 27, 1905.

[19,612.]

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I.

Much of the argument submitted in defendant's first brief is devoted to the contention that the railroad system of the Union Pacific Railway Company, which owns the stock of the complainant Oregon Short Line Railroad Company, is a parallel and competing line with the Northern Pacific Company (see complainants' brief, pp. 166–177). The relevancy of this argument is not perceived. It is indisputable that the Oregon Short Line Company owned the majority of the Northern Pacific stock in November, 1901, and the only question now before the court is whether com-

[1] Defendant has so far filed three briefs and a voluminous compilation of authorities. For convenience of reference, the brief signed by Messrs. Root and Stetson, which was the first filed, will be referred to as "defendant's first brief," that signed by Messrs. Johnson, Griggs and Clough as "defendant's second brief," and that signed by Mr. Thacher as "defendant's third brief."

plainants are entitled to the return of that property so far as it can be traced and identified.

But it may be interesting to call attention to the fact appearing in the record that if the Union Pacific Railroad be parallel to and compete with the Northern Pacific Railroad, so also must the Burlington Railroad be a parallel and competing line with the Northern Pacific. Indeed, all the reasons so eloquently advanced in the Government suit to explain and excuse the purchase of Burlington shares and the "alliance" then made and the suppression of competition through the "manifest interest of each company" (record, p. 96) to the illegal copartnership, apply with infinitely more force and reason in favor of an alliance between the Northern Pacific and the Union Pacific Systems. If it be true that the Northern Pacific, through the Burlington lines, is enabled to reach the best markets for the products of the Northern Pacific territory, obviously it can reach those markets and many others much more easily and readily through a connection with the Union Pacific, and the people of the Northern Pacific territory would thereby save hundreds of miles of unnecessary haul and millions of dollars of unnecessary freight. The answer of the Northern Securities Company in the Government case alleged that the Burlington lines traversed the states of "Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas and Colorado, which afford the best markets for the lumber of the Pacific coast," and reached "Denver, Kansas City, Omaha and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the

defendant railway companies" [*i. e.*, the Northern Pacific and Great Northern], and "Omaha, Kansas City and Chicago, where are the great packing houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon and Washington," and also reached "St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan" (record, pp. 93, 94). It is then added in the same answer (p. 94) that the joint purchase by the Great Northern and Northern Pacific companies, two competing lines, of the Burlington stock, was "the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on the Pacific coast," and that "these connections and such interchange of traffic were deemed to be and are *indispensable* to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian

Pacific railway, and with European carriers, for the trade and commerce of the Orient." If all this be true in respect of the alliance then made and of any close connection between the Northern Pacific and Burlington roads, how much more true must it be of a connection between the Northern Pacific and Union Pacific Systems?

The Union Pacific System traverses and reaches practically the same markets in Nebraska and Northern Colorado as the Burlington does, but in addition it traverses and reaches the fertile territories and rich markets of Kansas, Southern Colorado, Utah, Nevada, Idaho, Oregon, California, Arizona, New Mexico, Texas, Louisiana and Mexico.

Complainants, it should be added, are not quite so disingenuous as to contend that the Burlington railroad is not parallel and competing with the Union Pacific railroad in Nebraska and part of Colorado. We may leave that to the solemn denials interposed by the Northern Securities Company in the Government suit (complainants' brief, pp. 174–175). But complainants do contend that, apart from two or three limited localities, the Union Pacific and the Northern Pacific reach, traverse and serve different territories, different communities and different markets, that they are not in any just or legal sense parallel or competing (*Louisville & Nashville R'd* v. *Kentucky*, 161 U. S. 677, 698), and that the communities served by each of these systems would be immeasurably benefited by a free and uninterrupted interchange of traffic and products in the natural flow of commerce north and south.

II.

The defendant Northern Securities Company in its first brief, discussing the plan of *pro rata* distribution, speaks of "the steady dispersion of the stock of the Securities Company," and of "the reasonable probability that a ratable distribution according to such widely extended interests would accord most nearly with the purposes of the Government which is the administrator of the Anti-Trust law and of the courts that granted the decree in the Government suit" (p. 27).

If the court will refer to complainants' principal brief, it will be seen that there is no proof before the court that the stock has been dispersed or widely distributed (see pp. 119–123). On the contrary, for anything that appears, practically all the stock issued in exchange for the Great Northern and Northern Pacific shares may still be held by the original depositors.

The defendant's first brief then proceeds to state (pp. 27, 30):

> "This condition was readily comprehended by the Government, and by the Attorney-General, who, from the first fully advised of the present plan of ratable distribution, *expressed himself satisfied.* . . .
>
> "The question whether the proposed ratable distribution would be in violation of public policy, or would in any way promote the illegal purpose which it was the design of the Government suit to frustrate, has been decided by the Circuit Court in Minnesota which rendered the original decree in the Government suit, and *has been settled*, so far as it can be settled, *by the executive department of the Government charged with the enforcement of the statute.* In the intervention proceeding the Department of Justice has declared in sub-

> stance that the proposed distribution would have no such effect, and the Circuit Court decided that it would have no such effect."

The court will search in vain through the record in this case, or in the proceedings before the Circuit Court at St. Paul, for any evidence supporting these statements, if their intended meaning be comprehended. So far as appears, the "Government" and the "Attorney-General" have *not* expressed any opinion or intermeddled in any way in this litigation. There is not one word to show that the Executive of the United States or the Department of Justice has ever expressed satisfaction with the present scheme. On the contrary, the Attorney-General of the United States avoided answering Mr. Hill's letter of March 21, 1904 (record, p. 160), which was obviously written for the express purpose of securing some expression of approval on his part, for its effect on contemplated litigation. The position of the Attorney-General of the United States at St. Paul was stated in the paper that he filed, which practically amounted to an objection on his part to importing into the Government suit what seemed to him to be the subject-matter of a private controversy, which, as the Circuit Court in Minnesota said at St. Paul (128 Fed. Rep. 813), would have to be "settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce." The statement filed by the Attorney-General, without

granting complainants any hearing, although requested, and without any investigation of the facts, will be found in the record of the proceedings before the court at St. Paul, copies of which complainants have filed in the office of the clerk of this court, and is as follows (p. 59):

> "I respectfully submit to the Court that notice has been served upon me that Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company will apply to the Judges of this Court for leave to intervene in this cause and to proceed and be heard in respect of the execution of the final decree of this Court entered on April 9, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as to the Court may seem meet.
>
> "*The United States neither admits nor denies the allegations of the petition, but objects to the proposed intervention.*[1]
>
> "This case was heard by this Court on bill, answer and testimony, and a final decree was entered, enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States, the decree of this Court was affirmed in every particular, the effect of which was to end and close the case.
>
> "The United States stands on the decree as affirmed, and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms.
>
> "P. C. KNOX,
> "Attorney-General."

It will be assumed that the Executive has scrupulously avoided any expression of opinion, and that any

[1] Italics are ours.

interference or suggestion on its part, however conveyed, would be regarded by this court as improper.

III.

On page 21 of the same brief, the following statement is emphasized with italics:

> "*After the conclusion of that hearing* [motion for a preliminary injunction before Judge Bradford] *the complainants filed their second amended bill.*"

The object of this emphasis may have been to suggest to the court that in some way or other the defendant Northern Securities Company was placed at a disadvantage by the delay in filing the second amended bill, and that if this bill had been filed before the argument of the motion for a preliminary injunction, the defendant might have pleaded, or might have disclosed in the usual way the nature of its defense, or its affidavits might have been more fully and candidly responsive to the verified bill and supporting affidavits.

As matter of fact, however, the second amended bill was filed on the 4th of June, 1904 (record, p. 1); the Circuit Court filed its opinion on the 15th of July, 1904 (p. 321), and the injunction order was not entered until the 18th of August, 1904 (p. 344). All this time, the defendant never intimated that it wished to plead or supplement its imperfect and evasive affidavits, even when the Circuit Court criticized them (p. 342).

Indeed, defendant's second brief says (p. 16):

> "The filing of the second amended bill was not followed by any request, from either side, to reopen the application and submit additional proofs or arguments."

Surely, it cannot now lie with the defendant to plead any prejudice or to exculpate itself for the insufficiency of the denials of the verified allegations of the bill and moving affidavits because of the delay in filing the second amended bill in view of the stipulation entered into by its own counsel at the time of the entry of the order granting leave to file such amended bill (record, p. 360), viz.,

> "We hereby waive notice of application for the foregoing order and have no objection to the making thereof, it being understood and agreed that the pending motion for a special injunction shall be determined upon the second amended complaint and the papers and briefs heretofore submitted and upon the supplemental briefs which are to be filed on or before Tuesday, June 14th, 1904, *all as though the second amended bill of complaint had been filed preceding the oral argument.*"

In defendant's second brief, we also find an argument somewhat difficult to follow, based apparently upon the fact that Mr. Harriman did not verify the second amended bill, and concluding with the assertion that "to every intent, therefore, the bill is a mere unverified pleading" (p. 21).

As matter of fact, two of the complainants verified the bill, and there may have been reasons why Mr. Harriman did not verify the second amended bill. For example, Mr. Harriman might then have been in Europe. He had, however, already made a full affidavit in which he had verified the amended bill by practically incorporating it in his affidavit (record, p. 155), and the second amended bill was only filed because it had been suggested on the oral argument by defendant's own counsel

that proper pleading required the complainants to set forth the terms of the alleged illegal combination and then to plead the decree in the Government suit as *res adjudicata*, which was done.

It is further stated in defendant's second brief (p. 34):

> "It is not claimed that in these negotiations J. P. Morgan & Co. acted for the Securities Company, or had any authority to do so."

If the court will refer to the testimony of Mr. Perkins and Mr. Steele, members of the firm of J. P. Morgan & Co., in the Government suit, set forth in the present record, it will be seen that Messrs. J. P. Morgan & Co. did act for the Securities Company in those transactions (record, pp. 164–165).

It is then stated in regard to questions of additional proof on final hearing that "*No such proof is tendered here by these plaintiffs. They do not even offer to make any at some future time*" (defendant's second brief, p. 35).

In the Circuit Court, in the Circuit Court of Appeals, and in this court, complainants have urgently asked the opportunity to make proof as to all the allegations of their bill, which proof they believe will conclusively establish the facts as alleged.

IV.

The defendant's first brief then states (p. 22) that—

> "All parties agree that now is presented for consideration and final determination by this Court the question whether the decree in the Government suit concerned and decided as between themselves the mutual rights of the parties to this suit."

In order to prevent any misunderstanding, it is proper to repeat that in the court below, in the petition for a writ of certiorari, and in the briefs now filed, the complainants' counsel have endeavored to make it as plain as language can express any idea of the human mind that in their view the case is not ready for final determination, that proofs are necessary, that upon the cross-examination of the defendant's directors and officers much would be disclosed, and that the Circuit Court of Appeals erred in proceeding to dispose of the whole controversy on an appeal from an order granting a preliminary injunction. It has been consistently urged that it would be in contravention of the established rules of equity procedure and of all precedents regulating appeals, for this court now to sanction the practice of the court below as an appellate tribunal, and finally determine the controversy in the absence of a final hearing in the court of original jurisdiction. The reason why complainants' counsel have discussed the merits at length, is not because they agree that in any aspect the case should be finally determined on this hearing, but because the questions of law on the merits will arise upon final hearing, and the court may, therefore, "think it proper to now look into [the allegations] *simply* for the purpose of determining whether, assuming them to be facts, the [complainants] below made out a case which would entitle [them] to recover the [railroad stocks] in suit." (Mr. Justice Peckham in *City of Oklahoma City* v. *McMaster*, decided February 20, 1905, but as yet unreported.)

It is conceived that, if the court does pass beyond the

question of due equity procedure and discuss the points of law presented on the merits, it will only be to declare the rules of law as to the effect of contracts in violation of an act of Congress, as to the effect of the decision in the Government suit, as to the operation of estoppels, as to restoration of the *status quo* if practicable on the dissolution and abandonment of an unlawful combination, etc.; in a word, to declare the general principles and rules of law which should govern the legal rights of the parties if the facts on final hearing remain unchanged.

V.

The defendant's first brief further asserts (p. 23) that—

> "The contentions of the defendant have been fully sustained by *every* court that has considered the merits at all, and have not been denied upon the merits by any court or judge."

As matter of fact, the court at St. Paul avoided passing upon the merits of the controversy (complainants' brief, pp. 125–129).

The Vice-Chancellor in the Continental suit did not have the merits before him. The suit was not brought by an original depositor, and the remarks of the court were clearly *obiter dicta*, delivered in a litigation brought in bad faith (complainants' brief, pp. 182–183).

Judge Bradford did not pass upon the merits, but held that the case was not ripe for final hearing.

The only judicial action upon the merits ever had was in the opinion of the majority of the court below, from which Circuit Judge Gray dissented, and this court is now about to consider whether or not the

learned majority did not err both in passing upon the merits and in their view of the merits.

VI.

As we have already seen (complainants' brief, p. 140), immediately after the rendition of the judgment of this court in the Government suit, the directors of the Northern Securities Company hastened to exculpate themselves in the eyes of the world and proclaimed in their famous circular of March 22, 1904 (record, p. 152):

> "The company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States—an opinion which has received the approval of four justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the company to hold and vote the shares. However, the majority of the court, disregarding as irrelevant any beneficial increase of commerce, was of the opinion, that as a matter of law your company's holding of the stocks of the two railway companies in itself constituted a restraint of interstate commerce prohibited by the so-called Sherman act of 1890."

It will also be recalled that, in the Government suit, the defendants pleaded that the parties had acted in good faith and with innocent intent, the language of the answer of the Northern Securities Company being as follows (present record, p. 99):

> "So far from intending to violate any provision of said act of Congress, the persons who were concerned

> in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act."

The answer of Messrs. Hill, Clough, Kennedy, James and Baker, original promoters and directors of the Northern Securities Company, was substantially to the same effect (p. 115).

Yet, in order to support the present defense of *in pari delicto*, we are now told in defendant's first brief that the combination, as alleged in the bill of the United States in the Government suit, as found and declared by the Circuit Court in Minnesota in and by its decree, as found and declared by this court in affirming such decree, and as alleged in the present bill (defendant's first brief, p. 61)—

> " was precisely the kind of confederation that over and over again the courts had held to be illegal. Upon that point no lawyer and no business man of intelligence in the United States, could possibly have had a moment's doubt."

But, later on, the same brief contains the following statement (p. 84):

> " They [complainants] entered the combination with full knowledge of its character and purpose, and for more than two years participated in its proceedings. But they seek to offset their admission by an allegation that then and during the pendency of the Government proceedings they believed the transaction to be lawful. *This we do not doubt, for such was the honest belief of all parties until the recent adverse decision by a court nearly equally divided.*"

VII.

In defendant's first brief, the complainants and their motives are severely criticized, and it is, among many other things, said (p. 98):

> "The unlawfulness of the acts done was brought sharply to their attention by the filing of the Attorney-General's bill."

May it not with equal truth and force be said that this "unlawfulness" was also brought sharply to the attention of Mr. Hill and the other directors of the Northern Securities Company, who were defendants in the Government suit and charged with a conspiracy in violation of an act of Congress? Were they not nevertheless professing to all the world that they had done nothing unlawful? Was it not brought sharply to the attention of these gentlemen that they ought not, during the pendency of the Government suit, to sell stock to the public and attempt to mislead innocent people? What did Mr. Hill say to his fellow directors which induced them, *six months after the institution of the Government suit and in anticipation of the final hearing*, to agree to a sale of an enormous amount of the stock to the public? Was he thinking that it would be "advisable" to attempt to create equities and elements of estoppel? What was it that Mr. Hill said to the directors who were in his confidence? All he tells us in his letter of September 10, 1902, to the Northern Securities Company is, "having discussed with some of your directors the *advisability* of the issuance of additional stock and the sale thereof, and after that discussion such issuance and sale having been deemed *advisable*," etc. (record, p. 318). Why was it

advisable in the teeth of the Government suit? Had not "the unlawfulness of the acts done" been brought "sharply to the attention" of Mr. Hill and the directors in whom he *confided* his secret reasons, as well as to the attention of every individual in the community? Did not every purchaser of the cash stock, every speculator who bought into the situation, acquire with full knowledge of "the unlawfulness of the acts done"? Was not this "brought sharply" to the attention of the whole world "by the filing of the Attorney-General's bill"? Is it not the crucial point in this defense of estoppel, which explodes its fallacy, that all acted in disregard and defiance of the charge of unlawfulness sharply brought to their attention by the Government suit, and that no court can permit parties so acting to acquire legal rights thereby? See further discussion of estoppel in complainants' brief, p. 129 *et seq.*

Then there follows in the same brief a statement in regard to the assigns of the original depositors (p. 110), viz.,

> "The Circuit Court, in its decree, expressly recognized the rights of such persons as may now be the holders and owners of Securities stock."

How did the Circuit Court in Minnesota recognize those rights? Did it declare that, notwithstanding the illegal purposes for which the stocks of the railway companies had been acquired and were held by the Northern Securities Company, the latter had nevertheless become the legal owner under an illegal and void contract? Did it hold that the assigns of original depositors had acquired greater rights than such original

depositors or than the corporation itself? Did it hold that such purchasers *pendente lite* had succeeded in creating an estoppel which changed what was an illegal and void contract into a valid and enforceable contract? No, emphatically no. On the contrary, in answer to the plea advanced by the defendant Securities Company and by Messrs. Hill *et al.*, that all parties had believed in the legality of the transaction, the Circuit Court and this court said that the assigns of the original depositors would be entitled to the same rights as the original depositors themselves, and no more. So reads the decree as affirmed by this court (record, p. 151), viz.,

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The defense of estoppel is fully discussed in complainants' brief at pages 129–137, and the authorities are there cited which declare the settled rule of law and public policy that an illegal contract cannot be validated by estoppel (see also at p. 51 *et seq.*), and that any

purchaser, speculator, jobber or money changer "who intermeddles with property in litigation does it at his peril." No language could be more emphatic on this point than that of Mr. Justice White in *California Bank* v. *Kennedy*, 167 U. S. 362, 367; and no more is needed than the statement that "it is true that parties to an illegal contract cannot by estoppel make the contract legal" (defendant's first brief, p. 111).

VIII.

After much discussion as to what this court did decide in the Government suit, the following are the present contentions of the Northern Securities Company. In defendant's second brief (p. 56), defendant states:

> "A majority of the court, although by apparently different and dissimilar processes of reasoning, decided that *all purchases* of the stocks by the Securities Company had been prohibited by a statute which the Government had made."

And in defendant's third brief (p. 36), is the following candid statement:

> "We accept the decree as determining, for the purposes of this appeal, the illegality of the combination."

Therefore, we may, at last, assume, as the starting point on the merits, that the Northern Securities Company, notwithstanding what it has heretofore argued, now concedes that this court did decide "that *all* purchases"—necessarily including the purchases from the complainants—"had been prohibited by a statute which the Government had made," and that the combination in pursuance of which all of the stock "was *acquired* and is now *held*" was illegal.

The discussion of the general principles of law on the subject of the legal effect of contracts entered into in violation of a statute seems to have been assigned to defendant's third brief, where, under the heading (p. 44), "*That transaction was not void because illegal*," the leading case of *Harris* v. *Runnels*, 12 How. 79, and analogous cases are cited, which, as is well known, establish the doctrine that a contract in violation of a statute will not be declared void if the court is satisfied from the statute that it was the intention of the lawmakers that it should not have that effect (*vide*, *McCormick* v. *Market Bank*, 165 U. S. 538, 552; *California Bank* v. *Kennedy*, 167 U. S. 362, 367; *Burck* v. *Taylor*, 152 U. S. 634, 648).

Defendant quotes a part of a sentence in the *Harris* case as follows (defendant's third brief, p. 45):

> "The statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."

Yet, it must have been overlooked that this excerpt from the opinion of the court was *preceded* by the following statement of the law (12 How. 83):

> "Contracts in violation of statutes are void; and they are so whether the consideration to be performed or the act to be done be a violation of the statute.
>
> "A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it, by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be expressed or implied. In either case, a contract in violation of its provisions is void. The rule is certain and plain."

And it must also have been overlooked that the above quotation in defendant's brief was followed in the opinion in the *Harris* case by the following (p. 84):

> "When the statute is silent, and contains nothing from which the contrary can be properly inferred, *a contract in contravention of it is void.*"

Another case cited in the same brief (p. 46) is *Burck* v. *Taylor*, 152 U. S. 634, in which Mr. Justice Brewer delivered the opinion of the court and said (p. 649):

> "But it has never been doubted that, as a general rule, *a contract made in contravention of a statute is void* and cannot be enforced, and the only exception arises where, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the lawmakers."

The other authorities cited in defendant's brief are, so it seems to complainants' counsel, equally wide of the mark.

IX.

It has been the contention of the complainants from the beginning that to allow a distribution *pro rata*, as proposed, on the theory that the Northern Securities Company *owned* the railroad stocks, would be but carrying into effect the illegal contract of purchase, and that any attempt to treat the stock as so *owned* by the Securities Company would be in conflict with and disregard of the decree in the Government suit. If the legal effect of an adjudication that a corporation has acquired and *holds* property in violation of a statute be that it did not thereby acquire title to and ownership of the property, because the contract of purchase and

holding was void, then any attempt, as in the case at bar, to treat the property as *owned* by the corporation would be in conflict with the adjudication and tend to circumvent and nullify it. It is now apparently avowed that what the Securities Company is doing is endeavoring to perform a part of the *illegal* contract of purchase. If words mean anything, the defendant's briefs convey and are intended to convey that distinct meaning. Thus, in defendant's second brief, we have the statement (pp. 81–82):

> "A ratable distribution, in which equality between all stockholders, in proportion to their respective holdings, is preserved, is recognition and performance by it of its obligation to them. Hence, the Securities Company, by proposing ratably to distribute these railway stocks among its own stockholders, including Harriman and Pierce, is not proposing to repudiate, nor to terminate, the contract with them, arising out of and accompanying the act of making them stockholders.
>
> "*On the contrary, it is an express and formal recognition, by the Securities Company, of the continued existence and binding force of that contract, and is performance of it.*"

And later on in the same brief, we have the following (p. 103):

> "Undoubtedly it was the right of these plaintiffs, at any time since acquisition by the Securities Company of a majority of both railway stocks, to demand of the company that it should rid itself of the power thus unlawfully held. But that right did not include one to insist on a specific return of what had been sold to the company."

It will be said that the context shows that defendant was discussing, not the illegal contract, but some other contract; that there were two contracts growing out of the same illegal transaction, one of purchase and sale,

concededly illegal; the other, a contract fixing the relations of stockholders among themselves and between them and the corporation, claimed to be legal, and that the latter will be enforced by the courts. In other words, the conclusion to which this reasoning leads us is that the second contract has validated the first and vested title in the Securities Company! But, of course, there was only one contract, and the illegality affected every part of it, express or implied. *Scovill* v. *Thayer*, 105 U. S. 143, 150.

Throughout the defendant's briefs filed in this court, it is repeatedly asserted that the only transaction between Messrs. Harriman and Pierce and the Northern Securities Company was that of an unconditional purchase and sale, and that it nowhere appears in the evidence that there was any other understanding. What difference can that make? The contract, whatever the intent, was illegal and void. But the objects for which the Northern Securities Company was organized are, as shown in complainants' brief at pages 96–103, established beyond contradiction or possibility of peradventure by the proofs in the present record, even if we disregard wholly the proceedings in the Government suit and the conclusive effect of the decree.

Complainants have not pretended that when Harriman and Pierce delivered the Northern Pacific stock to the Northern Securities Company on November 18, 1901, there was any exchange of agreements as to what the Securities Company intended to do with the stock or what it would do in the future, for that was wholly unnecessary. It was sufficient that prior to that time

Mr. Harriman, although not a party to the original combination, knew the purposes for which the company had been organized and the plans of its promoters. Consequently he must have dealt with the Northern Securities Company in the light of that knowledge.

However, it is now no longer necessary to argue the point, for it is practically conceded in defendant's second brief (p. 102) in the following language:

> "Harriman and Pierce did not sell the Northern Pacific shares to the Northern Securities Company in ignorance of the plans of the latter's projectors, nor of the nature of the transactions the company itself both contemplated and made. . . . Harriman and Pierce cannot deny perfect knowledge of the effect of ownership by the Securities Company of a majority of the two railway stocks. They cannot deny knowledge that such ownership carried power in the owner to restrain trade, and therefore, in effect would itself amount to such restraint. Their sole mistake, if any, lay in the supposition that this particular kind of restraint had been overlooked by Congress, and had not been included with the others prohibited by the Anti-Trust Act."

X.

We may now consider the defendant's contention that there was no conversion of Northern Pacific preferred stock into common stock (see discussion in complainants' brief at pp. 163–166) and that complainants cannot enforce any agreement to convert because it was part of the illegal contract. Of course, complainants cannot enforce any part of an illegal and void contract. The illegality is exhibited only for the purpose of disaffirming the illegal and void transaction, not to enforce it. The point of complainants' contention is quite misap-

prehended by defendant. It is not claimed that complainants are entitled to the preferred stock because part of the agreement of deposit was to the effect that there should be a conversion, but because, as matter of fact, the complainants' preferred stock has been actually converted into common stock. The agreement is alleged for the purpose of showing and explaining the conduct of the parties. The legal right to recover is based upon the fact that the defendant, holding as it did and does under an illegal and void contract, converted complainants' property, that is, its Northern Pacific preferred stock, into common stock, and that—

> "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them." *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68.

The defendant further suggests in regard to the conversion of the preferred stock as follows (defendant's first brief, p. 114):

> "The allegation of the bill certainly is, and will be seen to be, in defiance of the facts.
>
> "The averment of Mr. Harriman is true only if meaning that, *as to the Northern Pacific Company, all* of its $75,000,000 preferred stock was converted into $75,000,000 of new common stock. It is grotesquely misleading, if understood as asserting that any holder of preferred stock had or acquired or exercised any right to obtain new common stock in exchange for his preferred stock. . . .
>
> "The testimony on this point will repay careful consideration."

Now, what are the facts as actually disclosed in the record before the court, and in what way will the

testimony repay careful consideration, except to confirm complainants' theory?

The bill alleges (record, p. 6) as follows:

> "that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

In addition Mr. Harriman swore to the truth of a similar allegation in the amended bill (pp. 155, 376).

Mr. Harriman's uncontradicted affidavit is to the following effect (p. 159):

> "As a director of the Northern Pacific Railway Company, I know that all of its preferred stock issued and outstanding in November, 1901, consisting of $75,000,000 par value of shares of $100 each, has been converted into common stock of the company through the medium of convertible certificates, which were immediately after issue changed into a like amount of the common stock of the company at par. As a director of the Northern Securities Company, I know that the company did not in November or December, 1901, have any funds with which to pay cash for $34,709,062

of Northern Pacific convertible certificates except through or by means of the preferred stock so delivered by Mr. Pierce and myself on November 18, 1901. As to the proceeds or credits in respect of the remaining $6,375,938 par value of the preferred stock, I have no knowledge, but I always understood that the whole amount of the $41,085,000 of preferred stock so delivered to the Northern Securities Company by Mr. Pierce and myself had been actually converted into common stock."

Mr. Hill testified in the Government suit (present record, pp. 166–167), as follows:

"A. As soon as the notice was given to redeem the preferred stock of the Northern Pacific, my recollection is that a number of the preferred stockholders surrendered their stock, took their certificates for their common and converted them. Now, it may be, and I think quite likely, that that is what was done by Mr. Morgan or his firm with the Harriman preferred stock. I know that others did that."

The affidavit of Mr. William Mahl, read in support of complainants' verified bill, was to the following effect (p. 178):

"IV. The books of said Securities Company show that the alleged retirement of $34,709,000 of said preferred stock, the purchase of $34,709,062.50 of the convertible bonds or 'convertible certificates of indebtedness' of the Northern Pacific Railway Company and the conversion of said bonds into the common stock of said railway company referred to in the affidavit of Edward T. Nichols, verified on the 2d day of May, 1904, occurred on the same day, to wit, the 27th day of December, 1901, and appear to have been different parts of and together constituting actually but one transaction."

Mr. Millar's affidavit, also read in support of complainants' bill, was to the following effect (record, pp. 371–372):

> "VI. On or about the 13th day of November, 1901, the board of directors of the Northern Pacific Railway Company resolved to retire the preferred stock through an issue of bonds which bonds were to be convertible into new common stock of an amount equal to the pre-existing preferred stock, namely, $75,000,000 par value; that said preferred stock was subsequently so retired, and that the whole amount thereof was thereupon converted into an equal amount of common stock."

The defendant's only argument against all this proof is that the *form* of the resolutions and documents should control as against the reality, the shadow as against the substance, the mask as against the true face (*vide* complainants' brief, pp. 89–95). Yet all this line of argument was used in the Government suit, but, as Circuit Judge Thayer said, a court of equity "looks always at the substance of things . . . rather than upon the particular devices or means by which it has been accomplished" (120 Fed. Rep. at p. 726).

Is it then a wonder that, notwithstanding the forms adopted and phrases used, the Circuit Court of Appeals for the Eighth Circuit, following the only statutory authority for the proceeding, namely, to convert preferred into common stock (Wisconsin Laws 1895, c. 244, § 10, referred to in the resolution which authorized the conversion, record, p. 284), said in *Weidenfeld* v. *Northern Pac. Ry. Co.*, 129 Fed. Rep. 305, 309:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the pro-*

ceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a larger sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company."

There can be no doubt that Mr. Harriman acquiesced in the illegal method of conversion, which excluded the holders of preferred stock from any rights in respect of the common stock into which their own stock was being converted, as part of one and the same transaction by which he agreed to accept Northern Securities stock. Thus he states in his affidavit (record, p. 158):

> "The conversion under conditions reducing the Oregon Short Line holdings to a minority was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash. Some time after the terms of the agreement had been settled, and on November 18, 1901, Messrs. J. P. Morgan & Co. notified me to deliver the Northern Pacific stock to the Northern Securities Company, and informed me that such company would close the transaction, and that we would receive from it the stock and cash payment agreed upon."

XI.

In opposition to the complainants' contention that even if restoration of the *status quo* be not practicable, the assets of the company should be sold and a distribution made in cash, the following suggestion is submitted by defendant, after going outside the record to refer to present values (defendant's second brief, pp. 93–94):

> "An operation like the sale of these stocks would shake to the bottom the financial fabric of both America and Europe. Nothing comparing with it has ever been undertaken."

This statement will, of course, strike the court as obviously unsound in view of the frequent sales of railroad properties involving equally large values. It has never yet been seriously suggested by any court that on the dissolution or reorganization of a railroad company, the stockholders of the company could be forced against their will to become stockholders in a new or different railroad corporation. No one would for a moment venture, in connection with the winding up or dissolution of a railroad corporation, seriously to contend that the stocks held by such railroad corporation need not be sold and the proceeds distributed, but could be forced on non-assenting stockholders against their will.

XII.

Finally, the court will find throughout defendant's briefs a repetition of the contentions advanced in the Government suit in almost the same language, and we

are led again and again around the same circle of reasoning. In one part of the defendant's briefs, it is conceded that the decision of this court in the Government suit established the illegality of the purchase, yet in another part we are told that the question was not settled at all by that decision, but still "is at best doubtful," and "that the power is doubtful cannot be disputed in the light of the opinion . . . of Mr. Justice White in the Government suit" (defendant's third brief, p. 48). What is meant by that suggestion? Is the idea sought to be conveyed that the question decided in that case is still open and is now to be reargued? Is it possibly the notion that any justice of this court will not recognize the decision in that case as settling the questions there decided for every purpose affecting the Northern Securities Company?

Then follows another extraordinary argument under the heading (p. 48), "*The transaction was not void because ultra vires.*" It is contended that the acquisition and holding of the stocks of the railway companies adjudged in the Government suit to have been illegal and in violation of an act of Congress, nevertheless was authorized by the laws of the state of New Jersey and, therefore, not *ultra vires*. In order that there may be no possibility of not appreciating the purport of this argument, it ought to be quoted at length (defendant's third brief, p. 48):

> "It was within the power of the Company, according to the language of the certificate, and was expressly authorized by the New Jersey law. Section 51 provides: 'Any corporation may purchase . . .

> the shares of the capital stock of . . . any other corporation or corporations of this or any other state . . .' Whether an act of a corporation is *ultra vires* or not, is determined by the law of the state which created it. No other state or sovereignty can enlarge or limit the corporate powers or capacity. It may forbid the corporation from doing some or even any acts within its jurisdiction; transactions so forbidden will be illegal, but not *ultra vires*. Corporations, like natural persons, are subject to the laws which operate generally upon persons. If they violate such laws, their action is illegal, perhaps criminal, but it is not *ultra vires*, if it is within the power given it by its charter. The violation of a federal statute by a state corporation cannot give rise to a case of *ultra vires*. But even if the transaction were *ultra vires*, it would not for this reason be void."

Yet, if there be one doctrine which is the settled law of this court, it is that a contract made by a corporation in violation of express statutory prohibition is *ultra vires* and absolutely void, that the objection is not merely that the corporation ought not to have made it but that it could not make it, and that such a contract cannot be ratified or confirmed or given validity for any purpose or be the foundation for any right (complainants' brief, pp. 51–55).

Defendant's third brief then proceeds to contend (pp. 49–50) that the cases in this court "to the effect that contracts *ultra vires* are void" have no application because, forsooth, "the Securities Company is a New Jersey corporation" and "the effect of its acts is to be determined by the law of New Jersey."

The learned counsel for the defendant seem to expect this court to listen patiently to the contention that a contract forbidden to a corporation by an act of

Congress is not *ultra vires* for the reason that the corporation was organized under the laws of a state and that such laws authorized it to do the very act prohibited by the act of Congress! It seems, indeed, to be again forgotten that the Constitution of the United States has declared for all time and for every case that any act of Congress made in pursuance of the Constitution is to be the supreme law of the land.

According to the view of the learned counsel for the Northern Securities Company, however, "the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation," and the laws of a government declared to be supreme must be subordinated to the laws of a local and state government whose legislation, when in opposition to acts of Congress, was declared not to be supreme. *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 433.

As Mr. Justice Harlan said in the Government suit (193 U. S. 349–350):

> "If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words."

WASHINGTON, D. C., February 27, 1905.

WILLIAM D. GUTHRIE,	JOHN F. DILLON,
R. S. LOVETT,	D. T. WATSON,
MAXWELL EVARTS,	R. V. LINDABURY,

BAINBRIDGE COLBY,

Of counsel for petitioners and complainants.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 2 1905
JAMES H. McKENNEY,
Clerk.

(19,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS AND COMPLAINANTS,

vs.

NORTHERN SECURITIES COMPANY.

MEMORANDUM ON BEHALF OF COMPLAINANTS.

The exact facts appearing in the record in regard to the conversion of the complainants' original Northern Pacific preferred stock into common stock were not, perhaps, sufficiently explained upon the oral argument.

There is no dispute that on the 18th of November, 1901, the complainants Harriman and Pierce delivered to the Northern Securities Company certificates for $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, consisting of $41,085,000 of preferred stock and

$37,023,000 of common stock, out of a total capital stock of $155,000,000.

The bill alleges and the proofs show that of this preferred stock $34,709,000 was converted into common stock and not retired by the payment of cash (see reply brief, pp. 23-28, and opinion of Judge Bradford, record, pp. 338-341), and that only $6,376,000 was paid off in cash (record, p. 180). The injunction of the circuit court, now before this court for review, covered the original $37,023,000 of common stock delivered by the complainants and the $34,709,000 of new common stock into which the Securities Company had been shown to have converted an equivalent amount of complainants' preferred stock.

If, on final hearing, it shall appear that only $34,709,000 of complainants' preferred stock was actually converted into common stock, as the present proofs tend to establish, the complainants will then only be entitled to the return to them of that stock together with their $37,023,000 original common stock, making in the aggregate $71,732,000, being the exact amount covered by the injunction order of the circuit court. This will be less than a majority of the capital stock of the Northern Pacific Company ($155,000,000, par value), and will result in turning the original majority holding of the Oregon Short Line Company into a minority holding.

Assuming that complainants would have been entitled to the restoration of their preferred stock *if still in existence*, it is submitted that they are entitled to whatever now represents their original property in whatever form it may be. If their preferred stock had actually been paid off and converted into cash and the cash were now in the possession of the Securities Company, they would be entitled only to cash; but if their preferred stock was actually converted into other property, be it now more or less valuable, then they are entitled to the substituted property, no more and no less (complainants' brief, p. 164). If the Northern Pacific

stock had greatly depreciated in value, complainants could not on that ground demand cash.

Moreover, the return to complainants of the $34,709,000 of new common stock, into which their preferred was actually converted, will not place them *in the slightest degree* in a better position than they would have been in if they had never gone into the Northern Securities Company, or it had never been formed.

Under the plan of conversion, the right to obtain new common stock was confined solely to the holders of the existing common stock, of which Messrs. Morgan, Hill and associates then held a majority, in the proportion of seventy-five eightieths of their holdings, that being the proportion of the new to the old common stock. Such proportion of the $37,023,000 par value of old common stock then held by the complainant, Oregon Company, amounted to exactly $34,709,000. In other words, the Oregon Company became entitled, as holder of $37,023,000 of old common stock, to acquire $34,709,000, par value, of new common stock. This would have made them common-stock holders of the Northern Pacific Company to the amount of $71,732,000, being the exact amount covered by the present injunction, and this amount, they assert, they are entitled to have returned to them upon the surrender of the shares of the Northern Securities Company which they received and the return of such an amount in cash as may be equitable.

The proofs before the court indisputably show that the Northern Securities Company actually used the common stock acquired from the complainants, Harriman and Pierce, in order to secure the $34,709,000 of new common stock, which it now holds. The subscription was made on complainants' common stock and was paid for with their preferred stock. Had the Oregon Company then done exactly what the Northern Securities Company itself is admitted to have done, it would have had $71,732,000 out of a total capital of

$155,000,000, and would have received $6,376,000 in cash, being the difference between $34,709,000 of new common stock, to which they were entitled, and their entire holding of $41,085,000 of preferred stock.

The minutes of the meeting of the directors of the Northern Securities Company of November 15, 1901, which Mr. Clough testified in the Government suit had been prepared in blank for the purpose of being submitted to Mr. Harriman (present record, pp. 242–243), expressly provided that the president be authorized to purchase convertible certificates "equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company," and also authorized to convert the same into common stock "whenever such conversion may be effected" (p. 312).

Thereupon, the following entry was made in the books of the Northern Securities Company, as appears by the affidavit of William Mahl (pp. 177–178), viz.:

> "Upon the journal of said Securities Company, there are two entries reading as follows:
>
> "1901, Nov'b'r 18th.
>
> "Investment Account No. 1—To Capital Stock a/c
>
> | | |
> |---|---|
> | "For 410,850 shs. N. P. pfd. stock bought from E. H. Harriman and Winslow S. Pierce for..... | $41,085,000 |
> | "Less paid in cash as per entry in cash book this day..... | 8,915,629 |
> | "Balance paid in stock..... | $32,169,371 |
>
> "Say 321,693 shs. & $71. scrip issued as fully paid-up stock @ par."

"Nov'b'r 18.

Investment Account No. 2—To Capital Stock a/c.

For 370.230 shs. North'n Pac. common stock purchased from E. H. Harriman & Winslow S. Pierce with the rights conferred thereon by resolution of the directors of the N. P. Ry. Co. adopted Nov. 13th, 1901, and paid for with 503,225.087½ shs. capital stock of Northern Securities Co. issued as fully paid up stock @ par..... 50,322,500.87½ "

"These entries appear to have been regularly carried into the capital and investment accounts of the Securities Company. I was informed by Mr. Nichols that the charges of $32,169,371, and of $50,322,500.87½ on account of the preferred and common stock of the Northern Pacific Railway Company referred to in said entries were merely an arbitrary apportionment of the cost of the entire stock received from Harriman and Pierce.

"The only preferred stock of the Northern Pacific Railway Company which was ever deposited with the Northern Securities Company or passed into its possession, so far as I was able to ascertain from said books was the $41,085,000. par value delivered to it by complainants Harriman and Pierce."

It also appears from the present record that Mr. Clough, one of the directors of the Northern Securities Company, testified, among other things, in the Government suit as follows (pp. 167–168):

"Witness: By the terms of the resolutions of the Northern Pacific Railway Company retiring the preferred stock of that company it was provided that the holders of the then existing common stock of that company of record at a certain future day, which I think now was the 10th of December, 1901, would be

entitled to subscribe at par for convertible bonds that were to be issued by the Northern Pacific Railway Company in the process of retiring the preferred stock to the amount of 75/80 of their holdings in the existing common stock. All stock that was transferred on the record of the Northern Pacific Railway Company prior to the date of the closing of the books, which, as I have stated before, as I remember, was on December 10, would carry with it this right of subscription, so that when the Northern Securities Company purchased the Harriman and Pierce stock, common stock, or any other common stock of the Northern Pacific, prior to December 10, with their purchase they got the right of subscription which the resolutions which I have mentioned gave. Now, does that explain it fully?

"Q. Yes, that explains that portion of it. Now, as a matter of computation, 75/80 of 37,000,000 is about 34,000,000, isn't it?

"A. Yes, sir; it is about 34,000,000. And I think that the subscription right which the Northern Securities Company exercised was obtained by it almost wholly from its purchase of the thirty-seven and odd millions of the Harriman and Pierce stock."

And Mr. Hill, president of the company, testified in the Government suit (present record, pp. 166–167) as follows:

"A. As soon as the notice was given to redeem the preferred stock of the Northern Pacific, my recollection is that a number of the preferred stockholders surrendered their stock, took their certificates for their common and converted them. Now, it may be, and I think quite likely, that that is what was done by Mr. Morgan or his firm with the Harriman preferred stock. I know that others did that."

This $34,709,000 of new common stock is all that now represents the original preferred stock of the complainants. The fact that it is said to have increased in value, which is denied, makes no difference. If it had decreased in value complainants could not then have refused to take it and have

insisted on cash. The courts cannot decree the payment or restoration of $34,709,000 *in cash never received by the Securities Company.* All that can be decreed to be restored is the property into which complainants' original preferred stock was converted.

It is, therefore, submitted that the restoration to the complainants of the $71,732,000 par value of common stock of the Northern Pacific Railway Company, covered by the injunction order before the court, would not place them in any better or different position than they occupied in November, 1901.

WILLIAM D. GUTHRIE,
D. T. WATSON,
Of counsel for petitioners and complainants.

WASHINGTON, March 2, 1905.

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Office Supreme Court U.
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MAR 17 1905
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and Appellants,

vs.

NORTHERN SECURITIES COMPANY.

MEMORANDUM IN OPPOSITION TO MOTION FOR IMMEDIATE ISSUE OF MANDATE BEFORE THE FILING OF ANY OPINION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

The appellants in the above-entitled case respectfully ask this Honorable Court not to direct the issue of the mandate on the recent decision herein until after the court has filed its opinion and the grounds of its decision have been disclosed, and the appellants have had an opportunity to examine the same. The immediate issue of the mandate in the case at bar would render the exercise of the right of petition for rehearing, etc., futile and unavailing, because it is the avowed intention of the appellee, Northern Securities Company, forthwith to distribute and dispose of the subject matter of the litigation. It is earnestly submitted that it would be unjust to permit this to be done until the grounds of the decision have been disclosed in the opinion of the

court, and the appellants' counsel have been afforded the opportunity to advise their clients in the light of such opinion.

Washington, D. C., March 17, 1905.

Respectfully submitted,

WM. D. GUTHRIE,
D. T. WATSON,
R. S. LOVETT,
MAXWELL EVARTS.

FILE COPY.

No. 512.

Supreme Court of the United States.

Supreme Court, U. S.
FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

vs.

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

Suggestions by Respondent in Answer to the Petition for a Writ of Certiorari.

JOHN G. JOHNSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON and
JOHN W. GRIGGS,
Of Counsel for Respondent.

C. G. Burroughs, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners

vs.

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

SUGGESTIONS BY RESPONDENT IN ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI.

Advanced copies of the Petition herein were furnished counsel for the Securities Company on the 15th inst., and formal service of it was made the next day. Petitioners' counsel also intimated that they should file a brief in support of the Petition; but Respondents' counsel were not favored with copies until the 20th instant.

The short interval between receipt of the Petition and supporting brief and the date fixed for the application, naturally has precluded preparation on Respondents' behalf of an argument upon the merits of the main controversy. Respondent therefore submits the question arising upon the Petition, without discussion of the rights of the parties in the property which Petitioners claim, and merely with some

suggestions which they think may be helpful to the Court in reaching a conclusion as to whether a writ as prayed for should be granted; and if it should be granted, in so ordering the further proceedings in this Court, that the time required for final disposition of the case may be shortened as much as possible, and the three thousand stockholders of the Securities Company be relieved as far as practicable from the great inconvenience and loss which the unavoidable delay incident to a revew by this Court of the decree of the Circuit Court of Appeals, would necessarily cause them.

The subject matter of the controversy is about 71,000 shares of the stock of the Northern Pacific Railway Company, which is in the possession of Respondent. It is not disputed that Respondent is the registered owner and holder of that stock; that it became so by the act of the complainants, the Petitioners here; that the stock was acquired from the Petitioners pursuant to the resolution quoted below; that the Petitioners were privy to this resolution, transferred the stock under it to Respondent, and received the consideration agreed upon in form of Securities stock and cash; that the Petitioners have applied to their own uses the cash which they received in consideration of transferring this Northern Pacific stock to Respondent, and have conveyed away the Securities stock which they received as the remaining consideration for the transfer, to the Equitable Trust Company as security for money borrowed to the extent of the par value thereof from a great number of bondholders. The Petitioners seek to get this stock away from Respondent substantially upon the ground that this Court decided in the Government suit that notwithstanding the transfer, the Petitioners still retain title to it.

The Circuit Court of Appeals did not so construe the decision of this Court.

The series of acts of the parties constituting the acquisition by the Securities Company from Harriman and Pierce of the

preferred and common stock of the Northern Pacific Railway Company, began with a special resolution of the Board of Directors of the Securities Company, passed at a meeting thereof, held on November 15, 1901, as follows:

"*Resolved*, That the President be, and hereby is authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,971 thereof in the fully paid-up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of the stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the Preferred stock of the Northern Pacific Railway Company."

Record, p. 383.

It appears from the Record that this resolution was passed with blanks left for insertion of the amount of Northern Pacific stock to be acquired by the Securities Company, and the amount of its own stock and cash to be delivered to Harriman and Pierce in payment therefor; that these amounts were afterwards made definite and inserted in the minutes of the resolution, between the time of its passage, and the holding of the next meeting of the Board, which was on November 19; and that, at this latter meeting, the minutes of the next former meeting, containing the resolution in its completed form, were read to, and approved by the Board.

Record, pp. 297–299, 384.

As a director of the Securities Company, Mr. Harriman was present at, and participated in, this meeting of November 19.

Record, p. 384.

On March 14, 1904, the decision of this Court was announced, affirming the decree of the Circuit Court, in the suit

of the Government against the Respondent. Eight days afterward, on March 22, 1904, the Board of Directors of this Respondent considered the situation which the affirmance had created, and thereupon decided that there should be immediate and full compliance by Respondent with the purpose of the decree, and that a reduction of 99 per centum of its capital stock, and a ratable distribution among its stockholders of its holdings of Northern Pacific and Great Northern Railway stocks, as a resultant surplus, were necessary and desirable.

These holdings then were and now are 1,537,594 shares of Northern Pacific, and 1,181,200 shares of Great Northern; all of the par value of $100 each. Under the laws of the State of New Jersey, where Respondent is incorporated, propositions for reduction of capital must be submitted to a vote of stockholders, and be approved and assented to by the holders of at least two-thirds of all the outstanding stock of the corporation. Accordingly Respondents' Board, as part of its action, called a meeting of its stockholders, for April 21, 1904, to consider and take action upon the matter. On April 2, 1904, three of the Petitioners herein, Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company filed in the Circuit Court of the United States, for the District of Minnesota, their petition, asking leave to intervene in the Government suit; asserting that a distribution by Respondent here of its holdings of Northern Pacific and Great Northern shares would be in violation of their rights, and of the decree against Respondent in said suit; and praying for such orders of that court as should protect their interests in the premises. In other words, Harriman and Pierce, and the Oregon Short Line Company set up in the Minnesota court the same claims which they now seek to assert in the suit wherein their present Petition is filed. Upon the filing of the Minnesota petition, the petitioners gave notice of hearing upon it, for April 12, 1904; and, on that day, both parties appeared by counsel, who argued the matter at length: with the result that a few days

afterward the Circuit Court, four judges sitting, filed its decision dismissing the petition, and holding that the *pro rata* method of distribution in no way violated the decree in the Government suit, and that it would restore to the markets of the world the railway stocks, which, in view of the decree, would otherwise remain worthless. The opinion of the court was by THAYER, Circuit Judge, and appears in the pamphlet of opinions herewith submitted, on pp. 109–115.

As appears by that opinion, "the Government was satisfied "with the relief obtained, and expresses itself as satisfied at "the present time;" the reference being to a formal declaration signed by the Attorney-General, and then filed in open Court by the District Attorney of the United States for the Minnesota District.

In the meantime, the Continental Securities Company, another stockholder of Respondent, began suit against the Respondent in the Court of Chancery of the State of New Jersey, to restrain Respondent from carrying into effect the *pro rata* method of distribution, on the same ground as that urged by these Petitioners in the Minnesota and New Jersey Federal courts, and on the additional ground that such method would be violative of the rights of stockholders under the laws of the State of New Jersey, for the same reasons asserted by the Petition herein, in respect to this latter point.

Upon commencement of the suit, the plaintiff therein moved for a preliminary injunction; which was argued at length before Mr. Vice Chancellor BERGEN; who filed an opinion shortly after the hearing, sustaining the *pro rata* method, in every respect. The pleadings and opinion in that suit appear at length in the Record: pp. 301–323. For the convenience of the Court, the opinion has been separately printed, and is herewith submitted.

No proceedings for the review of this decision have ever been taken; and no challenge of its correctness has ever been made in the courts of the State of New Jersey.

It must therefore be regarded as settling the proposition, that the method of distribution proposed by Respondent is in accordance with the laws of the state of its creation.

Immediately following denial by the Minnesota Federal Court of the Petition for leave to intervene in the Government suit, the present suit was begun in the Circuit Court of the United States for the District of New Jersey.

No authority recognizes difficult or doubtful questions of law as forming sufficient ground for tying up property for a lengthy period. The exigency arising from the existence of law questions, however difficult or doubtful, is fully and fairly covered by preservation of the *status quo* merely long enough to allow fair preparation for argument, and reasonable advisement afterwards by the court. Such questions might be, although no case has been found where they actually have been, regarded sufficient reason for an *ex parte* injunction running until a fair hearing could be obtained, and the court could reasonably consider the case; but no longer. Any and every right of preparation to which plaintiff could be entitled, under the utmost stretch of favor, was certainly exhausted in the Circuit Court.

On April 20, 1904, an *ex parte* injunction, in the form of a stay order, was issued.

(R. p. 195).

This order remained in force until superseded by the order appealed from.

The motion came on for argument on May 20, and the hearing occupied three days. Lengthy original and reply briefs were submitted on both sides. The plaintiffs amended their bill twice; the case now rests on the Second Amended bill. The oral argument terminated on May 23. The case was held under advisement until July 20, when the decision and opinion of the Circuit Court were filed.

Neither the restraining order, nor the special injunction following it, forbade action by the stockholders, on the question of reduction of capital and distribution of assets. The special meeting of the stockholders, to act on those questions was therefore held at the designated time, viz., on April 21, 1904; and the reduction and distribution were ordered by the affirmative votes of nearly three-fourths of all the stockholders; of all save the Petitioners here, and others holding altogether about four or five per cent. of the total of Respondent's stock.

Record, pp. 329-330.

Any and all right which plaintiffs originally might have had, of opportunity for preparation, argument, and decision of the law questions in the case had by the time of the making of the injunctive order been exhausted, and no further delay on the ground of the existence of such questions could rightfully be imposed on the Securities Company. Nevertheless, it was imposed; and the opportunity for preparation was again extended from July 20 to the date of argument in the Circuit Court of Appeals. Petitioners cannot urge the existence of difficult law questions as a ground for still further retaining the injunction.

The plaintiffs were heard there with like effect as if the appeal had been their own. They had the benefit of a full consideration of their case, and a judgment of their rights, by the Court to which alone an appeal therein could be taken from a final decree of the Circuit Court.

The opportunity of obtaining the opinion of the Circuit Court of Appeals which was strongly pressed for by plaintiff in the Circuit Court, both orally and on all their printed briefs, and preserved for them by the order of the latter court, has been accorded to them.

By its appeal from the ruling of the Circuit Court, the Securities Company necessarily undertook to satisfy the Appellate Court that the motion papers exhibit plaintiffs' case in full; that every essential transaction and fact composing it was then before the court, in all amplitude; and, consequently, that the duty of the appellate court was merely to apply to the established facts the principles of law governing the ultimate rights of the parties; in other words, to dispose of the application for an injunction on the merits of the case In the Circuit Court, the Securities Company opposed an injunction solely on the ground that the plaintiffs were shown to have no case. Questions of procedure were not mooted.

The facts necessarily consist of the things done and intended by Harriman and Pierce, on the one part, and the Securities Company on the other. On these points this record is complete. It contains all. Nothing more could be supplied. The sources of information are exhausted.

Furthermore, there is no material dispute or difference between the parties as to what was done and actually intended by them.

In the spring of the year 1901, at the instance of, and with money furnished by the Union Pacific Railway Company, there were purchased, of the preferred stock of the Northern Pacific Railway Company, $41,085,000 out of $75,000,000, and of common stock of that company $37,023,000 out of $80,-

000,000; thus a majority of the total $155,000,000 of capital stock of the Northern Pacific Company.

Mr. Harriman's deposition before the Interstate Commerce Commission discloses the connection of the Union Pacific with this purchase:

"MR. DAY: What is the total capital stock of the Oregon Short Line?

MR. HARRIMAN: I think between twenty-seven and twenty-eight millions.

MR. DAY: It purchased how much stock of the Northern Pacific?

MR. HARRIMAN: Seventy-eight millions.

MR. DAY: How did it pay for that stock?

MR. HARRIMAN: Some in cash and some by issuing its own obligations against that stock.

MR. DAY: How much cash did it pay approximately?

MR. HARRIMAN: Fifteen or twenty million dollars.

MR. DAY: That came out of its own treasury.

MR. HARRIMAN: Yes, sir.

MR. DAY: How was the money raised by the Oregon Short Line to acquire the balance of $60,000,000?

MR. HARRIMAN: By issuing its own certificates of indebtedness.

MR. DAY: Who did it issue the certificates to? What I want—

MR. HARRIMAN: What you want is to find out if the Union Pacific had any interest in that purchase?

MR. DAY: Yes, sir.

MR. HARRIMAN: I want to be frank about it. The Union Pacific helped the Oregon Short Line to finance it and purchased from the Oregon Short Line the certificates of indebtedness, the money for which it was used paying for the Northern Pacific stock.

MR. DAY: The sixty-one millions of that purchase money came out of the Union Pacific treasury, practically?

MR. HARRIMAN: Yes, sir.

MR. DAY: Directly or indirectly?

MR. HARRIMAN: Yes, sir.

R., pp. 243, 244.

It was further disclosed by Mr. Harriman, in the same examination, that the Union Pacific Railway Company is owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R., p. 242), and that this latter company is in turn owner of practically the entire capital stock of the

Oregon Railway and Navigation Company (R., p. 247). The court will take notice, without special proof, of the geography of the country, of the location of the prominent transportation systems, and of the public laws of the several states, as well as of the United States, on the subject of railway combinations.

The railways of the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad and Navigation Company, comprise the Union Pacific Railway System, which extends from the Missouri River westward, through the states of Nebraska, Wyoming, Colorado, Utah, Montana, Idaho, Washington and Oregon, to the Pacific coast, at Portland, and is a close competitor of the Northern Pacific Railway Company for both the east and west bound traffic of a large section of each of the four states last named.

These facts characterize the purchase of the Northern Pacific stock, by the Union Pacific system, as a scheme to secure control of a powerful competitor in the interstate trade. This record discloses no trace of a present purpose to abandon that plan. This suit is manifestly a mere step in realizing it.

While acquisition by the Union Pacific system of $71,732,062 of Northern Pacific stock would not give that system a majority of the entire capital stock of the Northern Pacific Company, yet for every practical purpose it would give quite a sure control of that Company. Corporations are controlled by stockholders' meetings; and the stock which makes the action of the company is not the totality of stock outstanding, but merely that part of the whole which attends the meetings.

Experience shows that only in rarest instances is the whole body of any stock represented at meetings.

Under the Northern Pacific charter, a majority of all the shares is required for a quorum; but the majority of any quorum suffices to determine the action of the meeting.

The amount of Northern Pacific stock which plaintiffs here ask the court to take from the Securities Company, and hand over to the control of Union Pacific, forms almost exactly 46 3/10 per cent. of the entire capital stock of the Northern Pacific Company. It would be a majority at every stockholders' meeting where not more than 92 1/2 per cent. of the total should be present. But no one with experience in such matters would expect so large a percentage of the stock of a great corporation ever to assemble. To all practical certainty, the Union Pacific holdings of Northern Pacific stock would be a majority of all stock represented at any meeting; and whenever the question is of the effect of placing a large body of corporate stock in a given hand, experience must be the guide.

In the *Pearsall* case, this Court considered that acquisition by a railway company of a proportion of the stock of a competitor, less than a majority, would be inimical to a state statute forbidding one railway corporation to obtain control over another owning, or otherwise controlling, a parallel or competing line.

161 *U. S.*, 646.

Plaintiffs therefore come here asking the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railroad Company.

The distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the whole will concentrate in a single interest. The individual defendants in the suit of the United States against the Securities Company and others, and all other persons referred to in the evidence in that case as having been consulted about the formation of the Securities Company, hold altogether but 996,016 shares of the stock of the Securities Company out of a total of 3,954,000

shares. A ratable distribution of the railway stocks would vest in all those defendants and consulted persons, combined, 378,224 shares, or 24–9/10 per cent. of the total Northern Pacific stock, and 297,493 shares, or 23–8/10 per cent. of the total Great Northern stock.

The Union Pacific interests would get 320,706 shares or 20–69/100 per cent. of the stock of the Northern Pacific, and 246,389 shares, or 19–71/100 per cent. of the stock of the Great Northern. The residue of the stock of each railway company comprising more than a clear majority of each, would be scattered among nearly 3,000 separate holders, not originally concerned in the formation of the Securities Company.

(Record p. 324.)

The plan of distribution of the Securities Company is therefore to utterly dissolve the combination condemned in the Government suit, and to diffuse the ownership and control of the railway stocks among thousands of separate holders, while the plaintiffs' plan would merely substitute another combination still more dangerous and offensive than the original one.

The fact that *pro rata* distribution will give each stockholder of the Securities Company shares in both railway companies, forms no objection to that plan. Each one's holdings will be individual and distinct from those of every other one; and the process of scattering the holdings still farther, may be relied on to begin at once. Holding of the stocks of competing corporations, by the same body of stockholders, is perfectly lawful. This court expressly settled that point in the *Pearsall* and *Louisville & Nashville* cases, in 161 U. S.

The circumstances under which this Court may, and having the appropriate jurisdiction will, review by *certiorari* the orders and judgments of inferior courts not reviewable by appeal or writ of error, are not clearly defined. Likely they

would not be susceptible of perfect definition; but counsel for Respondent are unable to perceive the smallest basis, either in matter of right or in matter of precedent, for the taking, by this Court, of jurisdiction over the question whether the special injunction here shall stand or be vacated.

If any precedent exists for issuance of a *certiorari*, to review a decree of the Circuit Court of Appeals, reversing an injunction order of the Circuit Court, standing alone and disassociated from any final decree covering the same controversy, counsel for respondent has not heard of it, nor been able to find it. Issuance of a *certiorari* here could be regarded only as the making of a new precedent; not the following of an existing one.

As finally established by this Court in a series of decisions, of which the latest is *Forsyth v. Hammond* (156 U. S. 506–514), the power of this Court to review by *certiorari* an interlocutory decree even when associated with a final decree, is a "power "which will be sparingly exercised and only when the circum- "stances of the case satisfy the Court that" (except in four contingencies specified in that decision and not now presented) "the importance of the *question* involved * * * "demands such exercise." But, here there is not involved any *question* important within the meaning of the cited rule. The *amount* involved, particularly the amount of dividends long withheld from suffering stockholders, is vastly important, but that cannot in this Court impart importance to questions which in themselves are comparatively simple, and have been answered adversely to petitioner's contentions by every Court that has undertaken to answer them at all. In no ordinary case would this Court burden itself with the review of such questions, unless upon a review of a final decree after hearing. The amounts involved, vast as they are, cannot compel the exceptional attention of this Court. Neither are they beyond the power of the defendants to respond in money damages which would be the meas-

ure of the possible relief of petitioners, vainly and unlawfully clamoring for a practical majority of the Northern Pacific stock *in specie* in order to vest its control in the rival Union Pacific System.

For all reasons above suggested respondent firmly opposes the granting of the writ.

Nevertheless, if counsel for Respondent mistake, and the Court should be of opinion that it has power to issue the writ in such instances, and that the present instance is one properly calling for the exercise of such power, they feel they could not too strongly press upon the attention of the court the hardship that such a determination would unavoidably carry to thousands of Respondent's stockholders, scattered through many countries, who not only have been innocent of all intent of wrongdoing, but were as ignorant of the plans of the promoters of Respondent's formation as any stranger could be.

The stockholders of Respondent have from the beginning been a body of investors and not a body of speculators. They rely upon the revenues from their Securities stock, to meet their regular financial needs. Multitudes of them are women. Other multitudes are estates of deceased persons and minors. A considerable number are institutions of learning and charities, which hold this stock as part of their endowment, upon which the support of the establishment is largely dependent.

Since the affirmance by this Court of the decree of the Circuit Court, in the Government suit, the Northern Pacific and Great Northern Railways have each earned net revenues enabling it to declare and pay a regular quarterly dividend at the rate of seven per cent. per annum ; the dividend dates being February, May, August, and November, of each year.

The supersedeas on the appeal from the decree of the Circuit Court enabled the Securities Company to collect from the railway companies the dividend of February, 1904, on its holdings of their shares; and to distribute the same among its own stockholders, through its own dividend paid at the beginning of the same month. The affirmance by this court of the decree in the Government suit in March, followed by the restraining order procured by plaintiffs in the present suit, in April, 1904, and the special injunction awarded in July, has operated to prevent payment by the railroad companies to any one of any part of the dividends since declared on their shares held by the Securities Company. Including the one for February 1, 1905, recently declared, in regular course, these dividends are four in number; and on the shares held by Respondent, aggregate over $19,000,000. By operation of the injunction in this suit, that vast sum is not only detained from those to whom indisputably it belongs, but remains tied up in the hands of the railway companies, and thus removed from the channels of business circulation.

Counsel for Respondent therefore respectfully suggest, that if, against Respondent's earnest objection and protest, this honorable Court shall determine to grant the writ prayed for, it be granted on condition, firstly, that the case be set down for hearing and argument at such early date as will permit the earliest practicable decision and final disposition thereof, by this Court, consistent with the requirements of justice; and, secondly, that, pending the final disposition of the case here, this honorable Court make such order, or give Respondents leave to apply to the Circuit Court of the United States, for the District of Minnesota, for such order in the Government suit, as will permit the accumulated dividends of the railway companies to be paid out by them as part of the distribution of assets which this Respondent is endeavoring to make, and

will make, as soon as the restraint imposed by the injunction in this suit has been removed.

Petitioners could not be hurt by such partial distribution of assets; for, by confession of their bill, they have in hand the $8,915,629 cash, paid Harriman and Pierce by the Respondent, as part of the price of the Northern Pacific shares they transferred to it, and for which the bill offers to account. This cash fund, in their own possession, will amply protect them.

JOHN G. JACOBSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON and
JOHN W. GRIGGS,
Of Counsel for Respondent.

FILE COPY.

U. S. SUPREME COURT.

OCTOBER TERM, 1904. NO. 512.

EDWARD H. HARRIMAN ET AL.

vs.

NORTHERN SECURITIES COMPANY.

BRIEF OF MR. ROOT AND MR. STETSON.

CORRECTIONS AND ADDITION.

Page 85. The *third* sentence should read as follows:

"It cannot be that the defendant takes an unfair advantage of the complainants in retaining the exact consideration that originally was considered and declared by both parties to be fair, especially as since that time the Securities Company's stock has advanced in market value. (See *post* p. 112)."

Page 123. The *fifth* sentence should read as follows:

"This assertion, though ill-founded, is not equivalent to, but excludes, the contention that there was a very different agreement".

In continuation of the first subdivision of the *Seventh Point* of our *Brief* (p. 86), and in further answer to complainant's proposition (p. 150) that an admitted mutual mistake of law affords a distinct ground of relief in equity, we would call special attention to the case of *Midland Great Western Ry. vs. Johnson* (6 H. L. Cases, 798, 810).

It was there held that :

" Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law.

" Mutual mistake as to its construction will not entitle either party to relief in equity."

Accordingly, the House of Lords overruled the decree of the Lord Chancellor of Ireland, based upon the contrary theory.

The Lord Chancellor of England (CHELMSFORD) in the following language (pp. 810–811), stated and refuted the position taken by the Lord Chancellor of Ireland thus :

" He observes, ' they say, " true it is that on the strict letter of this contract we are not able to get back this money, but, what we urge here is, not that we are to have a performance of that contract, but that it is inequitable for you to rely on it, having regard to what has occurred, for we are placed in the position that we have been induced to lay out a large sum on the improvement of the stock belonging to you, the advantage of which expenditure we have given under the belief that we were entitled to the portion we claim out of this fund if we could make a case showing that we had made an equivalent expenditure. We have made such a case ; we have acted for your benefit ; and you still possess the benefit of our acts. All this was induced by letters, valuations and accounts, in which you and your agents spoke and acted, so as to create the belief under which we acted, and you therefore must not rely on the strict legal construction of the deed ; for, by so doing, you would obtain the same advantage twice over." '

" With very great respect to the Lord Chancellor of Ireland, this appears to me to open an entirely new head of equity. Mistake is undoubtedly one of the grounds for equitable interference and relief ; but then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law ; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

Lord WENSLEYDALE said (p. 821):

"There is equally an end of any ground for altering the original contract between the parties. It was not at first pretended that it did not express the real intention of the parties. And although it might appear that the parties had a mistaken view of the nature of the contract they had entered into, that would not entitle the respondents to any relief in equity unless they can show that it is a contract that did not really represent the intention of the parties at the time. And that I have disposed of already."

Washington, 28 Feby 1905.

ELIHU ROOT
FRANCIS LYNDE STETSON
of Counsel for Respondent.

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Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

VERSUS

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

No. 512.
February 1905.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The decree brought up for review reverses a decree of the Circuit Court for the District of New Jersey, restraining the Northern Securities Company from dividing its assets ratably among its stockholders.

BRIEF FOR RESPONDENT

The present controversy developed immediately upon the attempt of the respondent, upon March 21, 1904, to conform to the condition resulting from the decree of the Circuit Court of the United States for the District of Minnesota in the Government suit against the Northern Securities Company (120 Fed. Rep. 721; R. p. 150) as affirmed by this Court (193 U. S. 197) March 14, 1904.

While the more prominent facts exhibited in that suit, probably are still familiar to this Court, it is assumed that at this point it may be helpful to summarize some matters, which bear particularly upon the present contention.

During all the transactions involved in this controversy, the Northern Pacific Railway Company* owned and operated the trunk line of railway and branches in the several States from Lake Superior to Portland, Oregon, and to the Pacific Coast. Jointly with the Great Northern Railway Company,* it was the owner of substantially all of the capital stock of the Chicago, Burlington & Quincy Railroad Company. In conjunction with the Great Northern Company, it controlled the operation of the many lines of the Burlington Company (R. 172)* extending into and through the States of Illinois, Wisconsin, Minnesota, Iowa, Missouri, South Dakota, Nebraska, Montana, Wyoming and Colorado.

During the same period, the Union Pacific Railway Company* owned and operated, or controlled the operation of, the several lines of railroad comprising the Union Pacific Railway System. The Union Pacific Railway System included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company,* and the railroad of the Oregon Railroad & Navigation Company.* The Union Pacific Company is the owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R. p. 194), and the latter company in turn is the owner of practically the entire capital stock of the Oregon Railway & Navigation Company (R. p. 198). The three named railroads in the Union Pacific System extend from the Missouri River westward through the States of Nebraska, Kansas, Wyoming, Colorado, Montana,

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* The affidavit of Mr. Nichols in the present Record states tha the line of all these railroads is "accurately shown upon the map "Exhibit 13 opposite page 662 of volume one of the record in the "suit of the United States against Northern Securities Company "and others to which reference hereby is made." (R. p. 279.)

Idaho, Utah, Washington and Oregon, to the Pacific Coast at Portland.

Between Chicago and Portland by means of connecting roads, and between Butte, Montana, and Portland and many intermediate points, and between Butte, Montana, and Missouri River points, there is sharp competition between the Northern Pacific System and the Union Pacific System.

The situation as above described continues to exist to the present date, (R. 279) and in the States of Montana, Idaho, Washington and Oregon, the railways of the Union Pacific System are active competitors of the Northern Pacific Company for both east and west bound traffic, and in traffic within and between the States of Nebraska, Wyoming, Colorado and Montana, they are active competitors for traffic with the Chicago, Burlington & Quincy Railroad. Thus it is true beyond dispute that the Union Pacific Railway *System* and the Northern Pacific Railway *System* are within a large section of the country parallel and competing lines of railway; and, brushing aside the fiction of the separate entity of a corporation from the body of its stockholders, it will be manifest that the purposes and acts of the Oregon Short Line Railroad Company (one of the complainants herein and the equitable owner of the subject matter of this suit) were in fact the purposes and acts of the Union Pacific Railway Company, the corporation which dominates the Union Pacific System.

Even without the special proof presented by the record of the competitive character of the two systems (R. pp. 171, 173, 175, 207, 217, 279, 67, 88, 104), the Court would take notice of the geography of the country, of the location of the prominent transportation systems mentioned and whether or not they are parallel and naturally competitive (*Gulf, &c., R. R. v. State*, 72 Tex., 404, 10 S. W. 81; *Miller v. Texas, &c., R. R.*, 83 Tex. 518, 18 S. W. 954) as well as of the laws of the States mentioned and of the United States on the subject of railway combination.

In the year 1901, the Northern Pacific Railway Company had issued, and there was outstanding, a total capital stock of $155,000,000, of which $75,000,000 was preferred stock and $80,000,000 was common stock. (R. 157.) The preferred stock was subject to redemption at the option of the Company (R. 283), and, as hereinafter more particularly described, it was so redeemed and retired on January 1, 1902 (R. 168). Since that date there has been no preferred stock, but an equal amount of new common stock was then issued and sold to the holders of its original common stock, so that the capital stock is still $155,000,000, but all of common stock.

From the time of its reorganization in 1896, the Northern Pacific Railway had been managed by directors generally recognized as friendly to Messrs. J. P. Morgan & Co., the managers of the reorganization. (R. 167; 204.) During the same period the Great Northern Railway Company was managed by directors generally recognized as friendly to Mr. James J. Hill, the President of the Company. For present purposes, we may style the Northern Pacific interests "the Morgan party", and the Great Northern interests "the Hill party" and the two collectively "the Morgan-Hill party" as they were termed in the Government suit.

Upon the acquisition of the Chicago, Burlington & Quincy shares by the Northern Pacific and Great Northern Companies in April, 1901, the interests in control of the Union Pacific System, which may be called the Harriman interests, immediately recognized how effective and lasting thereafter would become the competition with the Union Pacific lines of the Burlington road when operated in conjunction with the Northern Pacific and Great Northern trans-country routes. (R. 217.) Becoming alarmed at the probable effect thereof, the Harriman interests made overtures to the Morgan-Hill party for an allotment of a portion of the Burlington shares, so that they might have voice and influence in the

management of the Burlington and thereby be enabled to protect and to promote the business of the Union Pacific Railway. For manifest reasons this proposition of the rival and unfriendly line was not acceptable to the Morgan-Hill party, and the request was refused. Following this refusal, and shortly before May 10, 1901, at the instance of the Union Pacific Railway Company and with borrowed money furnished by that Company (R. pp. 194–196) the Oregon Short Line Company in the open market purchased Northern Pacific preferred stock to the amount of $41,085,000 and common stock to the amount of $37,023,000, or in the aggregate $78,108,000 of stock, being a clear majority of the $155,000,000 total capital stock of the Northern Pacific Company as then issued and outstanding (R. 157). But, those making these purchases with a view to the control of the Northern Pacific road (R. p. 240) had disregarded the fact before mentioned, that the preferred stock was subject to retirement at par at the option of the Company, and the 370,230 shares of common stock so purchased was less than a majority of 800,000 shares of the total common stock controlling the redemption of the preferred stock (R. p. 236, 157). Within a few days previous to May 10, 1901, learning the extent and the nature of these purchases of Northern Pacific stock and appreciating the injury to the Northern Pacific likely to result from ownership of a majority of the shares in the interest of the Union Pacific, Messrs. Hill and Morgan and their friends undertook similarly to increase their holdings of Northern Pacific common stock by purchases in the open market to an extent which would assure to them a majority of the common stock and the control of the Company after the preferred stock should have been retired (R. p. 175). Upon cessation of the competitive buying, the Morgan-Hill party held about 420,000 common shares as against less than 380,000 such shares held by the Harriman interests (R. 157).

These enormous purchases by the rival interests became known to the public through the startling and unprecedented market movement of the Northern Pacific issues, and in financial circles gave rise to an anxiety so acute, and a fear of untoward consequences so widespread, that there resulted in the securities markets a most disastrous panic, since known as the "Northern Pacific corner" or the "panic of May, 1901," when urgent bidders on the New York Stock Exchange bought in Northern Pacific common at exorbitant prices, in some instances equal to ten times the par of the shares.

These attempts on the part of the Union Pacific to obtain control of the Northern Pacific Railroad, find their latest development in the case at bar. The various matters and events thus far recited will readily recur because of their relation to the facts appearing in the record in the Government suit.

From the panic of May 9, 1901, we may pass now over the months following until October in the same year. On the first day of that month, the complainant Harriman was elected, and Mr. James Stillman was re-elected, as a member of the Board of Directors of the Northern Pacific Railway Company (R. p. 281). Each was a director of the Union Pacific Railway Company and both attended the meeting of the Northern Pacific Board held on November 13, 1901, when Harriman was chosen a member of the Executive Committee (R. pp. 281–282).

At this meeting of the Northern Pacific board held November 13, 1901, the Union Pacific representatives being present as aforesaid, there were duly adopted, by the affirmative vote of all present, resolutions providing for, and in due course resulting in, the retirement of the preferred stock upon January 1, 1902 (R. pp. 168, 282). These resolutions declared that the Company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary so to do, the Company should issue its negotiable bonds for $75,000,000, convertible at par

into shares of the common stock of the Company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to 75/80ths of the par amount of said common stock at such time owned by such holder; and finally arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof upon January 1, 1902, of $100 cash for each and every share (R. p. 281, 283-286).

The resolutions expressly excluded the preferred stockholders from any opportunity to convert their preferred stock, and such exclusion was upheld by the Supreme Court of New York (*Hackett v. Northern Pacific Ry.* 36 Misc. Rep. 583; Appendix p. 376).

On November 15, the Executive Committee of the Northern Pacific Company met and authorized the execution of a contract with The Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 as provided in the directors' resolution last above recited. (R. p. 287, 290–293.) On November 18, the Executive Committee again met, Mr. Harriman being present, and took further proceedings toward the accomplishment of the preferred stock retirement (R. p. 293–6).

Mr. Harriman's explanation of the circumstances eventuating in this surprising result are set forth in his affidavit filed in support of his prayer for the preliminary injunction. It runs as follows (R., p. 155, 158–159):

"My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of said firm, but I cannot remember exactly what each said, and at the present time can only recollect the substance and result of my conversations with them.

"I was then urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company on the ground that it would be a minority holding under the plan of conversion if consummated, that the majority would be held by the holding company, and that there would probably be no market for any such minority holding. They further stated that upon the organization of the proposed holding company, they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take in the common stock held by them and Mr. Hill and his associates, and all other parties, and they thereupon offered me those terms. I took the matter under consideration and conferred with members of the board of directors of the Oregon Short Line Company. The conversion under conditions reducing the Oregon Short Line holdings to a minority was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash."

The exact date of these negotiations is not fixed by Mr. Harriman, but presumably they took place shortly before November 13, 1901 (R. p. 211). Upon the subject of these conferences, the testimony of the members of the firm of Messrs. J. P. Morgan & Co. appears in the present record only by extracts from their testimony in the Government suit annexed to the affidavit of Mr. Winslow S. Pierce, and forming

part of the complainant's proofs (R. p. 161, 163–176). However, it is clear that on the part of Messrs. J. P. Morgan & Co.—who, according to the Mr. Harriman's affidavit, alone appeared as purchasers (R. p. 205, 213, 234)—there was no exaction or request, but simply an offer, to obtain for Harriman and Pierce terms as good as (and ultimately made better than) those offered to any other holder of Northern Pacific shares. The offer was accompanied not by any threat or by any intimation that the holding company would require the shares, but merely by observation of the obvious fact that there might be no profitable market for minority shares (R. p. 165, 158). Mr. Harriman seems to have been governed not by any consideration of this suggestion, but by his own idea that unless he sold "it would be to the in- "terest of the holding company to sacrifice the North- "ern Pacific for the benefit of the Great Northern Com- "pany" (R. p. 158). It was therefore finally agreed to sell.

The Northern Securities Company was formed by the filing of articles of association at Trenton on the 13th of November, 1901 (R. p. 302). Shortly before the filing of the articles, the complainant Winslow S. Pierce, attended a meeting of counsel for the purpose of considering the incorporation. Mr. Pierce, in his affidavit filed by the complainants, describes the circumstance as follows (R. p. 185–186):

"Referring to my affidavit, verified May 16, 1904, in this suit, my attention has been called to the fact that after the arrangement with Messrs. J. P. Morgan & Co. to accept shares of the holding company for the Northern Pacific stock held by the Oregon Short Line Company, as stated in Mr. Harriman's affidavit of May 16, 1904, and shortly before the organization of the Northern Securities Company (the exact date I do not recollect), I attended a meeting at which were present counsel representing Mr. Hill and his associates, counsel representing Messrs. J. P. Morgan & Co., and counsel representing the Oregon Short Line interests. At such meeting a form of certificate of incorporation of a holding company was submitted by counsel representing Mr. Hill and was discussed. The form thus sub-

mitted and discussed was to the best of my recollection substantially the same as that subsequently used in the incorporation of the Northern Securities Company. The formation of the holding company had been previously decided upon by interests other than our own and in the decision to form such a company I had no part."

The articles of association of the Northern Securities Company were signed by three incorporators, who constituted the first board of directors and who resigned the next day. On that day, the 14th of November, 1901, one share of stock was placed in the name of each of fifteen gentlemen who were to constitute the permanent board of directors (R. p. 307). Of these 15 one was Mr. Harriman. One was Mr. James J. Hill, the president of the Great Northern Company. Two others, Messrs. Schiff and Stillman, were directors with Mr. Harriman in the Union Pacific board. Two others, Messrs. Bacon and Perkins, were members of the firm of J. P. Morgan & Company. Five of the others appear among the individual defendants in the Government suit. Thereupon on the same 14th of November all of the 15 were elected directors of the Northern Securities Company (R. p. 308, 309). It appears by the minutes that upon being elected Mr. Harriman forthwith appeared and accepted his election as director, and took his seat in the board (R. p. 309). On the same 14th of November an executive committee of five was elected, Mr. Harriman being one of the five (R. p. 311). On the same day, the executive officers who have managed the company throughout its existence were elected by the votes of all including Messrs. Harriman and Stillman (R. p. 310).

On the next day, the 15th of November, the board passed resolutions authorizing the purchase of the Harriman-Pierce Northern Pacific stock upon the terms set forth therein. The statement and resolutions were as follows (R. p. 311–312; 270–271; 331–333):

"The President stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred

stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the Directors present, it was

"*Resolved*, That the President be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company—at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company."

"*Resolved*, That the President be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent. per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the President be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the Board of Directors of the Northern Pacific Railway Company passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the President be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the President be, and hereby he is, authorized to borrow, on such terms as he may ar-

range, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises."

Mr. Harriman and the other Union Pacific interests remained absent from that meeting, but at the next meeting of the board on the 19th of November following, Mr. Harriman, Mr. Schiff and Mr. Stillman all being present, the minutes of the meeting of the 15th were read and on motion were approved. (R. p. 312).

In the meantime (on the 18th of November) the resolution had been effectuated by Harriman and Pierce delivering their Northern Pacific stock to the defendant and by the defendant delivering to Harriman and Pierce the 824,000 shares of defendant's stock and $8,915,629 in cash. (R. p. 5).

At the same meeting on the 19th of November, Messrs. Harriman, Schiff and Stillman being present, a form of by-laws for the company was read, amended and adopted. (R. p. 312). On the 27th of November, the organization of the company was completed at a meeting of the Executive Committee in which Mr. Harriman participated, when the rules of procedure of the Executive Committee were adopted and the form of the company's permanent stock certificate was unanimously approved (R. p. 312–318). The stock certificate is in the usual form, and is set forth in full in the opinion of the Circuit Court of Appeals (R., 388) and also in the Directors' Minutes. (R. p. 317).

Continuously from that time Mr. Harriman has acted as a member of the Board of Directors and of the Executive Committee of the Northern Securities Company.

The Northern Pacific stock certificates received from Harriman and Pierce were by the Securities Company surrendered to the Northern Pacific Railway Company and have ceased to exist. The certificates for the 370,230 shares of common stock

were exchanged for 370,230 shares of common stock issued in the name of, and now held by, the Northern Securities Company. The certificates for the 410,850 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement in pursuance of the preferred stock retirement proceedings of that Company above recited, and in exchange therefor the Northern Securities Company received $41,085,000 in cash (R. p. 265–266). After the surrender of the preferred stock as aforesaid, the Northern Securities Company purchased for cash at par, from the Northern Pacific Railway Company, the bonds of that company convertible at par into common stock, and by so converting the same it received from the Northern Pacific Railway Company certificates of new common stock to an amount equal to seventy-five eightieths of the number of shares of common stock delivered by Harriman and Pierce, to-wit, certificates for 347,090 shares of new common stock (R. p. 325–326). *Thus at cost to itself of $82,491,800 in its own stock, and a net cash sum of $2,539,691.50 over and above all cash by it received, the Northern Securities Company became the holder of certificates for 717,320 shares of Northern Pacific new common stock.* The certificates for all this new common stock now are, and for nearly three years have been, registered in the name of the Northern Securities Company, and none of them ever was held by any one of the complainants (R. p. 265).

From time to time after the 18th day of November, 1901, until shortly before the entry of the Circuit Court decree in the Government suit, the Northern Securities Company acquired from a large number of the owners of the stock of the Great Northern Railway Company, acting separately, a large majority of its stock, and prior to the 8th day of March, 1903, the Northern Securities Company acquired from a very large number of separate individual owners thereof $82,027,362.50 par value of the common stock of the Northern Pacific Railway Company. (R., p. 265–266).

From the minutes of the Northern Securities Company, it appears that on the 22d day of January, 1903, the board of Directors of that company, Messrs. Harriman, Schiff and Stillman being present and taking part in the meeting, and no negative vote being recorded, approved the sale by the company itself for cash at a price much above par of 75,000 shares of Northern Securities stock (R. p. 317–318). The purchasers of these shares parted with their money in exchange for a ratable interest in all the corporate assets of the Northern Securities Company, including the Northern Pacific stock transferred to that company by the complainants, and they acquired no other rights whatever. (R. 272, 275, 266, 278–9.) For more than a year after the original transaction, the Union Pacific representatives in the Securities Board of Directors accepted responsibility for the sale of ratable interests to the public purchasing Northern Securities shares.

During all the period from the organization of the Securities Company until the affirmance of the decree in the Government suit, the complainants continued to exercise the rights of holders of 824,000 shares of stock in the Securities Company; they received their share of such dividends as were declared by the company, and they gave their proxy to vote at the annual meetings of 1902 and 1903 (R. p. 320).

Four months after the filing of the bill in the Government suit, Harriman and Pierce and the Oregon Short Line Company, on the 17th day of July, 1902, further asserted their rights of ownership over the 824,000 shares of stock of the Northern Securities Company, by pledging that stock to the Equitable Trust Company under the trust indenture set out in the bill of complaint. The terms of the indenture show that then they transferred to every holder of the bonds issued thereunder a part of their interest in the general assets of the Northern Securities Company represented by the pledged stock, for the indenture assures to the bondholders not merely payment of interest upon the bonds, but a pro-

portionate share of all the dividends paid by the Northern Securities Company upon the stock pledged (R. pp. 31, 33, 45, 46). This trust indenture provided not only for the issue of bonds in respect of the stock immediately pledged, but further authorized the issue thereunder of additional bonds to an aggregate amount limited only by the par value of all stock of the Northern Securities Company that might be deposited with the trustee, thus disclosing an expectation that the Oregon Short Line Railroad Company might acquire and pledge any and all other shares of the Northern Securities Company even up to the total authorized capital of that company.

The bill on behalf of the Government was filed by the Attorney General upon March 10, 1902. Previously thereto, on January 25, Mr. Harriman had been summoned before the Interstate Commerce Commission and had been examined by the Solicitor General concerning the Securities Company and the railroad interests represented therein. His testimony on this occasion was subsequently introduced in evidence in the Government suit (R. p. 190). Being given *ante litem* and within two months of the transaction, it is most important. The following, portions of the deposition, are directly material to the present controversy.

MR. DAY: Did you attach to your negotiation for the sale of Northern Pacific stock, any other condition than the one of the money price?

MR. HARRIMAN: No, sir.

MR. DAY: No other conditions?

MR. HARRIMAN: No other conditions that I remember.

MR. DAY: No other conditions except the one of the money price?

MR. HARRIMAN: I do not remember any condition of the Union Pacific or Oregon Short Line, in any way (R. 208-209).

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"MR. HARRIMAN: The transaction was complete" (R. p. 210).

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MR. DAY: You told Commissioner Prouty, in reply to a question propounded by Commissioner Prouty respecting your reasons for the sale of this seventy-eight millions of stock so shortly after you purchased it, that the Union Pacific had accomplished its object in the purchase. What was that object, or how did you accomplish that object? What assurance have you that you have accomplished it, if that was the only object? What assurances were given you by any one respecting the future conduct of the Northern Pacific or those avenues of communication between it and the Oregon Short Line or the Union Pacific?

MR. HARRIMAN: I do not presume that it would be possible for any individual or any combination to give any promise that would be a security to anybody else in the affairs of the operation of any railroad, the Northern Pacific or any other. *For instance, these people who purchased the Northern Pacific might sell the stock to-morrow or before the next election, and still whatever assurances there were would be of no avail.*

MR. DAY: Were there any assurances?

MR. HARRIMAN: No, sir.

MR. DAY: None at all.

MR. HARRIMAN: No, sir.

MR. DAY: Directly or indirectly, controlling the operation of the Northern Pacific?

MR. HARRIMAN: That covers a great deal of ground. We had many conferences as to what the movement by various lines would be, and, considering the whole question, the Union Pacific management determined that it was no longer necessary, as it was believed that it would be to the interest of the Northern Pacific to use the avenues open over the Northern Pacific as it had before, notwithstanding it had purchased the Burlington.

MR. DAY: Were any assurance given you regarding the future relations of the Burlington road with the Union Pacific?

MR. HARRIMAN: No, sir.

MR. DAY: Nothing said in respect to that, as to how it should be conducted and used?

MR. HARRIMAN: The Burlington touches the Union Pacific lines at a great many points.

MR. HARRIMAN: I should think it did.

MR. DAY: You asked no assurances regarding that and received none?

MR. HARRIMAN: No, sir.

MR. DAY: Was any inducement held out to you to enter the Northern Securities Company or to take any interest in that?

MR. HARRIMAN: No, sir.

MR. DAY: By any of these gentlemen?

MR. HARRIMAN: No, sir. (R., 206–207.)

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MR. DAY: What were the terms reported to it (the Oregon Short Line)?

MR. HARRIMAN: *The sale of the stock.*

MR. DAY: What were the terms of it?

MR. HARRIMAN: You mean what price we got?

MR. DAY: I do not care about the price, but the terms—the conditions of the sale.

MR. HARRIMAN: *No conditions.* (R. p. 199).

* * * * * *

MR. DAY: Pending the negotiations for the sale of the $78,000,000 of Northern Pacific stock, which has been referred to, and the questions which arose respecting it from time to time among your associates, who acted as your legal counsel?

MR. HARRIMAN: Mr. Pierce.

MR. DAY: On what basis was such portion of the $78,000,000 as was taken in exchange or exchanged for Northern Securities stock based or taken? What was the basis of the exchange?

MR. HARRIMAN: We made no exchange.

MR. DAY: I thought you said—

MR. HARRIMAN: No. We had no transaction whatever. I think you have got a wrong impression. We had no transaction whatever with the Northern Securities Company. (R. 213).

* * * * * *

MR. DAY: I understood you to say that you took some Northern Securities in part payment.

MR. HARRIMAN: Yes, sir, in lieu of cash. We did not make any exchange.

MR. DAY: You did not subscribe?

MR. HARRIMAN: No, sir, we had no transactions with them. (R. 214).

* * * * * *

MR. DAY: Then I asked if you did rely upon the statement that a Securities Company was to be formed?

MR. HARRIMAN: In making the sale?

MR. DAY: Yes, sir.

MR. HARRIMAN: No.

MR. DAY: I do not mean that that was the moving consideration. Would you feel that you had a cause of complaint against the gentlemen you were negotiating with if that stock had not been put into the Northern Securities Company?

MR. HARRIMAN: I do not think we would; I do not know any reason why we should. (R. 215).

* * * * * *

THE CHAIRMAN: As I understand Mr. Harriman, he said he negotiated the sale of this Northern Pacific stock when his company decided that it was best to sell it. He reported the terms to his company and they ratified the arrangement.

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the securities of the Northern Securities Company if organized on a certain basis?

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: Subsequently it was organized on that basis?

MR. HARRIMAN: And the stock was delivered and received.

THE CHAIRMAN: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

MR. HARRIMAN: Yes, sir. (R. 215).

* * * * * *

COM. CLEMENTS: When did you first seriously consider taking any stock in that company yourself or for the corporations you represent?

MR. HARRIMAN: Only when we sold the Northern Pacific stock. (R. 216).

In December, 1902, Mr. Harriman testified to similar effect in the suit of the State of Minnesota against the Northern Securities Company (R. p. 238): his testimony on that examination was incorporated in the record in the Government suit and appears in the present record at pp. 233 *et seq.*

The proceedings taken in the Government suit resulted, on or about April 9, 1903, in the decree therein

in favor of the United States of America and against the defendants in said suit. A copy of said decree is annexed to the bill as Exhibit D (R. p. 190). Upon or about the 14th of March, 1904, this decree was finally affirmed by this Court.

At this time the Northern Securities Company had issued and outstanding capital stock to the amount of $395,400,000, and was the holder of 1,537,594 shares of the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company.

Immediately the Northern Securities Company in good faith undertook to conform to the decree.

Upon March 22, the Board of Directors adopted the resolutions set forth by the complainant as Article XIV. of the *second amended bill* (R. p. 9), quoted at length in the opinion of the Circuit Court of Appeals (R. p. 380), and forthwith caused a copy thereof with an explanatory letter (Exhibit A, R. p. 160) to be sent to the Attorney General.

Coincidently with the adoption of these resolutions of the directors, the Union Pacific party promptly set out to effect the long-coveted control of the Northern Pacific. The first move was made early in April, 1904, when the three principal complainants in the present case presented to the Circuit Court for the District of Minnesota, their petition for leave to intervene in the Government suit for the purpose of therein asserting their present contention. The grounds of this application were substantially the same as those upon which the present bill is founded. On April 12 and 13, 1904, argument was had at St. Paul upon the application, the Court, including three of the four learned Judges who had rendered the decree since affirmed by this Court. The Government appeared by the Attorney General and filed a declaration stating that it was satisfied with the relief already obtained. Upon April 19, 1904, the Court rendered its decision denying to the petitioner the prayed for leave to intervene.

The following, taken from the opinion of THAYER, J., constitute the Circuit Court's construction of the Circuit Court decree upon the former opinion which had been delivered by him (R., p. 367-368) :

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. * * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of the said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned or exclude other methods of disposition of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities

Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

On April 20, 1904, the day following this denial of their petition to intervene in the Government suit, the complainants began the present suit in the District of New Jersey by filing their original bill of complaint against the Northern Securities Company as sole defendant; and thereupon and upon the affidavits and exhibits accompanying the same obtained from Circuit Judge KIRKPATRICK a temporary restraining order pending the hearing of the complainants' motion for a preliminary injunction. On April 26, the original bill was superseded by their first amended bill, including the Northern Pacific Railway Company as a defendant.

Upon this first amended bill and the affidavits and exhibits filed in connection therewith, the complainants' application for the preliminary injunction was heard by Circuit Judge BRADFORD on May 20, May 21 and May 23. *After the conclusion of that hearing the complainants filed their second amended bill.* On July 15, 1904, the Court made its decision allowing an interlocutory decree for a preliminary injunction (R. p. 344). On August 18, 1904, the complainants entered the decree which on January 3, 1905, was vacated by the Circuit Court of Appeals.

The opinion of Judge BRADFORD (Record pp. 321-344) contains not one word indicating any view upon the merits. The learned judge did not even find a *prima facie* case; he granted the preliminary injunction expressly and solely upon the grounds (R. p. 343)

that (1) there were ultimately to be determined questions which were grave and difficult, (2) the balance of inconvenience was in favor of the complainant, and (3) an appeal would lie from an interlocutory decree granting, but not from one denying, a preliminary injunction.

Upon the invitation extended by the last reason (3) so assigned by Judge BRADFORD, the Circuit Court of Appeals proceeded fully to consider the merits (R. p. 386–396) and reaching the conclusion that upon the allegations of the bill and indisputable facts, the Securities Company was owner of the Railway shares (R. p. 393), dissolved the preliminary injunction. Judge GRAY dissented in a short opinion (R. p. 396–7) without any consideration of the merits but solely upon the ground that the case was one in which the duty of the appellate court was merely to determine whether or not the sound judicial discretion of the court below had been abused.

In the meantime, the Continental Securities Company, a stockholder of the Northern Securities Company, had filed its bill (R. p. 245) in the New Jersey Court of Chancery to enjoin the proposed distribution but the application was denied by Vice Chancellor BERGEN (R. p. 257–263) who fully considered the merits and held *(1)* that the ownership of the railway stocks by the Northern Securities Company was not now questionable, and (2) that the proposed ratable distribution was authorized by the laws of New Jersey.

The decision of the Circuit Court of Appeals has now been brought to this Court for review upon *certiorari* issued upon a petition of the complainants in which among other things it was urged (Petition p. 12) that the Circuit Court of Appeals had erred "in "failing to give due effect to the decision of this Court "in the Government suit upon the same question of "ownership there presented upon the same proofs."

The present condition, then, is one in which (1) all parties agree that now is presented for consideration and final determination by this Court the question

whether the decree in the Government suit concerned and decided as between themselves the mutual rights of the parties to this suit, and also is one in which (2) the defendant, denying that such rights were there decided, contends that upon the facts indisputably established by incontestable depositions and documents in the present proceeding, the complainants are not entitled to reclaim the railway shares which voluntarily they sold and delivered to the defendant now holding the same, an immensely valuable consideration therefor having been received and retained and enjoyed for years by the complainants who have disposed of the same as their own property. The propriety of a review of the case as a whole is established by many decisions, but it is sufficient to refer by title to only a few. See *Green v. Mills*, 69 Fed. Rep. 852-860; *Knoxville v. Africa*, 77 Fed. Rep. 501; *Smith v. Vulcan Iron Works*, 165 U. S. 518-525; *Mast v. Stover*, 177 U. S. 485-494; *Castner v. Coffman*, 178 U. S. 168, 183.

The contentions of the defendant have been fully sustained by every court that has considered the merits at all, and have not been denied upon the merits by any court or judge.

The contrary contention of the complainants depends upon four principal propositions of which not one can be maintained :

1. That the Securities Company did not become the owner of the railway shares, but was only a trustee or bailee for the complainants :

2. That even though the Securities Company be considered to have been a purchaser of the railway shares, its purchase was upon a consideration which has failed, viz., an understanding that the Securities Company should continue permanently to hold such shares :

3. That upon general principles, the complainants are entitled to recover back property transferred by them in virtue of an illegal combination : and

4. That the property so transferred by the complainants should be deemed to include the new common stock which they never owned, because their transfer of preferred stock, since retired, was made upon the understanding that it was to be converted into new common stock.

By way of inducing a favorable consideration of their contention the complainants further assume to stand as the sole guardians of the former decree of this Court which they allege the defendant is now endeavoring to evade.

These several propositions may now be considered and refuted.

First.

The proposed ratable distribution is not an attempt to evade the decree of this court, which however would be nullified in principle were the complainants to consummate their unlawful purpose.

FIRST. *As to the ratable distribution proposed by defendants.*

In Article IV. of the petition for *certiorari* (p. 43) the complainants charge that "the probable effect" (of the plan proposed by defendant) "will be to "circumvent and defeat the intent and spirit of the "decree of this court in the Government suit." This charge means of course that the effect of the proposed ratable distribution would be to perpetuate the control of the two Northern railways in the hands of those who organized the combination condemned in the government suit.

To this charge there are several sufficient answers:

(1) The charge is not sustained, but is absolutely refuted, by the facts. These are fully shown by Mr. Nichols in his third affidavit (R. p. 264). To this affidavit the complainants make one and only one reply, viz., that Mr. Nichols testifies only as to what is shown by the transfer books, while it is common experience that the names of the true owners of stock do not always appear on the transfer books. But the complainants, who have freely examined the transfer books R. p. 182), do not deny that they sustain Mr. Nichols' affidavit, nor do they in one single instance venture to swear, even upon information and belief that any one or more of the alleged conspirators own one share in excess of the amounts stated on the transfer books. These entries, together with Mr. Nichols' affidavit, are not to be overthrown by mere suspicion and innuendo. This charge of the complainants is not founded on fact.

(2) But even though it be "probable" as matter of inference that ratable distribution would reinvest the alleged original conspirators with the control of the two Northern railways, it is inevitable as matter of experience, and not merely of inference, that to return the shares to the original depositors would certainly reinvest such control in those conspirators. If originally, without the aid of the complainants, the Hill-Morgan party were able to bring into the Northern Securities Company the controlling shares of each of the two Northern railways, it would seem to follow that their ability to control the two properties would be restored if all of such shares were to be returned to those who originally deposited them. Their capacity of control would be lessened only in part though in some instances the returns were not to original depositors, but to the transferees of original depositors in case of transfers.

Possibly the express permission to make such return may have been inserted in the Circuit Court decree, in order to relieve the individual defendants from the charge of contempt should they thus reinvest the original conspirators with their original control. It is true that such return would have been to each conspirator of his own stock in his own separate railway instead of an aliquot part in the shares of each of the two railways. But, no one pretends that any one or any two or all twelve of the original conspirators (R. p. 264) singly or together have ever owned a controlling interest in both railways or in either railway. This being so, it is a matter of indifference whether the return of all the shares in the two railways be made to the respective depositors, severally to each the particular stock deposited by him, or ratably to each both stocks according tohis present interests. Nothing in evasion of the decree could be done except by a new and unlawful conspiracy to control the railways. Such a conspiracy could be consummated by six Northern Pacific stockholders combining with six Great Northern stockholders, as readily as by twelve persons, each holding severally in each of those companies an amount of

stock equal in the aggregate to the separate holdings originally combined.

The absolute ineffectiveness of a ratable distribution in and of itself, as compared with a return to the original conspirators, as a means of perpetuating their control is so obvious, that there is no point to complainants' suggestion that there may be a present stock ownership different from that shown by the transfer books.

On the contrary the exhibition upon these books of 2,531 separate shareholders (R. p. 269, 364), of 16,000 transfers, and of 86,945 certificates (R. p. 266), attests the regularity of the books, the steady dispersion of the stock of the Securities Company, and the reasonable probability that a ratable distribution according to such widely extended interests would accord most nearly with the purposes of the Government which is the administrator of the anti-trust law and of the Courts that granted the decree in the Government suit. This condition was readily comprehended by the Government, and by the Attorney General, who, from the first fully advised of the present plan of ratable distribution, expressed himself satisfied. Nevertheless the brief of the complainants filed in support of their petition for *certiorari* suggests (p. 8) that he should not have been satisfied. "*The Attorney General, however, it is humbly conceived, may have been in error.*" But, the judgment of the Attorney General is that which must determine what is for the public interest and upon him the anti-trust act must rest for prosecutions for its enforcement (*Minnesota v. Northern Securities Co.*, 194 U. S., 48).

(3) Finally, it may be observed that under the decisions of this Court, and as matter of law, there is no valid objection to any transfer of the railway shares in any proportions to any person or persons as individuals not bound together by any agreement or conspiracy in restraint of trade. The opinions of this Court do not question, but on the contrary they affirm, the right of

any individual or individuals freely to acquire and to transfer property in absence of conspiracy or monopoly. Manifestly the dispersion of the railway shares among 2531 persons (R. p. 269, 364) would not aid in the creation of a monopoly or of an unlawful combination.

SECOND. *The disposition of the Northern Securities property preferred by complainants, being a delivery to themselves of 781,080 shares, an absolute majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other stockholders, is one which would directly and effectively contravene the object of the Sherman Anti-trust Law, and the purpose of the Government suit.*

Having in mind the extraordinary efforts and achievements of the Union Pacific party in the spring of 1901, in acquiring Northern Pacific shares of both classes in an aggregate amount exceeding $78,000,000 (and also exceeding one-half of the total Northern Pacific capital stock as then issued), and that the expenditure, for such a purpose unparalleled in the history of railroads, was made not out of surplus but out of moneys borrowed for the extraordinary purpose (R. p. 195),—certainly it cannot require either argument or the evidence in the record (p. 3 *infra*) to induce belief that in fact as well as in appearance the Northern Pacific System is competitive with the Union Pacific System, and, despite present professions, that it was so regarded by the Union Pacific managers (R. pp. 171, 207, 217). Neither can it require argument to satisfy the Court that these mighty and strenuous efforts of the Union Pacific party have been and are being put forth in the hope of being able to prevent or to smother the competition on the part of the Northern Pacific system and its connected Burlington system.

In effect it is conceded by the complainants that the Union Pacific System is competitive with the Burlington System (R. pp. 151, 207)—a fact of legal importance in view of the Nebraska laws concerning the restriction of

competition between parallel railways. The difficulties resulting from this condition complainants have sought to dissipate by suggesting that the Northern Pacific Company does not control, but has only an equal interest with the Great Northern Company in controlling, the Burlington System (R. p. 151). However, for the purpose of preventing or of smothering the Burlington competition, the Union Pacific Company, if substantially in control of the Northern Pacific Company, by exercising its veto power over its co-owner, the Great Northern Company, would be able to effect its unlawful purpose as to the Burlington almost as well as though it were the paramount owner of Burlington stock.

To acquire and to maintain control of the Northern Pacific System, therefore, is the essential, underlying and sleepless purpose of the Union Pacific party. Such control it now seeks by demanding a majority of the present outstanding Northern Pacific stock, though when entering the Securities Company, in November, 1901, the Union Pacific party had no such control. In other words, the Union Pacific party is endeavoring, by means of a decree of this Court, to improve, to strengthen and to extend its influence over the Northern Pacific system.

Even though the Union Pacific party's claim be regarded as though limited to the 717,320 shares of Northern Pacific stock tied up by the injunction (R. p. 350), a little less than a majority of the stock, such minority interest would be effectual for control if the remainder of such stock is dispersed among Northern Securities stockholders according to present interests instead of being accumulated by return to the original depositors. Accordingly and naturally it will be found that from the beginning of this litigation the continually recurring suggestion of the complainants has been and is that the Securities Company forthwith should proceed to make present ratable distribution of all of the Great Northern stock and of all of the Northern Pacific stock except the portion retained for the possible benefit of the complainants, who, in case of a

final decree in their favor, would then be in clear and indisputable control of the long-coveted competing Northern Pacific System and would be invested with a veto power upon the operation of the concededly closely parallel and interlacing lines of the competing Burlington System.

The parallelism and competitive situation of these great railroads is established by this record *(infra*, p. 3), and furthermore is an important, permanent and obvious physical fact of which the Courts will take judicial notice *(Gulf, &c. R. R. vs. State*, 72 Tex., 404, 10 S. W., 81; *Miller vs. Texas, &c. R. R.*, 83 Tex., 518, 18 S. W., 954).

In fine, if, as contended by the complainants, considerations of public policy are to enter into the determination of the present appeal, it would be impossible to devise a scheme more ingenious than that insidiously suggested by the complainants, to defeat and to evade the Circuit Court decree defining and declaring the public policy which should regulate this entire railway situation.

THIRD. The question whether the proposed ratable distribution would be in violation of public policy, or would in any way promote the illegal purpose which it was the design of the Government suit to frustrate, has been decided by the Circuit Court in Minnesota which rendered the original decree in the Government suit, and has been settled, so far as it can be settled, by the executive department of the Government charged with the enforcement of the statute. In the intervention proceeding the Department of Justice has declared in substance that the proposed distribution would have no such effect, and the Circuit Court decided that it would have no such effect. Little weight should be given to the contrary assertion of the complainants here, who were parties to the original illegal purpose, who certainly are not charged with the protection of public policy in this regard, whose motive in making the assertion is to secure a personal advantage, and who sustain their assertion only by suspicion.

FOURTH. The injunction which prevents the distribution of the 710,000 Northern Pacific shares claimed by complainants also prevents *any* distribution of the Northern Securities assets.

The distribution authorized by the Board of Directors and the stockholders, at their meetings in March and April, 1904, was based upon the application of that principle to all the shareholders of the company. The complainants now say, "Exempt us from the application of that principle, take out from the assets of the corporation and give to us what we claim thus giving us the practical control of the Northern Pacific Railway, and then proceed and apply the principle of equal ratable distribution to the other shareholders!"

The other shareholders cannot be expected to assent to any such proposition; they cannot reasonably be required to assent to it. The principle of ratable distribution must apply to all or to none. If Harriman and Pierce are to be exempted from the application of that principle, other shareholders must be at liberty to demand a similar exemption. Until the right of anyone to be exempted from the application of the principle has been determined, the principle cannot be applied at all and no distribution whatever can be made.

Second.

The Securities Company became the owner of the railway shares, and does not hold them as a trustee or as a bailee for the complainants.

FIRST. THE FACTS as to the character of the transfer appear fully in the record, and are beyond possibility of dispute.

The facts have been referred to in our preliminary statement, and are collated in the brief filed by Mr. Johnson and Governor Griggs (see pp). For present purposes it is sufficient to quote from the opinion of the Circuit Court of Appeals (R. pp. 391-392) Judge DALLAS' summary and absolutely accurate recapitulation as follows:

"The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital

stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000 was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company": and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required,

whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company" not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securties Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale."

This summary statement of the learned judge is not disputed by the complainants, who say (Petition, p. 35) that

"The transaction in November, 1901, was undoubt-
"edly put in the *form* of a contract of purchase and
"sale. The facts and surrounding circumstances,
"however, fixed the legal nature and effect of what
"the parties did, and not the particular form they
"adopted, or the words they selected as expressing
"their view or opinion * * * * * * * *
"*Evidently, Mr. Harriman at the time believed as a*
"*matter of law that the transaction constituted a sale,*
"*and so testified.*"

Thus it is conceded even now by the complainants—all of whom, including Mr. Harriman, signed the Petition—that in form and purpose the transaction was a sale and nothing else. But, unwilling that the courts shall be "blinded by mere

"forms or names, and thus prevented from dealing "with the substance and reality of things" and desirous that the Court shall look "through the form and "phrasing of the parties, and deal with the substance "and reality, in seeking to determine the *truth*" (Petition, p. 36), the complainants insist that the truth is not to be found in what the parties did, and intended to do, and that the reality of this particular transaction, is to be sought, for under the strange mask in which complainants counsel seeks to exhibit it. But whatever legal consequences may be imputed to the transaction, in truth and reality, and also in fact and intent, it was a sale *in presenti*.

SECOND. THE LAW does not authorize or require the transfer of the railway shares to be considered anything other than the sale which in fact and intention it was.

We are not now considering questions which we shall hereinafter discuss—whether the sale was upon a condition subsequent, or whether the sale was illegal. What we are now insisting upon is only that IN LAW, as well as in fact, the transaction was not the creation of a bailment or of a trust for the complainants.

What, then, are the grounds upon which—to the contrary of our contention—complainants assert that despite both its form and intent, the transaction was a bailment or a trust for the complainants.

The fundamental ground must be that the transfer was for an illegal purpose. But, as we have already suggested, this would operate merely to invalidate the transfer, and not to change its character. An attempted sale may be a nullity, by reason of illegality; but it does not thereby become a bailment or a trust.

In such case any obligation of the possessor to return property, re ts upon him not because he has become a bailee or a trustee; but as hereafter considered, only in particular cases, because of some necessity of doing justice to a wronged party or when compelled by considerations of public policy, neither of which elements is now present.

THIRD. The ground upon which the complainants most insistently base their claim is the pretense that THE DECREE in the statutory proceeding wherein the Government was petitioner, and the Securities Company, its organizers, and the two railway companies were respondents, adjudicated that the Securities Company was a bailee or a trustee for the complainants in the present suit.

But in that statutory proceeding the complainants were not parties upon the record, nor yet by representation. Upon their theory, at all times as well as now, the particular rights and claims now asserted by them conflicted and could not harmonize with those of any defendant in the Government proceeding, and therefore they could not have been represented by any such defendant.

The rule applicable in such case was accurately stated by Judge HOOK in *Weidenfeld v. Northern Pacific Ry. Co.* (129 Fed. Rep., 305–311) as follows:

"It is true that, generally speaking, a corporation is the proper representative of all its stockholders in a suit in which the relief sought will affect each and all of them in the same way and to the same degree. In one sense all the stockholders are the corporation, and the corporate body, as a legal entity, may be intrusted with the defense of those rights which are common to all. Obviously, the very foundation of this rule is a community of interest, with respect of the object of the suit, between the corporation and all of its stockholders. But, where the gravamen of the complaint consists of a vital conflict of interest between the corporation and one or more of its stockholders, or between different stockholders or classes of stockholders, the reason for the rule concerning the representative character of the corporation ceases."

Neither was the purpose of the Government proceeding to determine the character or the quality of the transfer as between the defendants themselves. As elsewhere we observe, the Circuit Court did not determine any such question. The purpose and the effect of the Government proceeding was limited to

the assertion and enforcement of its constitutional authority to regulate interstate commerce, and of its lawful authority to prevent restraint of such commerce. As afterwards pointed out by Judge THAYER for the Circuit Court in the District of Minnesota (R., p. 367) this assertion and enforcement of the governmental authority was effected by prohibiting certain use of the property and by denying to the Securities Company any benefit from its possession. The decree did not hold directly that the railway stock was unlawfully acquired, but that it was acquired and was held by the Northern Securities Company *in virtue of* an illegal conspiracy. Consequently any acquisition and holding *in virtue of* such conspiracy, were illegal and should be enjoined. Beyond that nothing relevant to any present issue was decreed.

With the transfer of property interests and the effect of such transfers upon the rights of parties, this Court expressly disclaimed any intention to interfere. It conceded the absolute right of individuals to buy and sell what and as they pleased.

The insufficiency of the decree for the purposes of his case was recognized by the skillful draughtsman of the bill of complaint. Accordingly he undertook to stretch the decree, by inserting (p. 9) Article XIII. which alleges *arguendo* that the complainants "are advised by "counsel and *therefore* aver that *the effect* of said de- "cree of April 9, 1903, as affirmed by the Supreme "Court of the United States was to adjudge that the "Northern Securities Company was not a purchaser "or owner, but simply a custodian, of the shares of "stock of said railway companies acquired and held by "it as aforesaid, etc. etc."

Of course the decree of the Circuit Court as affirmed "is conclusive upon any matter directly in "question before it, even when coming incidentally in "question in another court for a different purpose "*between the same parties.*" But to this commanding "rule formulated by him in the *Duchess of Kingston's Case* (20 How. St. Tr. 538, 2 Sm. Ldg. Cases [8th Ed.]

784) Lord Chief Justice DE GREY attached the following exception, now directly in point: "But neither the "judgment of a concurrent or exclusive jurisdiction is "evidence of any matter which came collaterally in "question, though within their jurisdiction, nor of any "matter incidentally cognizable, *nor of any matter to "be inferred by argument from the judgment.*" (See *Hopkins v. Lee*, 6 Wheat. 108.)

"It is a very familiar principle that a judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. (Cow. and Hill's Notes, vol. 3, p. 826.) And, although a decree in express terms professes to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact. *Coit v. Tracy*, 8 Conn., 268; *Manny v. Harris*, 2 Johns. 224.) The mere fact of the alleged tenancy is undoubtedly found by the judge on the trial in the Superior Court, but the fact was immaterial, and the judgment did not in any respect rest upon that finding, as is most obvious from an inspection of the pleadings, the findings of the court, and the final judgment rendered thereon." *People v. Johnson*, 38 N. Y., 63, 65-66. See also *Stokes v. Foote*, 172 N. Y., 327, 341-342.)

FOURTH. Certain expressions used by Mr. Justice HARLAN, descriptive of the method adopted in carrying out the combination that has been adjudged to be illegal, have been urged as conclusive in favor of complainants upon the question of title. But as already observed the critical question in the Government proceeding concerned not title but combination.

To the established fact of illegal combination, complete title would have contributed no less efficiently than mere custodianship. If, as contended by complainants, a mere custodian of the railway shares possessed the power to restrain commerce, it is clear that the owner of such shares would have had no less power.

The complainants are not suing upon an opinion of the Supreme Court. Nor, strictly speaking, are they suing upon a decree of the Supreme Court. Their suit is based upon the *Circuit Court's* "decree of April "9, 1903, as affirmed by the Supreme Court of the "United States." *(Second Amended Bill of Complaint, Article XIII.*, page 9.)

Upon this particular point, then, the questions are as to the effect of: *(1)* The Circuit Court's Decree of April 9, 1903; *(2)* The Circuit Court's Opinions; *(3)* The Supreme Court's Judgment; and *(4)* The Opinions in the Supreme Court.

1. *The Circuit Court's Decree of April 9, 1903.*

The decree consists of three articles.

The *first article* (described by Judge THAYER as wholly prohibitive) adjudges that the defendants, being the Securities Company, the two Railway Companies and the two groups of stockholders, had theretofore entered into a combination or conspiracy in restraint of trade and commerce, and that all stock of either of the Railway Companies then claimed to be held and owned by the Securities Company was acquired and was then held by it in virtue of such combination or conspiracy in restraint of trade; and it restrains and enjoins the Securities Company and the two Railway Companies from exercising, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company. This first article also expressly forbids the Securities Company from acquiring, or attempting to acquire, further stock of either of the Railway Companies.

The *second article*, being the so-called *permissive* article, provides that nothing shall be construed as prohibiting the Securities Company from returning and transferring the railway shares either *(1)* to

the original railway shareholders who had delivered their shares to the Securities Company in exchange for its stock, or *(2)* to such person or persons as may now be the holders and owners of *its own stock* originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

The *third article* awards costs.

The effect of the *substantive provisions* of the first article of the decree undoubtedly was to denounce as illegal the combination resulting in and constituted by the Northern Securities Company, and to determine that all of the railway shares in possession of the Securities Company were acquired and are now held in virtue of an illegal combination.

Whether or not the very act of transfer of these shares in virtue of such combination was or was not illegal, was not expressly adjudicated. Even if the necessary effect of the decree was to adjudge the illegality of the transfers, the decree failed either expressly or by implication to pass upon or to determine the rights of the several parties in respect of the shares so transferred. As has since appeared, the absence of any adjudication upon this point was intentional.

The essential provisions of the first article of the decree are the *prohibitive provisions*. As was observed by Judge THAYER in the opinion of April 19, 1904:

"The decree was wholly prohibitory. It enjoined "the doing of certain threatened acts, and so long as "these acts are not done it enforces itself, and no "further action looking to its enforcement is deemed "essential. In its bill of complaint the United States "prayed, among other things, for a mandatory injunc- "tion against the Securities Company requiring it to "recall and cancel the certificates of stock which it "had issued and to surrender the stock of the two "Railway Companies in exchange for which its stock "had been issued. This prayer for relief was denied. "The Court doubted its power to command stock- "holders of the Securities Company, who had not been

" served with process and were not before the Court
" otherwise than by representation (if indeed they were
" present by representation), to surrender stock which
" was in their possession and to take other stock in
" lieu thereof. It accordingly contented itself with an
" order which rendered the stock of the two Railway
" Companies, so long as it was in the hands of the Se-
" curities Company, valueless for the purpose of carry-
" ing out the objects of the unlawful combination in
" restraint of interstate trade. The Government was
" satisfied with the relief which it obtained and ex-
" presses itself as fully satisfied therewith at the
" present time."

The *second* or so-called *permissive* article of the decree also has been fully construed by Judge THAYER in his opinion of April 19, 1904, as follows:

" It is true that the decree contained a provision in
" substance that nothing therein contained should be
" construed as prohibiting the Securities Company
" from returning to the stockholders of the Northern
" Pacific Railway Company and the Great Northern
" Railway Company any and all shares of stock
" in either of said Railway Companies which the
" Northern Securities Company had acquired in ex-
" change for its own stock, and that nothing therein
" contained should be construed as prohibiting the
" Securities Company from making such transfer of
" the stock aforesaid to such person or persons as had
" become the owners of its own stock originally
" issued in exchange for stock in the two Railway
" Companies. But this provision was merely per-
" missive. It did not command that the stock should
" be returned or exclude other methods of disposing
" of it that in view of all the circumstances might
" appear to be more equitable. The fact that the
" directors of the Securities Company have proposed
" to its stockholders a plan of distributing the stock
" of the two Railway Companies in a manner some-
" what different from that which was tentatively sug-
" gested by the decree but not commanded, cannot be
" regarded as a failure to obey the decree. It was
" said in argument that one purpose of the inter-
" vention is to have that clause of the decree which is
" now merely permissive, made mandatory. But this
" would be to modify the provisions of a decree which

" has now become final by affirmance, and make an
" order which we expressly and on full consideration
" declined to make when the decree was entered. This
" we must decline to do."

In this Government proceeding upon a criminal statute, the Circuit Court properly doubted its power to determine or to affect the rights of the stockholders of the Securities Company in the property held by that company. When, at St. Paul, in the Government suit the Circuit Court was asked to make mandatory these permissive clauses, the Court expressly declined so to do, because

" this would be to modify the provisions of the decree
" which has now been made final by affirmance, and
" make an order which we expressly and on full con-
" sideration declined to make when the decree was en-
" tered."

As already observed, Judge THAYER has held that the provision was merely permissive, and that it did not

" command that the stock should be returned, or ex-
" clude other methods of disposing of it that in view
" of all the circumstances might appear to be more
" equitable."

That the *decree* of the Circuit Court was not intended to define the character of the Securities Company's possession, is indicated further by the two *opinions* of the Circuit Court of April 9, 1903, and April 19, 1904.

2. *The Circuit Court's Opinions.*

(a) Judge THAYER's opinion of April 9, 1903, repeatedly recognizes the Securities Company's ownership of the railway stocks, and so states the essential question at issue as to exclude the complainant's present contention that the decree denied the title of the Securities Company.

Upon this point the following statements seem to be conclusive:

"Very shortly after its organization the Securities "Company *acquired* a large majority of all the stock "of the Northern Pacific Company at the rate of $115 "per share, *paying* therefor in its own stock at par. "At the same time it *acquired* about 300,000 shares of "the stock of the Great Northern Company from those "stockholders of that company who had been instru- "mental in organizing the Securities Company, *paying* "therefor at the rate of $180 per share, and using its "own stock at par *to make the purchase.* The Securi- "ties Company subsequently *made further purchases* "of the Great Northern stock at the same rate."

References to the transaction as a purchase are too many to justify repetition. Four particular paragraphs will be sufficient to show that they were not unintentional:

"At the present time" (April, 1903) "the Securities "Company is *the owner* of about ninety-six per cent. of "all the stock of the Northern Pacific Company and "*the owner* of about seventy-six per cent. of all the "stock of the Great Northern Railway Company."

"First, it (the scheme) placed the control of the "two roads in the hands of a single person, to wit, the "Securities Company, *by virtue of its ownership of a* "*large majority of the stock of both companies.*"

(The foregoing holding *in totidem verbis* was adopted by Mr. Justice HARLAN.)

"The fact that *the ownership* of a majority of the "capital stock of a corporation gives one the mastery "and control of the corporation was distinctly recog- "nized and declared in *Pearsall v. Great Northern* "*Railway Company.*"

"In opposition to this view, counsel cite *Pullman* "*Car Co. v. Missouri Pacific Co.;* but in that case the "meaning of the word 'controlled,' as used in a pri- "vate contract, was the point under consideration, "and what was said on the subject cannot be held "applicable to cases arising under the anti-trust act, "when THE POINT INVOLVED IS WHETHER THE OWNERSHIP

" OF ALL THE STOCK *of two competing and parallel roads*
" *vests* THE OWNER THEREOF *with the power to suppress*
" *competition between such roads. We entertain no doubt*
" *that it does. Indeed we regard the suppression of com-*
" *petition, and to that extent a restraint of commerce, as*
" *the natural and inevitable result of* SUCH OWNERSHIP."

This statement that the point involved depended upon the Securities Company's *ownership* of the railway stocks, would seem conclusive that the Circuit Court did not deem it to be essential to deny that such ownership existed.

(b) Judge THAYER's opinion of April 19, 1904, already quoted at length, reinforces our construction of his first opinion.

In the proceeding in which was rendered the later decision of Judge THAYER, the claim of the complainants, seeking to intervene in the Government suit for the purpose of making therein their present contention, was not that of a stockholder within the Securities Company, but was from the outside against that Company, and was in hostility to all claims of its stockholders. As against such an outside claim, any plea of alleged equities of stockholders *inter sese*, was impertinent. But, Judge THAYER recognized the right of the Securities Company to do equity, and to that end to dispose of the railway shares—a right necessarily exclusive of the complainants' claim of their continuing ownership of those shares. He declared that the original decree did not exclude any method of disposing of the stock that in view of all the circumstances might appear to be more equitable, and that a proposition to distribute the railway shares "in a manner somewhat different from " that which was tentatively suggested by the decree, " but not commanded, cannot be regarded as a failure " to obey the decree."

Such language is absolutely inconsistent with the idea that the author of the decree intended to deny the power of the Securities Company to make disposition

of the railway shares among the stockholders of the Securities Company upon the basis of their relative rights as stockholders of that Company.

In our view, therefore, the decree of April 9, 1903, in its own terms, and as construed by the two opinions of Judge THAYER, involves no decision that any original vendor of railway shares was *entitled* to a judicial restitution thereof.

3. *The Supreme Court's judgment.*

" *The judgment of the Court is that the decree below* " *be, and hereby is, affirmed, with liberty to the Circuit* " *Court to proceed in the execution of its decree as the* " *circumstances may require.*"

From this judgment four justices dissented. Therefore, unless the other five justices concurred in reasons different from those stated by the Circuit Court, the decree of the Circuit Court would stand affirmed upon the grounds assigned below. The reasons for affirmance, stated in the opinion of Mr. Justice HARLAN, received the concurrence of three other justices.

In the judgment of affirmance Mr. Justice BREWER concurred, but he stated his own views for himself.

" I cannot assent to all that is said in the opinion " just announced, and believe that the importance of " the case, and the questions involved, justify a brief " statement of *my* views."

4. *The Opinions in the Supreme Court.*

This honorable Court alone can declare, and it needs no advice to enable it to declare, what was the opinion of the Court. It would seem that it has not yet so declared (see remarks of Mr. Justice PECKHAM, *Dorr vs. U. S.*, 195 U. S. 138–154).

It is sufficient now to observe that incidental and illustrative expressions do not partake of the charac-

ter of a judgment. Upon this point, the law was stated, with his accustomed felicity, by Mr. Justice CURTIS in *Carroll vs. Lessee of Carroll* (16 How. 275, 287), as follows:

"This court, and other courts, organized under the "common law, has never held itself down by any part "of an opinion in any case which was not needful to "the ascertainment of the right or title in question "between the parties."

Inasmuch as the Circuit Court made no deliverance as to title or custody either in its opinion or in its decree based thereon and affirmed in this Court, how can it be that the parts of Mr. Justice HARLAN'S opinion cited by complainants, even in the sense attributed by them, were "*needful* to the ascertainment of any right or title in question" between the respective defendants to the Government proceeding?

The true rule is that which in the case of *U. P. Ry.* v. *Mason City &c. R. R.* (128 Fed. Rep. 230, 235-236) was recognized by Judge SANBORN (p. 234) being Chief Justice MARSHALL'S ruling in *Cohens v. Virginia* (6 Wheat. 234, 399), that "It is a maxim not to be dis-"regarded that general expressions in every opinion "are to be taken in connection with the case in which "those expressions are used. If they go beyond the "case they may be respected, but they ought not to "control the judgment in a subsequent suit when the "very point is presented for decision," etc., etc.

We may briefly consider the *particular expressions of Mr. Justice* HARLAN, upon which the complainant have chosen to hang their case.

The first of these expressions is that:

"There was no actual investment, in any substantial "sense, by the Northern Securities Company in the "stock of the two constituent companies. If it was, in "form, such a transaction, it was not, in fact, one of "that kind."

Later Mr. Justice HARLAN observed that the actual nature of the transaction "was only to organize the "Northern Securities Company as a holding company, "in whose hands, not as a *real purchaser* or *absolute* "*owner*, but *simply as a custodian*, were to be placed "the stocks of the constituent companies."

It has been observed that in the Circuit Court the learned Judges did not so much as suggest any such ground either in their opinion or in their decree to which consequently it could not have been deemed essential by them. Nor as we have indicated, were such grounds inherently essential to any judgment rendered by the Circuit Court or by the Supreme Court; for the power of an illegal combination as owner, could not have been less than its power as a mere custodian, of the railway shares.

If, as argued by complainants, mere custodianship by the Securities Company was sufficient to support the judgment of the Court denouncing the combination, then the judgment in the suit of the Government, directed expressly against the power of the combination, did not involve, or depend upon, a determination that the Securities Company was not something more than a custodian of the railway stocks. For the purposes of that suit, it was enough that in any capacity the Securities Company had the power to vote the railway stocks, and to receive the dividends thereon. The real object and effect of the decree was to destroy that power, and was not to define the tenure out of which the power issued.

But Mr. Justice HARLAN'S opinion as to the character in which the Securities Company held the railway shares, is to be ascertained not from this incidental expression—but from his very significant declaration as follows:

"The Circuit Court was undoubtedly right when it "said—all the judges of that court concurring—that "the combination referred to 'led inevitably to the "following results: First, it placed the control of the "two roads in the hands of a single person, to wit, the "Securities Company, by virtue of its *ownership* of a

" large majority of the stock of both companies; sec-
" ond, it destroyed every motive for competition be-
" tween two roads engaged in interstate traffic, which
" were natural competitors for business, by pooling the
" earnings of the two roads for the common benefit of
" the stockholders of both companies.' "

This adoption and affirmance of the holding of the Circuit Court upon the precise point, excludes the idea that in referring to the Securities Company as custodian Mr. Justice HARLAN intended to decide that it was not owner of the railway shares.

The term "*holding corporation*" means merely a *stockholding* corporation, and does not indicate that the corporation does not own the stock which it holds. A stockholder ordinarily is a stock owner.

The term "custodian" even though representative of a combination formed by the shareholders of the constituent companies, *does not necessarily imply a custody of the several shares, for the respective vendors thereof. Naturally it would signify a custody for the whole body of stockholders of the Securities Company* in the usual way in which all corporations hold all their assets in custody for the benefit of all their stockholders, without distinction as to persons or property. All corporations are essentially combinations of stockholders, who alone have any beneficial ownership of the corporate property, as they alone have any capacity to enjoy. In this sense, every corporation is custodian for its stockholders—a sort of pool from which they draw in common. Nowhere in bill, proof, opinion or decree was the acquisition of the Northern Securities Company sought to be distinguished from a stock acquisition by any other corporation in exchange for its stock.

Unless this had been so the Government's bill must have failed. That bill and the decree were based upon the idea that the two separate groups of vendors of railway stock had merged their separate interests in a common interest, so that all motive for competi-

tion was lost. If, notwithstanding the transfers, the original interests continued unaffected, then each group of original vendors must have had a continuing interest in the upbuilding of its own railway as against the other railway, and so the motive for competition would have continued.

The complainants have declared that this point in the opinion of Mr. Justice HARLAN is

" of all points the controlling and decisive consider-
" ation, namely, that the Securities Company was not
" entitled to exercise the rights of ownership because
" it was not in fact an owner but a mere custodian,
" depository or trustee."

Clearly this is erroneous. The Securities Company was forbidden to exercise the ordinary rights of ownership, *not* " because it was *not*, in fact, an owner, but a mere custodian, depository or trustee," but expressly upon the ground that the exercise of its rights, whatever they were, whether those of owner, custodian, depository or trustee, *would tend to prevent competition and thus to restrain commerce.*

It is necessary to consider the whole of Mr. Justice HARLAN'S opinion and not merely one portion of it. Other portions clearly are inconsistent with the idea that Mr. Justice HARLAN intended that in every sense the Securities Company was custodian or trustee of the railway shares for original vendors who retained full rights of property therein. He says :

" In further pusuance of the combination, the Se-
" curities Company acquired additional stock of the
" defendant railway companies, issuing in lieu thereof
" its own stock upon the above basis, and at the time
" of the bringing of this suit *held as owner and propri-*
" *etor substantially all the copital stock* of the Northern
" Pacific Railway Company, and, it is alleged, a con-
" trolling interest in the stock of the Great Northern
" Railway Company, ' and is voting the same and col-
" ' collecting the dividends thereon, and in all respects
" ' is acting as the owner thereof, in the organization,
" ' management and operation of said railway, compa-
" ' nies, and in receipt and control of their earnings.' "
(P. 319).

" In this manner, the interests of individual stock-
" holders in the property and franchises of the two
" independent and competing railway companies were
" to be *converted into an interest in the propety and*
" *franchises* of the holding corporation." (P. 319.)

" The stockholders of these two competing com-
" panies *disappeared*, as such, for the moment, but
" immediately *reappeared as stockholders of the hold-*
" *ing company*, which was thereafter to guard the in-
" terests of both sets of stockholders *as a unit*, and to
" manage, or cause to be managed, both lines of rail-
" road as if held *in one ownership*. Necessarily by
" this combination or arrangement the holding com-
" pany in the fullest sense dominates the situation in
" the interest *of those who were stockholders of the con-*
" *stituent companies; as much so for every practical*
" *purpose, as if it had been itself a railroad corporation*
" *which had built, owned and operated both lines for the*
" *exclusive benefit of its stockholders.*" (P. 323.)

" The result of the combination is that all the earn-
" ings of the constituent companies make *a common*
" *fund* in the hands of the Northern Securities Com-
" pany to be distributed, not upon the basis of the
" earnings of the respective constituent companies,
" each acting exclusively in its own interests, but *upon*
" *the basis of the certificates of stock issued by the hold-*
" *ing company.*" (P. 324.)

" The Circuit Court was undoubtedly right when it
" said—all the Judges of that Court concurring—that
" the combination referred to 'led inevitably to the
" following results: First, it placed the control of the
" two roads in the hands of a single person, to wit,
" the Securities Company, by *virtue of its ownership*
" *of a large majority of the stock* of both companies."
(P. 325).

" It (the Government) does not contend that Congress
" may control the mere acquisition or the mere own-
" ership of stock. * * * But it does contend that
" Congress may protect the freedom of interstate com-
" merce by any means that are appropriate," &c. (P.
331).

" *However that company may have acquired* for itself
" any stock in the Great Northern and Northern Pa-
" cific Railway Companies, no matter how it obtained

" the means to do so, *all the stock it held or acquired* " in the constituent companies *was acquired and held* " to be used in suppressing competition between those " companies." (P. 350).

" By the decree in the Circuit Court it was found " and adjudged * * * that all of the stocks of the " Northern Pacific Railway Company and all the stock " of the Great Northern Railway Company, *claimed to* " *be owned* and held by the Northern Securities Com- " pany, *was acquired*, and *is by it held*, in virtue of " such combination or conspiracy, in restraint of trade " and commerce among the several States." (P. 351).

At page 353 he quotes with approval the language of the Circuit Court :

" Concerning the second contention we observe that " it would be a novel, not to say absurd, interpreta- " tion of the Anti-Trust Act to hold that after an un- " lawful combination is formed and *has acquired the* " *power which it had no right to acquire*, namely to re- " strain commerce by suppressing competition * * * " it must be left in possession of the power it has ac- " quired, with full freedom to exercise it."

All of these many expressions are inconsistent with the denial of ownership by the Securities Company. Among inconsistent expressions, which is to be selected as the one defining the grounds of the judgment, that merely affirmed the decree of the Circuit Court ?

To avoid the necessity of so seeking and nicely valuing the various expressions used by a judge in his opinion, the Courts have laid down the rule already above quoted from the case of *Carroll's Lessee*, that any expression may be disregarded " which was not " needful to the ascertainment of the right or title in " question between the parties."

The complainants' contention as to the effect of the several decrees and opinions, is exhaustively considered and conclusively refuted in the opinion of Judge DALLAS (R. 393–396), and we conclude our argument on this point by a reference to his cogent reasoning.

Therefore we respectfully submit that neither in the nature of the case, nor in any decision of any court, is there anything to impress upon the complainants' transfer of the railway shares any character other than that determined by its form, and by the acts and intent of the parties, which was to effect a sale *in presenti* and was not to create a bailment or a trust for the complainants.

Third.

Complainants' sale of the railway shares was unconditional, and was fully executed upon their contemporaneous receipt of the entire consideration for which they had bargained.

FIRST. The issue on this point was sharply presented, and decisively considered, in the Circuit Court of Appeals (see Opinion, R. pp. 392-3). Judge DALLAS sums the matter up as follows:

"The only agreement upon which it [the railway stock] was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. * * * The only consideration agreed upon was payment of the price, and, admittedly, that payment was made."

SECOND. This finding clearly was justified by the evidence. In their petition for the writ of *certiorari* (p. 38), the complainants say:

"*It is true that Mr. Harriman also testified in the evidence before this Court in the Government suit that the transaction was an unconditional purchase and sale,* but this was only his opinion and understanding on a question of law and was not at all in conflict or inconsistent with his now stating the facts and letting the courts determine the legal effect. Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts?"

The testimony of Mr. Harriman thus referred to may be found in the record at pages 199, 200, 202, 205, 206, 207, 208, 209, 210, 213, 214, 215, 226, 234, 235, 237, 238 and 239. If it is to be understood that in his answers to the searching questions of the Interstate Commerce Commission and of the Attorney General of Minnesota, Mr. Harriman was stating not "the real facts," but "only his opinion and understanding on a ques-

tion of law," it would hardly seem that any useful purpose could be served by postponing decision of the question before the Court in order to elicit from Mr. Harriman additional opinions and understandings on questions of law. But the testimony of Mr. Harriman consists of concrete statements as to what was, and what was not, said and done in conference between him and J. P. Morgan & Co. These statements purely of fact are confirmed by the other evidence and documents in the case (R. p. 163–5, 168–170, 177, 242, 271). Of course, the legal effect to be attributed to such facts is a subject for judicial determination ; but, surely, no basis of determination could be more satisfactory than that afforded to the Circuit Court of Appeals by the testimony by the principal complainant given before securing professional advice as to what is necessary to constitute a statement of " real fact."

Do the complainants' counsel really contend that the testimony of Mr. Harriman—of whch the following is a fair sample—was not a statement of " real facts " ?

" MR. DAY : Did you attach to your negotiation for the sale of Northern Pacific stock any other condition than the one of the money price ?

" MR. HARRIMAN : No, sir.

" MR. DAY : No other conditions ?

" MR. HARRIMAN : No other conditions that I remember " (R. p. 208). * * *

" MR. HARRIMAN : The transaction was completed." (R. p. 210).

THIRD. As pointed out by Judge DALLAS (R. p. 391) the contract and its terms are conclusively established by the resolutions authorizing the purchases, as adopted by the board of directors of the Securities Company upon November 18, 1901, which resolutions at the succeeding meeting were approved by the vote of Harriman as a member of the board. In his affidavit embodying these resolutions (R. p. 271), Mr. Hill swears that the Securities Company made the purchase upon the terms of these resolutions, and that no other contract was made or authorized, and there is no evidence to the contrary.

FOURTH. The consideration received by the complainants consisted of money and of Northern Securities stock certificates in the common form, fully set forth in the opinion of Judge DALLAS (R. p. 388).

Every one of the certificates, of which there have been issued 86,945 (R. p. 266) declared upon its face that it was one out of the many thousands issuable for the four million shares, and informed each taker that to every taker each certificate would be a muniment of the holder's title to a proportionate interest in the corporate estate vested as a unit in the corporation, but equitably belonging to the holder of its stock (see 17 N. Y. 608). The complainants' acceptance of a consideration in this form conclusively estopped them from disputing that title and ownership had passed from them to the corporation.

The Securities Company was a corporation organized under the laws of New Jersey, with powers as broad as conceded by the liberal laws of that State.

The certificate of incorporation is set forth as Exhibit A to the bill of complaint (R. p. 15) and a statement of its objects is transcribed by Judge DALLAS (R., p. 387).

Under the provisions of the Corporation Act of New Jersey, as well as by the certificate of incorporation, the Northern Securities Company has express power not only to acquire and to hold, but at any time to sell, the shares of the capital stock of any other corporation or corporations. Under §§ 1 and 31 of that Act, it has absolute power also, in the arbitrary discretion of its directors and of the holders of two-thirds of its capital stock, at any time, upon a few weeks notice, voluntarily to dissolve and to wind up the corporation and to distribute its assets. This power might be exercised even for the very purpose of destroying a contract considered to be onerous. (*Windmuller v. Standard Distilling Co.*, 114 Fed. Rep. 491; also 115 Fed. Rep. 749). When in exchange for their Northern Pacific stock, the complainants accepted 824,918 Northern Securities

shares out of a total of 4,000,000 shares, they subjected themselves immediately to this absolute power of dissolution. Certainly the Northern Pacific stock in its treasury was subject to the claims of any creditors of the Securities Company (*Pittsburg Co. v. McMillen*, App. pp. 133-137).

The complainants' unqualified transfer of their railway stock to a company possessed of these powers, and which, immediately upon receipt of the stock, had an absolute right to sell it, either in ordinary course or in liquidation, is inconsistent with the implication of any obligation of the Securities Company to retain the railway shares for any period whatever.

In their brief of January 23, 1905, the complainants' counsel state (p. 66) that:

"The undertaking and promise of the Securities "ties Company which embodied the real purpose of "the whole transaction were to hold the shares in one "ownership for the future and thereby control the "management of the two railway companies. *This "was clearly implied although not declared from the "housetops.*

"The testimony of the promoters quoted in the pe- "tition filed herewith leaves no doubt as to this."

Reference to such testimony will show that which is shown by all the evidence, viz., *first*, that no promise of continuance or of permanent holding was exacted by, or was made to, the complainants; and *second*, that whatever may have been the expectation of any promotor or of any other person, no statement of any such expectation was ever made to the complainants or to any of them, and *third*, that there was no obligation assumed by the Northern Securities Company to the complainants or to any one in respect of its use or holdings of the Northern Pacific stock other than the obligation resulting from the issue of its stock certificates, which with all the incidents attached thereto by the laws of New Jersey constituted the sole subsisting contract, after November 19, 1901, between the Securities Company and the complainants. The con-

dition is properly stated as follows, in the opinion of Judge DALLAS (R. p. 393):

"Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But *expectation is not contract*, and therefore the frustation of this anticipation cannot be said to have occasioned a failure of consideration."

When Harriman and Pierce accepted stock of the Securities Company in part payment for the railway shares by them sold and delivered, they acquired a right to receive dividends, when and as declared, not in perpetuity, but only during the continuance of the corporation. Their right to periodical dividends of surplus earnings was not greater or different than that of one acquiring stock in any corporation.

Generally speaking, the rights by them intended to be acquired, and which actually were acquired, were the ordinary rights of the taker of stock in any business corporation of New Jersey, including the right to receive periodical dividends when and as declared, and to share in the distribution of the capital upon final dissolution—the power of the corporation finallyto dissolve itself, at any time, not being limited either by any agreement or by the inherent nature of the transaction.

FIFTH. As was accurately observed by Judge DALLAS (R. p. 392), "by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged."

This particular finding is criticised in the Petition (p. 39) as an erroneous assumption, on the ground that "obviously the Oregon Short Line Company became "the holder and owner of the certificates the same as "if they had been mere receipts, which it could

" pledge, transfer and assign without in any way affect-
" ing or changing the contract which those certificates
" or receipts might evidence ".

But, this criticism of the opinion of the Court below cannot receive acceptance, for it disregards the fact that a pledge of the stock certificates in ordinary form, being an unqualified declaration of the corporate ownership in the corporate assets, involves the pledgor's assertion to all the world that the corporation is the owner of the assets which appear to belong to it. On the other hand the pledge of a mere receipt or trust certificate would put every pledgee upon inquiry as to the conditions of the trust or deposit, and might not be inconsistent with the pledgor's denial of an absolute ownership by the corporation.

This observation applies with especial force to a transaction in which the pledge of the stock certificates was as security for negotiable bonds, which were to be and were sold, to the extent of $82,000,000, sold to the public, who necessarily must rely upon the representations expressed and implied in the instrument of pledge, and to whom that instrument assured not merely the payment of principal and interest secured by the pledge of the stock certificates, but also a participation in all dividends that should be paid upon the pledged stock. Granting, that if the complainants had had trust receipts or voting trust certificates, they might have pledged them, nevertheless it was certificates of stock that they pledged under the conditions above set forth.

Sixth. The complainants are conclusively estopped from asserting here that the contract between them and the Northern Securities Company contained any stipulation or promise as to the holding of the Northern Pacific stock by the Securities Company, or the use which that company would make of it, or that there was any agreement between them and the Northern Securities Company which went beyond the fully executed transaction appearing in the written instruments

passing between the parties. They cannot now say that there was any such further agreement without convicting themselves of being parties to an attempted fraud upon this court.

The answer of the Securities Company in the Government suit avers :

" Every share of the Great Northern Company and " the Northern Pacific Company acquired by this de- " fendant has been, and so long as it remains the " property of this defendant will continue to be, held " and owned by it in its own right, and not under any " agreement, promise or understanding on its part or " on the part of its stockholders and officers, that " the same shall be held, owned or kept by it for " any period of time whatever, or under any agreement " that in any manner restricts or controls to any ex- " tent any use of the same which might lawfully be " exercised by any other owner of said stocks. There " has been and is no agreement, promise or under- " standing between any of the holders of said stocks so " acquired by this defendant, or between any of them " and any other person or corporation, that any of said " shares should at any time be held, used or voted by " this defendant for the purpose of combining, or con- " solidating, or placing under one common management " or control, the railways of the Great Northern Com- " pany and of the Northern Pacific Company, or the " business thereof, or for the purpose of monopolizing " or restraining traffic or competition between the said " railways " (R. p. 91).

The complainant Harriman—the record owner of the Northern Pacific stock, the transfer of which is now in question—was a director of the Northern Securities Company and a member of its executive committee at the time this answer was interposed.

The complainants, in their *second amended bill of complaint* herein, aver " that they were represented in said suit by the Northern Securities Company " (R. p. 8).

In their second amended bill, in their petition for a writ of *certiorari*, and in their brief filed in this court January 23, 1905, the complainants answer the charge

of *laches* by averring that they refrained from taking any steps, or instituting any proceedings, for the protection of their rights asserted herein, to await the determination of the Government suit—that is to say, of the suit in which the contract between them and the Northern Securities Company was stated by that company in the averment above quoted (R. p. 5; Petition for *certiorari* p. 41; brief of January 23, 1905, p. 63).

In their brief, filed January 23d, they say:

"The fact that the petitioners, complainants below, "refrained from filing a bill until after affirmance of "the decree in the Government suit, does not charge "them with laches. The question of law was doubt- "ful and in litigation. They were justified in waiting "until the final adjudication. Good faith required "this. If the contract was valid and legal, which they "believed, as is conceded, they would necessarily have "to abide by the contract and permit the Securities "Company to continue to hold the Northern Pacific "stock and distribute the dividends."

The contract presented to the court as the basis for determining that question of law, was the contract described in the allegations above quoted.

Upon the trial of the Government suit, the testimony of the Complainant Harriman given by him as a witness in the suit of *Minnesota v. Northern Securities Co.* (R. p. 233) fully and at large supported under oath the averment of the answer above quoted.

Having thus sought a judgment of this court upon the legality of a contract alleged and sworn to be only what appeared in the written instruments, and being defeated, the complainants are now seeking a judgment against their associates upon the averment of a wholly different and inconsistent contract.

SEVENTH. The averment that the parties to the formation of the Northern Securities Company believed the transfers of Northern Pacific and Great Northern stock to that Company to be lawful, is wholly incon-

sistent with the statement now made by the complainants as to the terms of that contract. No one for one moment can contend that in November, 1901, there was the slightest question as to whether a contract such as now is averred by the complainants to have been made would be illegal under the Sherman anti-trust act. The agreement which now they pretend to have been made—that the Northern Securities Company was to take this stock, hold it permanently, vote it for the purpose of controlling the two railway corporations, and of collecting and distributing dividends—was precisely the kind of confederation that over and over again the courts had held to be illegal. Upon that point no lawyer and no business man of intelligence in the United States, could possibly have had a moment's doubt.

What *was* doubtful was whether there was any illegality in the unconditional transfer of stock to a corporation lawfully existing under State laws, without any contract other than the contract of incorporation—without any obligation on the part of the new holder of the stock, except the obligation that arose from the contract of incorporation. The whole scheme of the Northern Securities Company was to secure the protection that was supposed to be furnished by a simple transfer to a State corporation, without any agreement or any obligation except the obligations imposed on the corporation by the laws of the State. That was the position which all the parties to the formation of that corporation intended to maintain, and to maintain which they carefully shaped all their proceedings.

The complainants now pretend that, in carrying out this scheme, the parties intended to do the very thing the avoidance of which was a necessary element of the plan. The thing which the parties believed to be legal was the unconditional transfer of the railway shares to the Northern Securities Company, free from agreement or limitation, and that is the only thing which was done by them.

In the final analysis the transaction will be found to be as follows :

There were three separate acts :

1. A combination to restrain trade, &c., by certain means.

2. The formation of a corporation as a means to effect the illegal object.

3. A series of purchases of stock by the corporation as means to effect the illegal object.

The combination was to produce a continuous effect through the natural operation of motives of self-interest in the corporation holding the shares purchased.

But each of any number of separate acts done for the purpose of giving effect to the illegal combination may have been complete.

The corporation was completely formed.

The stock purchases were completely executed.

NINTH. It results that, if the transaction be tested by a consideration either of its inherent character, or of the actions and the intent of all the parties thereto, there is no ground whatever for the assertion that the contract of sale was conditional or that it was not fully executed. In our view this is decisive of the case. Neither is there ground for the claim that a failure to carry out the illegal purpose of the contract would entitle complainants to recover property delivered thereunder.

Even though the contract were deemed to have been executory, it would be executory solely as to its continuing purpose. As alleged, such purpose was to continue to do something now finally enjoined. In such case, the effect of the Court's decree would be to execute the contract by rendering impossible any executory results, and by concluding the term of the contract (*Jones* v. *Judd*, 4 N. Y. 411 ; *Heine* v. *Meyer*, 61 N. Y. 171 ; *Lorillard* v. *Clyde*, 142 N. Y. 456-462).

Fourth.

The Securities Company has not repudiated or abandoned any contract with the complainants.

The only pretense of such a repudiation is to be found in complainants' assertion, that the proposed reduction and disposition of capital stock by the Securities Company constitutes an abandonment of the illegal combination and holding, and of a continuing purpose for which it is alleged that the stock was transferred.

It is not denied, but, as already seen, it is expressly conceded, that the contract for the sale and delivery of the railway shares was fully executed on both sides; and that for more than two years the complainants have enjoyed and exercised the full rights of ownership of the consideration by them received upon such sale. This, as we have already shown, constituted an execution of the contract, and even an accomplishment of the alleged purpose to such an extent as to defeat the complainants now seeking to rescind. But, the assertion of an abandonment or repudiation raises the question, not of law but of fact, whether there was any contract or agreement that the Securities Company should hold these railway shares for any period whatever.

This question we have already answered at length, and have shown the incontestible fact to be that the transfer was made intentionally as an absolute and unconditional sale. Whether or not there was an unexpressed and illegal purpose of the transfer, there was, in fact, no agreement that the railway shares should continue to be held for such or for any purpose. The Securities Company did not, in fact, agree that even for a single day, it would continue to maintain its corporate existence: and no such agreement or purpose can be imputed to the Securities Company from anything inherent in the nature of the transaction. "There is no opportunity to spell out or

" imply a covenant * * * * to continue the busi-
" ness * * * * or which denied to them the right
" at their pleasure to discontinue " (*Jugla vs. Trouttet*, 120 N. Y., 21-28).

In the absence of any agreement limiting the right of the Securities Company to exercise its plenary power in its absolute discretion at any time to sell the shares, or to terminate its corporate existence, its acceptance of the railway shares was for its general corporate purposes, and they became subject to its disposition in the exercise of any of its corporate powers. To all such powers, and to their exercise, Harriman and Pierce consented when they delivered these railway shares, in consideration of the Securities' stock received and retained by them.

Harriman and Pierce accepted stock in the Securities Company—that is, the property interest of a shareholder therein. They are not being deprived of their rights as such stockholders. The legal dissolution of the corporation (or any other proceeding under the Corporation Law), is in accord with the agreement and is not a violation or a repudiation of it.

The only "abandonment" upon which could be implied a promise to return, would be a repudiation which should wholly deny to the party complaining *that which it was agreed he should receive* and which he agreed to accept.

This point is entirely independent of any question as to title, or as to the character in which the Securities Company held the railway shares. Whatever the contract; whatever the purpose of the transfer of those shares; and whatever the legal quality of that contract or that purpose, the question of abandonment or repudiation, as before observed, is a question not of law, but of fact. Here the fact is that there was no agreement and no stipulated purpose which has been either repudiated or abandoned, or which will be violated by the proposed distribution in obedience to the law.

The complainants assert that the Securities Company's proposed compliance with the law as now determined, constitutes an abandonment or repudiation and gives to the complainants a right that otherwise they would not possess. The bare assertion in itself seems to be a travesty upon justice.

"It would be absurd for the law to punish a man for "not doing, or in other words to require him to do, "that which it forbids his doing." 2 Parsons on Contracts, 674.

The expectation of the parties as to the continued profitable holding by the corporation in which they became stockholders, of the railway shares which it acquired, has been frustrated by operation of law, and even if there had been a contract that such an expectation should be fulfilled, there could have been no repudiation charged because of this enforced cessation. (See *People v. Globe Ins. Co.* 91 N. Y. 174.)

Fifth.

The contract of sale of the railway shares having been completely executed, the complainants cannot rescind, even though, as is not the fact, the purposes of the combination may not have been executed.

First. That neither party to an illegal contract, after the same has become fully executed, can recover property delivered thereunder, is a familiar rule of law, fully established, and fully recognized by the learned counsel for the complainants.

Second. That, in at least one aspect, the contract in the present case had been fully executed, is conceded by the complainants' counsel in their brief filed in this Court January 23, 1905 (p. 65), as follows:

"If the transaction between the Northern Securi-
"ties Company and its original depositors consisted
"only of the transfer and delivery of the shares as a
"mere investment under an unqualified contract of
"purchase and sale, it was complete and executed the
"moment the exchange was made, *and if that were all*
"*that either party contemplated* the contract would
"have been a valid contract and would have been fully
"executed."

The point in contest, then, rests *(1)* upon a distinction between the contract and the purposes of the contract, and *(2)* upon the allegation that the purposes of the combination were illegal and were not fully executed. This point we believe has been met and turned. We proceed now to refer to two decisions which absolutely negative the contention that if the illegal purposes of the combination have not been fully accomplished, any party may rescind and may recover his property.

The first is the *Vandalia* case (145 U. S. 393; *Appendix*, 265) hereafter considered, which concerned a lease for the considerable term of 999 years. The purpose of that contract was to convey the railroad and franchise

of the plaintiff to the defendant for all of that term Undeniably the contract " was beyond the defendant's " corporate powers, and therefore unlawful and void, " of which the plaintiff was bound to take notice."

Within seventeen years after the date of the contract, and 982 years before its purpose had been fully accomplished, the plaintiff brought suit to recover back its property because of the invalidity of its conveyance.

There, as here, it was sought to recover, under the *Thomas* case, on the ground that the contract had not been fully executed, and that it was a continuing contract capable of full execution only by observance of its covenants for the prescribed term of 999 years. In other words, the case was of the kind to which the complainants have declared the present case to be analogous. But the contention was rejected, in behalf of the Court, by Mr. Justice GRAY, in the following language :

" *The contract has been fully executed on the part of* " *the plaintiff by the actual transfer of its railroad and* " *franchise to the defendant; and the defendant has* " *held the property, and paid the stipulated considera-* " *tion from time to time, for seventeen years, and has* " *taken no steps to rescind or repudiate the contract.*

" Upon this state of facts, for the reasons above " stated, the plaintiff, considered as a party to the un- " lawful contract, has no right to invoke the assistance " of a court of equity to set it aside. And so far as " the plaintiff can be considered as representing the " stockholders, and seeking to protect their interests, " it and they were barred by laches."

In their brief of January 23, complainants seek to exempt themselves from the application of this decision upon the particular ground that there the complainant was the repudiator of the *ultra vires* contract. But, as we have already shown in this case, the complainants are, and the defendants are not, repudiators

The second case to which we have alluded as subversive of the complainants' contention as to the law, is that of *Kearley v. Thomson* (1890: L. R. 24 Q. B. D. 742).

In this ruling case Mr. Justice FRY, with the concurrence of the Lord Chief Justice COLERIDGE, and the Master of the Rolls Lord ESHER (who had decided *Herman v. Jeuchner)*, presented and disposed of the question as follows:

"Can it be contended that, if the illegal contract has "been partly carried into effect, and partly remains "unperformed, the money can still be recovered? In "my judgment, it cannot be so contended with suc- "cess. Let me put an illustration of the doctrine "contended for, which was that partial performance "did not prevent the recovery of the money. Suppose "a payment of 100 *l.* by A to B on a contract that the "latter shall murder C and D. He has murdered C, "but not D. Can the money be recovered back? In "my opinion it cannot be. I think that case illustrates "and determines the present one.

"I hold, therefore, that where there has been a par- "tial carrying into effect of an illegal purpose in a "substantial manner, it is impossible, though there "remains something not performed, that the money "paid under that illegal contract can be recovered "back."

The rule of law undoubtedly is as stated by these two controlling authorities, and unqualifiedly it negatives the complainants' contention that they are entitled to recover as if upon an unexecuted contract, notwithstanding their reception of the full consideration of the contract, and their participation in and enjoyment of its operation during a period of nearly three years.

Sixth.

The transaction in question being considered in the light of all the facts, either in connection with, or independently of the decree in the government suit, the complainants have no cause of action for the return of the Northern Pacific shares by them delivered to the Securities Company under the contract of November 18, 1901.

FIRST. The claim for rescission and return, so far as based strictly on the decree of April 9, 1903, has been already considered.

Rescission and return cannot be claimed on the ground of fraud or misrepresentation or suppression, as to the organization or powers or purposes of the Northern Securities Company, for the bill lacks the necessary parties and the necessary averments. It is not alleged that either of the defendant corporations made or authorized any representations or any action in the premises. It is not alleged that any false representation was made or that any fact was suppressed. It is not alleged that the complainants or any of them believed or relied upon, or were induced to act by, any representation of any one, whether true or false. There is here no cause of action for rescission for fraud.

Neither can a total failure of consideration be urged Even if illegal, the consideration actually received by Harriman and Pierce was and is immensely valuable.

SECOND. *The only possible ground upon which the prayer for rescission or return can rest, is the illegality of the contract or transaction of November 18, 1901.*

If that contract was legal, of course there can be no rescission.

The bill contains no direct charge of illegality, but this is so only because of complainants' natural desire to escape the dilemma in which they would be placed by a direct allegation of illegality.

The suit, then, is one for rescission and return on the ground of a decree ascertaining and determining the illegality of the transaction. But, as already observed in this case, the former judgment does not cover or embrace all of the questions properly to be considered in a suit for rescission and return. Complainants cannot, merely by indirection in alleging illegality, avoid the inquiries whether they are *in pari delicto*, and whether in equity they are entitled to relief such as they ask.

That they are *in pari delicto;* that they are subject to the rule applicable in such condition; and that in equity they are not entitled to the relief which they ask, are not merely matters for argument, but they are all susceptible of demonstration upon an examination of the facts in connection with the decree and the grounds thereof. Upon all these considerations, it is clear that any adjudication of the illegality of the Securities Company's acquisition of stock of Harriman and Pierce, does not relieve them from the application of the general rule that *in pari delicto potior est conditio possidentis* (*supra*, pp. 9–18).

We now proceed *first* to a presentation of the state of the law concerning illegal contracts and the relative rights of the parties thereto; and *then* to an exhibition of the position of the complainants with reference to such existing rule of law.

THIRD. The Federal decisions, from *Bank v. Owens* in 2nd Peters, to *Equitable v. Wetherill* (February, 1904) in 127th Federal Reporter, have declared one and the same rule, namely, that the Courts will show no favor to either one of two equally guilty parties to an illegal contract, "except to avoid injustice in cases *where injustice may be avoided without weakening the general rule.*" A further exception in protection of public policy, has no place in the present case, from which that element has been withdrawn by the action of the Government and the decisions in the Government suit.

In *Higgins v. McCrea* (116 U. S. 671), the plaintiff, a commission broker, sued for the balance of moneys paid for account of defendant upon the settlement in August, 1883, of certain contracts made in May for the future delivery of produce. The answer in effect averred that the transactions were gambling transactions; that the contracts made for defendant had been cancelled by plaintiff shortly after the making thereof, and that the settlement in August was not of defendant's transactions; and by way of counterclaim the defendant prayed to recover the moneys "paid by him to the plaintiff to promote and carry on said gambling transactions." Upon the evidence, the court found that the contracts *had* been cancelled by plaintiff almost immediately after the making thereof, and this left the defendant, upon the face of his counterclaim, in the position of having paid money to the plaintiff to be used to carry on illegal and criminal gambling transactions (but presumably not used in any such transaction), which money he sought to recover back. Upon the cause of action thus presented by the counterclaim, Mr. Justice WOODS, delivering the opinion of the Court, said: "*We do not* "*see on what ground a party, who says in his pleading* "*that the money which he seeks to recover was paid out* "*for the accomplishment of a purpose made an offence* "*by the law, and who testifies and insists to the end of* "*his suit that the contract on which he advanced his* "*money was illegal, criminal, and void, can recover it* "*back in a court whose duty it is to give effect to the law* "*which the party admits he intended to violate.*"

The general rule as stated by Mr. Justice GRAY for the Court (in *St. L. V. & T. H. R. R.* v. *T. H. & I. R. R.*, 145 U. S. 393-407; *Appendix* p. 265) is that:

"In equity as at law, '*In pari delicto potior est con-*
"*ditio defendantis*'; and therefore neither party to an
"illegal contract will be aided by the court, either to
"enforce it or to set it aside. If the contract is illegal,
"affirmative relief against it will not be granted, at
"law or in equity, unless the contract remains executory,
"or unless the parties are considered not in equal
"fault, as where the law violated is intended for the
"coercion of one party and the protection of the other
"or where there has been fraud or oppression on the
"part of the defendant. *Thomas v. Richmond*, 12
"Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S.
"49." (See *Appendix p. 256).*

" While an unlawful contract, the parties to which " are *in pari delicto*, remains executory, its invalidity " is a defense in a court of law; and a court of equity " will order its cancellation only as an equitable mode " of making that defense effectual, and when necessary " for that purpose. Adams Eq. 175. * * *

" When the parties are *in pari delicto*, and the contract has been fully executed on the part of the " plaintiff, by the conveyance of property or by the " payment of money, and has not been repudiated by " the defendant, it is now equally well settled that " neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 " Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the " compounding of a crime and the stifling of a criminal " prosecution, and therefore clearly illegal, cannot be " recovered back at law, nor the conveyance set aside " in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance " cannot be considered the voluntary act of the " grantor." (Citing cases including *Worcester v. Eaton*, 11 Mass. 368, *Appendix p. 68).*

The rule thus accurately and elaborately stated in the cited opinion, is laid down and illustrated by many text writers, with citations of many authorities. See Addison on Contracts, p. 1171, *Appendix p. 374;* Pollock's Principles of Contracts (4 ed.) p. *253, *et seq.*, *Appendix p. 364;* 1 Story Eq. Juris. (13 ed.), § 298, pp. 301–303, *Appendix p. 371;* 2 Pomeroy Eq. Juris. (2 ed.) § 939–942, pp. 1349–1359, *Appendix p. 367;* Story on Sales p. 603, *Appendix p. 373.*

The two cases of the *Central Transportation Co.* and the *Pullman Co.* (139 U. S. 24, *Appendix* p. 279; 171 U. S. 138, *Appendix* p. 307) arose out of a contract or lease which

" was held to be void because it was beyond the " powers conferred upon the Central Company " by the legislature and because it involved an " abandonment by that company of its duty to the " public. It was also added by Justice GRAY, " that there was strong ground also for holding that

" the contract between the parties was void because in " unreasonable restraint of trade and therefore con- " trary to public policy." (By Justice PECKHAM: see *Appendix* p. 314).

Each of these cases deal with a transaction held to be illegal because *ultra vires* the Central Company. The reasons for allowing a recovery of property illegally transferred were, therefore, much stronger than is possible in a case such as this, where the illegality consists in the commission of a criminal offense. On the other hand, the conclusions deliberately announced by this Court as to the limitations upon such a right of recovery, and the circumstances which will be fatal to the allowance of recovery, if applying to a case of simple *ultra vires*, apply with still greater force in the case at bar.

In the first, or *Central* case (139 U. S. 24; *Appendix* p. 279), Mr. Justice GRAY, dwelling upon the *ultra vires* contract, used the following language:

" A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

" In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

" The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been properly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that

nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.' *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 317.

"Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

When using this language, Mr. Justice GRAY had in mind those contracts that were merely *ultra vires*, but not those that were clearly illegal because expressly prohibited, as is evident upon reference to his opinion above quoted in the *Vandalia* case (145 U. S. 393, *Appendix p. 265*), as well as to his opinion in *Cranson v. Goss* (107 Mass. 439; *Appendix pp.* 92, 94), where he said:

"If a chattel has been sold and delivered on the Lord's day without payment of the price, *the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied.* [*Simpson v. Nicholls*, 3 M. & W. 240, s. c. 5 M. & W. (Eng. Ed.) 702 note; 3 M. & W. (Am. Ed.) 244 note. *Ladd v. Rogers*, 11 Allen, 209.]" (See also *Troewert v. Decker*, 51 Wis. 46).

The final opinion delivered in the second or *Pullman* case, by Mr. Justice PECKHAM (171 U. S. 138, *Appendix p. 307*) is most instructive. The learned justice says (*Appendix pp. 317-319*):

"But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.), 'the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract.'

"And the opinion of the Court ended with the statement that,

'Whether this plaintiff could maintain any action against this defendant, in the nature of *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, accordingly to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for.'

"The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowper, 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

"The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute con-

cerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.

"They are substantially unanimous in expressing the view that in no way and through no channel, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, *and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.*"

With reference to the two *Central-Pullman* cases, it is further to be observed not only that each case dealt most particularly with the question of *ultra vires*, but that the tenderness there exhibited toward one of the parties to an illegal contract concerned only that party which had not repudiated the agreement.

Mr. Justice GRAY, in the *Vandalia* case (*Appendix* p. 265), indicated that even in case of a contract void because *ultra vires*, an agreement to return property transferred will not be implied for the benefit of the repudiator at his suit:

"This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan Co. Bank v. Townsend*, 139 U. S. 67, and cases there cited.

"But the case is one in which, in the words of Mr. Justice MILLER in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Penn. R. R. Co. v. St. L. A. & T. H. R. R.*, 118 U. S. 290, 316-317."

This distinction is already drawn between cases of *ultra vires* contracts and illegal contracts; for it is difficult to understand how justice requires rescission or return for the protection of the party whose reception and retention of the agreed consideration of his contract has not been repudiated or disputed by the other party. (See *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46). Full justice is done to the repudiating complainant by permitting him to retain the consideration which he himself originally fixed and accepted as sufficient for his contract which and on that basis he has permitted the other party fully to execute.

Obviously, Mr. Justice PECKHAM'S qualifications of the general rule, *in pari delicto*, was not required by the facts of the case before him, nor was it intended to apply to any case in which the repudiator of the contract was seeking the aid of the court.

Upon this point, the view of Mr. Justice PECKHAM is clearly expressed as follows, in a later portion of his opinion in the same case (See *Appendix* p. 327):

"The property was placed in its hands by the lessor and in accordance with terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order

only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time."

FOURTH. The complainants' case rests upon and requires an exhibition of the illegal contract of sale and delivery of November 18, 1901. The complainants' contention to the contrary is that which in all such cases usually but unsuccessfully, is urged by the repudiator.

In *Myers v. Meinrath* (101 Mass. 366, *Appendix p. 86*), exactly the same contention was made and was rejected by the Court in the following language (*Appendix p. 89*).

"The contract was completely executed on both sides, the parties are in *pari delicto*, and by refusing to aid either party *in* the attempt to restore himself to his former position, we leave him in the condition in which he has placed himself by his own illegal conduct. That, as we understand it, is the aim of the courts in applying the general rule upon this subject.

"*The plaintiff contends that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proof by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is*

inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. Gregg v. Wyman, 4 Cush. 322. *Duffy v. Gorman*, 10 Cush. 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of the two offending parties at the instigation of the other."

Taylor v. *Chester* (L. R. 4 Q. B. 309 ; 1 English Ruling Cases, 488 ; *Appendix* p. 1) is the great leading case, and in it exactly the same contention was made by the late Lord Chancellor Herschell (*Appendix* pp. 2–3) and was rejected by the Court (MELLOR and HANNEN, JJ.).

These authorities describe and determine the position of the complainants. They seek to recover property in possession of the defendant Securities Company, and therefore presumably its property. To overcome this presumption, they disclose an executed contract of sale by Harriman and Pierce. This, however, instead of weakening, would confirm the presumption of ownership by the Securities Company. Therefore they call attention to and rely upon the illegality of that contract, and make such illegality the ground of their prayer for a return of the consideration by them delivered under the contract.

Nor is this all. In Article IX. of the amended bill of complaint, the complainants allege and seek affirmatively to enforce a particular stipulation of the contract of sale. The defendants deny that there was any such stipulation, but its mere assertion by complainants invalidates their prayer for the relief, if any, to which otherwise they might be entitled. The rule is thus stated in Story's Equity Jurisprudence (13 ed., vol. 2 ; p. 301 ; *Appendix* p. 371).

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to ; *and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original*

immoral purpose ; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it. (See also *McMullen* v. *Hoffman, Appendix* pp. 330, 340 ; *Trist* v. *Child*, 21 Wall. 441-8.)

The claim asserted in Article IX. challenges close consideration. *It asserts that Harriman and Pierce* turned over to the Northern Securities Company a majority of the total stock, constituting the control of the Northern Pacific Company. If this be true, then Harriman and Pierce were the efficient cause and agents of the illegal combination.

Clearly then the complainants are proceeding upon the illegal contract.

FIFTH. The adjudication that the transaction of November 18, 1901, was *in virtue* of an illegal combination, does not constitute an adjudication that the Securities Company has no title to the certificates in its own name and its own possession ; but even if such an effect were to be attributed to the decree of April 9, 1903, the possession of the Securities Company would not be disturbed at the instance of the complainants, who are *in pari delicto.*

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand ; both because (*a*) such possession stands as the equivalent of a title in the defendant, and because (*b*) to discourage such transactions, courts will be deaf to the clamor of a complainant *in pari delicto* (See cases in appendix).

The condition of the possessor is so much better than even that of the original owner, that he can recover the property not only from a stranger but from the original owner, if by chance the latter has been able to repossess himself of the property. (See cases in appendix.)

The result of many authorities is accurately stated in the following section of Harris on Sunday Laws (*Appendix*, p. 375):

"§ 169. *Sale — Possession — Rights — Creditors.*— Where the possession of property is acquired or obtained by contract of sale on Sunday, though the contract be illegal, the possession is by permission and he may retain it as against his vendor or anyone claiming under him, and against the creditors of his vendor, *not that he has any legal title which the law will protect, but because his vendor cannot be heard to set up a claim to it, and it is the inability of the vendor which protects the possession of the vendee, and is, to him, in effect, the same as a sufficient title.* Then, if he cannot recover it, his creditors cannot subject it to the payment of his debts, and it is not subject, in the hands of the vendee, to attachment or execution against the vendor." (See *Markley v. Mineral City*, *Appendix* p. 229, and the well-considered case of *Block v. McMurry*, *Appendix* p. 105).

The right of the possessor, and the right resulting simply from the fact of possession, are demonstrated to be the foundation and the meaning of the rule, in the philosophical discussion of Mr. POMEROY in Sec. 939 of his Equity Jurisprudence (*Appendix* p. 367).

At the request of one wrongdoer, the courts will not disturb the possession of the other, whether with or without title.

"If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. *But if the contract is unlawful both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus given his money is justly deprived of what he has expended, and cannot recover it back.*" (Les Lois Civ. liv. 1, tit. 18, sect. 14, 5.) Addison on Contracts, *Appendix* p. 374.

"Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has

been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor v. Chester* (Law Rep. 4 Q. B. 309) where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491), where it was not pleaded, but, the fraud being apparent, the Court would not interfere." Per A. L. SMITH, L. J.—*Scott v. Brown*, *Appendix* p. 26.

Neither the illegality of a transaction, nor an adjudication of its illegality, results in leaving the title to property transferred as a part of the transaction, in the transferor.

The true effect of such a finding of illegality has been stated by the Supreme Court of New Hampshire in a much approved and often cited case, as follows:

"The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in sale. It is void in that respect. *The principle shows that the laws will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said that the contract is void, the language is used with reference to the question whether there is any* legal remedy upon it (see 5 Barn. & Cress., 406, *Fennell v. Ridler*, opinion of BAYLEY, J.)". *Smith v. Bean*, 15 N. H., 577; *Appendix*, p. 125.

This effect of an illegal transaction is stated in other words by the Supreme Court of Massachusetts as follows:

"Upon this principle, possession, required from an illegal transaction, or by a contract fully executed, will often avail the party holding it, as a sufficient

title. Neither party is allowed to impeach its validity by asserting the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The Court does not give it effect, but simply refuses its aid to undo what the parties have already done" (Citing authorities.) *Myers vs. Meinrath*, 101 Mass., 366, *Appendix*, page 86.

"He (a vendor) could only impeach a sale by showing the illegality of his own act, which in the case of an executed and completed contract he certainly cannot do. *This disability on his part to reclaim it would avail the party holding it, as a sufficient title.*" *Horton v. Buffington*, 105 Mass., 399; *Appendix*, p. 90.

The same principle is necessarily involved in every one of the multitude of cases in which the courts have refused a recovery of property illegally transferred. The effect of the finding of illegality is still to leave in the transferee possession and a right of possession which no one can question, and which is therefore equivalent to title.

Seventh.

The complainants confessedly *participes criminis* have not relieved themselves from the application of the rule, *in pari delicto potior est conditio possidentis.*

The complainants claim exemption from the doctrine *in pari delicto* upon several grounds, viz:

(1) That the parties acted in good faith and without intention to violate the law;

(2) That the transaction was not *malum in se* but merely *malum prohibitum;*

(3) That the parties were not *in pari delicto,* because not original or active parties to the combination;

(4) That public policy will be promoted by the return of the stocks; and

(5) That the defense founded on the doctrine is not available to the Securities Company as it was merely a depositary, a custodian or an agent.

None of these pleas can be sustained.

First. All doubt as to complainants' contention as to their relation to the alleged illegal contract, has been dissipated by the frank statements in Article VI. of the *second amended bill.* (See also affidavit Winslow S. Pierce, R. p. 185).

They entered the combination with full knowledge of its character and purpose, and for more than two years participated in its proceedings. But they seek to offset their admission by an allegation that then and during the pendency of the Government proceedings they believed the transaction to be lawful. This we do not doubt, for such was the honest belief of all parties until the recent adverse decision by a court nearly equally divided. However, the good faith of the parties could not change the legal effect of the act, and they must be presumed to know the law (Lawson on Presumptions, pp. 526, 532–536).

Ignorance of the law, however innocent, cannot give the complainants any advantage over their associates in the combination who were equally innocent. The *delict* upon which the complainants rely, and as a basis of their cause of action, was a *delict* in which all shared alike. Whatever innocence can be claimed, can be claimed by all: whatever guilt is to be ascribed is to be ascribed to all.

In their brief of January 23, the complainants' counsel, conceding the general rule of law as above stated, declared that

" it has been established by innumerable decisions that
" relief will be granted from the consequences of a mis-
" take of law whenever the mutual mistake is clearly
" proved or admitted and by reason of such mistake
" the party against whom relief is sought would other-
" wise secure an unfair advantage."

The point of this statement naturally is to be found in its termination. The legal proposition is stated too

broadly, and strains the authorities cited in its support. But even as stated, it is applicable only in those cases in which "the party against whom relief is sought would otherwise secure an unfair advantage."

As we have already demonstrated, the present case is not one of that kind, for by the retention of the Northern Pacific stock the defendant would not obtain "an unfair advantage"; it would merely retain that which at the outset was declared by the complainants to be worth exactly $91,407,500, payable as to $82,491,871 in Northern Securities stock at par, and as to $8,915,629 in cash. It cannot be that the defendant takes an unfair advantage of the complainants in retaining the exact consideration that originally was considered and declared by both parties to be fair, and which since that time certainly has not declined in market value. Under such conditions, no mistake of law, whether mutual or unilateral, whether admitted or contested, would permit the complainants to recover back the consideration which they voluntarily delivered to the defendant. This was precisely held in the recent case of *Harse v. Pearl Life Ins. Co.* (L. R. [1904] 1 K. B. 558: *Appendix* p. 35), where it was adjudged that a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, must submit to that loss, unless the statement on which the complainant acted was fraudulently made: unless it can be said that the statement made by the defendant put the complainant in a worse position than the defendant, the parties were on an equal footing with regard to the transaction. Even in Judge TAFT'S opinion in the case of *City of Detroit v. Detroit City Ry. Co.* (60 Fed., 163), cited upon page 54 of complainants' brief of January 23, 1905, it is declared that the exemption applies only in cases where the stipulation of the contract is not binding because *ultra vires*, and not in cases where the stipulation is immoral or unlawful or against public policy.

In the *Vandalia* case (heretofore fully considered), and indeed generally in the cases cited in the *Appen-*

dix to this brief, it will appear that the parties proceeded upon a common mistake as to the law which ultimately was decided against them. The generality of the rule, as well as its reason was stated by Mr. Justice STORY in *Barlow v. U. S.* (7 Peters, 404), where he held directly that mistake as to the law did not prevent a forfeiture to the United States of sugar entered under a false denomination, and said that—

"The whole course of jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, *either civilly or criminally;* and it results from the extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party, and the extreme danger of allowing such excuses to be set up for illegal acts to the detriment of the public. There is scarcely any law which does not admit of some ingenious doubt."

The truth is that in the present case each party had full knowledge of the facts; each party was chargeable with knowledge of the Federal anti-trust act; and neither party would now deny that it then had actual knowledge of that act. The only mistake was in their supposition that the known statute would not be held applicable to the known state of facts. Under such conditions, neither party can plead ignorance of the law as a defense against the other party.

"When the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract or prevent him from obtaining and receiving all the benefit contemplated from it and to which he is entitled under it" *(Seeley v. Reed*, 25 Fed. Rep. 361).

SECOND. The distinction between *malum in se* and *malum prohibitum* cannot avail the complainants, who were parties to a transaction hostile to public policy,

condemned by statute, and constituting a criminal offence.

Even if, in actions for recission, the distinction be retained for the benefit of the less guilty party, the transactions now in question would be *malum in se* in the view of PARKER, C. J. (*Irwin* v. *Curie*, 171 N. Y. 409-415; *Appendix* p. 227). In such cases there is no balancing of the guilt of the respective parties; the courts absolutely refuse relief to any of them.

"The cases in which the courts will give relief to "one of the parties on the ground that he is not *in* "*pari delicto*, form an independent class entirely dis- "tinct from those cases which rest upon a disaffirm- "ance of the contract before it is executed. It is "essential to both classes that the contract be merely "*malum prohibitum*. If *malum in se*, the courts will "in no case interfere to relieve either party from any "of its consequences" (*Tracy* v. *Talmage*, 14 N. Y. 162-181; *Appendix* p. 156).

This is the rule also of the civil law, as cited from Domat by Mr. Addison (*Appendix*, p. 374):

"If the contract is unlawful both on the one side "and on the other, as if one party gives money to a "judge to gain his cause, or one person gives money "to another to induce him to commit a crime, he who "has thus given his money is justly deprived of what "he has expended, and cannot recover it back."

In cases not involving moral turpitude, the doctrine *in pari delicto* is generally applicable, as declared by Judge GRAY, for the Circuit Court of Appeals, in the very recent case of *Equitable Co. v. Wetherill* (127 Fed. Rep., 946; *Appendix*, p. 359). He said:

"It is claimed by the plaintiff in error, that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal and void.

"It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed. * * * 'Where money has

been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid.' *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347; Pollock on Contracts, star p. 332; Leake on Contracts. 774."

In the absence of any proof to the contrary, all the parties to a contract hostile to public policy are presumed to be *in pari delicto.*

" According to the authorities, then, it would seem " to be well settled that in reference to all acts or con- " tracts, which are unlawful on account of their im- " morality, or their tendency to promote it, or because " they are hostile to the public policy, the parties " thereunto are regarded as being *in pari delicto.*"
White vs. Hunter, Appendix p. 128.

THIRD. The plea that the doctrine does not apply to Harriman and Pierce because they were not original parties to the combination, is of no legal consequence; and the plea that they were not active parties, is not well founded in fact.

" Anyone who, after a conspiracy is formed, and who " knows of its existence, joins therein, becomes as " much a party thereto from that time, as if he had " originally conspired." (DILLON, J., in *U. S. vs. Babcock*, 24 Fed. Cas., 913–915).

The extent and the activity of the continuous participation of Harriman and Pierce, have been sufficiently indicated (see Mr. Pierce's affidavit, R. p. 185). The doctrine does not rest upon an ascertainment of an exact parity, but applies in every case where two persons *sui juris* agree upon a course of action which is in violation of law.

The long continued participation of all the complainants in the transaction establishes their character as willing and active participants and not as victims. The sale of the Northern Pacific shares of the Oregon Short Line was conducted solely by Mr. Harriman,

whose depositions are in evidence. His testimony may be searched in vain for any suggestion that the sale was made under duress or constraint of any kind. But his memory having been refreshed in connection with these recent proceedings, Mr. Harriman now avers (R. p. 157–158):

"I was then urged by Messrs. Morgan & Co. to dis-
"pose of the Northern Pacific stock held by the Oregon
"Short Line Company *on the ground that it would be*
"*a minority holding under the plan of conversion if*
"*consummated, that the majority would be held by*
"*the holding company, and that there would probably*
"*be no market for any such minority holding.* They
"further stated that upon the organization of the pro-
"posed holding company, they would be prepared to
"purchase the holdings of stock of the Northern Pa-
"cific owned by the Oregon Short Line and to pay
"therefor in the stock of the holding company *at the*
"*rate of 115 for all our stock*, which would be the rate
"at which the holding company would take in the
"common stock held by them and Mr. Hill and his
"associates, and all other parties, *and they thereupon*
"*offered me those terms.* I took the matter under
"consideration and conferred with members of the
"board of directors of the Oregon Short Line Com-
"pany. The conversion under conditions *reducing*
"*the Oregon Short Line holdings to a minority*
"*was then a foregone conclusion* unless we were
"prepared to commence litigation, which would
"be protracted and which would probably be detri-
"mental to the value of all railroad securities in
"view of the condition of the financial markets re-
"sulting from the panic of May 9, 1901. The alterna-
"tive of not accepting shares of the holding company,
"but holding the minority interest in the Northern
"Pacific Company, *involved serious risks of great*
"*loss, as it would then be to the interest of the holding*
"*company to sacrifice the Northern Pacific for the*
"*benefit of the Great Northern Company.* It was,
"therefore, finally agreed with Messrs. J. P. Morgan
"& Co. that the Oregon Short Line Company would
"turn over its entire holdings of Northern Pacific
"stock for $82,491,871 par value of the stock of the
"holding company and $8,915,629 in cash."

On the part of Messrs. J. P. Morgan & Co., who alone appeared as purchasers, there was no exaction or request, but simply an offer, to obtain for Harriman and Pierce terms as good as (and ultimately made better than) those offered to any other holder of Northern Pacific shares. The offer was accompanied not by any threat or by any intimation that the Securities Company required the shares, but merely by the suggestion that there would be no market for minority shares. Mr. Harriman, however, seems to have been governed not by any consideration of this suggestion, but by his own idea that unless he sold "*it would be to the interest* of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. *It was, therefore, finally agreed to sell.*"

In other words, his plea simply is that it would have been to the pecuniary loss of the Oregon Short Line interest had it failed to sell its stock to the Northern Securities Company. It is believed that no precedent can be found for such a contention in a court of equity —that the culpability of a party to an illegal transaction should be made to turn upon the question of financial gain. But whether or not novel, the contention is untenable, and naturally enough has found no place in the bill of complaint, notwithstanding it has been twice amended.

FOURTH. The defendants cannot consider it necessary to refer to the statement of the general principles concerning public policy as applicable to this case, for the public interest under the Anti-Trust Act is within the sole and exclusive jurisdiction of the Attorney-General of the United States, as held by the Supreme Court in the case of *Minnesota v. Northern Securities Co.* (194 U. S. 48), and by Judge THAYER in his opinion of April 19, 1904. The facts have been fully considered under our *First Point* (p. 25).

FIFTH. The plea that the defense founded on the doctrine *in pari delicto* is not available to the Securi-

ties Company, because it was merely a depositary and custodian or agent, has no proper application to the conditions in the present case.

The complainants' highly technical argument on this point depends entirely upon their contention that Mr. Justice HARLAN has found the Securities Company to be merely a custodian, and seems to be as follows:

The doctrine *in pari delicto* applies only to transactions between two principal parties, each capable of wrongdoing, and each equally doing wrong. But, conceding that Harriman and Pierce were wrongdoers, their wrongdoing is immaterial, because they contracted with a party which, though acting ostensibly in its own right, did not in fact do so, but really as a depositary, or custodian, or agent, or trustee, or stakeholder, for Harriman and Pierce. Such a party, it is said, cannot be held to be *in* PARI *delicto* with Harriman and Pierce, however guilty they may have been, and consequently as against them it cannot avail of a defense founded on this maxim, because *it* was not as guilty as they!!

Though regarded as only an artificial person, the Securities Company, as principal, had power to make the contract, as clearly as the Oregon Short Line Company, a similar artificial person, has power to elect and to seek to rescind the contract. Whether viewed as the executant of the illegal will of the thinking and acting parties, or merely as a custodian, the Securities Company was in fact (disregarding Morgan & Co.) the only party to the contract with Harriman and Pierce.

But, though the correctness of this afterthought were to be conceded, it would not follow that the complainants could recall property delivered to the Securities Company, regarded merely as custodian or agent. Even if a custodian, or agent, it received that property for a definite purpose, to which it has applied the same. With the full approval of complainants, it has issued to other parties, to the extent of more than two hundred million dollars, certificates of its new stock representing an interest in this property.

It may be observed that in any case where it appears that without meaning to vest any title in the custodian, possession has been delivered to accomplish an illegal purpose, the depositor has the right to demand the surrender of that possession, which, if allowed to continue, will promote the carrying out of the illegal purpose. In such case the only right that could be set up by the custodian would be a right to hold for the illegal purpose. If, however, in pursuance of the illegal purpose, it is intended to pass title, and possession accompanying the title is delivered, the party who, because of the illegality, desires to destroy the title and to resume the possession is not under the cases permitted to succeed. The cases which are assumed to hold otherwise are those of illegal contracts which have not been executed, and where a wrongdoer seeks to resume the ownership. In this case, the complainants attack the possession of a defendant who claims title by virtue of a contract intended to be a contract of sale; a defendant who has never consented to be custodian, and who has not repudiated the contract.

There are various kinds of custodians—some who do not claim any title, others who do. As already argued, it was not necessary either for the Circuit Court or for the Supreme Court to pass upon or to define the extent of the title conferred upon the Securities Company, if a custodian, and they did not pass upon such title.

Whatever may have been in the mind of Mr. Justice HARLAN when he applied to the Securities Company the term "custodian," clearly he did not employ that term as signifying "a mere depositary or custodian to execute the illegal will of the thinking and acting parties to the forbidden combination." This will be manifest upon reference to the complete sentence of his opinion (193 U. S., 354):

"The decree, if executed, will destroy not the prop-
" erty interests of the original stockholders of the con-
" stituent companies, but the power of the holding

" corporation, as the instrument of an illegal combina-
" tion, OF WHICH IT WAS THE MASTER SPIRIT, to do that
" which, if done, would restrain interstate and inter-
" national commerce.

Certainly something more than a mere custodian or depositary is the *master spirit* of the illegal combination. The vital and dominating character of the Securities Company was the very cornerstone of the Government suit. The power to control the railway companies was imputed not to the original parties to the combination, but to the Securities Company itself, acting, of course, as controlled by the holders of a majority of its capital stock, among whom were the individual parties to the Government suit, owning less than a majority.

The Circuit Court also recognized the Securities Company as a personality, dominating the railway companies, and made the Company and not its stockholders the direct object of its decree. In varying form, this was thrice stated by Judge THAYER as follows :

" When the Securities Company was organized, *it*
" *assented to and became party to the scheme* that had
" been devised by its promoters before it became a
" legal entity."

And again :

" In this instance, as we have already said, the
" *Securities Company made itself a party to a com-*
" *bination* in restraint of interstate commerce that
" antedated its organization as soon as it came into
" existence, doing so, of course, under the direction of
" the several individuals who promoted it."

And again :

" It is the common experience of mankind that the
" acts of corporations are declared and their policy is
" controlled *by those who own the majority of their*
" *stock.*"

The several individuals who promoted the Securities Company owned much less than a majority—barely twenty-four per cent. of its stock.

SIXTH. In no sense is the Securities Company a custodian in the sense of a stakeholder. A stakeholder occupies a position alike to that of a holder in escrow; he pays nothing for his possession, and has not the slightest interest in its continuance. The Securities Company has in itself, if not a title, a possession as of its own property, by assent of the complainants.

Even though the Securities Company be regarded as having no rights greater than those of a stakeholder, it cannot be called upon to return property in which it has conferred rights upon its stockholders according to the intention and direction of Harriman and Pierce. Though money may be recalled from a stakeholder before he has paid it over, it cannot be recovered from him after such payment. The cases stating and illustrating this familiar rule are too many to require extended citation (See *Howson* v. *Hancock*, 8 Term, 575; *McCullum* v. *Gourlay*, 8 Johns. 147; *Ball* v. *Gilbert*, 12 Met. 397–405. *Appendix* p. 75).

The Securities Company dealt with this stock, and created new rights therein exactly as was intended and directed by Harriman and Pierce, and they cannot now disaffirm the act of their agent or trustee (even if only such) to the disadvantage of third parties.

Eighth.

If, at any time, the complainants might have rescinded the executed contract of November 18, 1901, and have demanded the return of the consideration, any such right has been lost by their acquiescence and by the creation with their consent of superior equities of third parties.

First. The equities of the persons who hold stock of the Northern Securities Company bought in the open market since the complainants became a part of that company, must prevail against the complainants' claim.

It appears by the records of the Northern Securities Company, that since Harriman and Pierce transferred their Northern Pacific stock to the defendant on the 19th of November, 1901, there have been approximately 16,000 transfers of stock upon the books of the Northern Securities Company. The stock is now in the hands of 2,571 separate holders (R. p. 269), many of whom are residents of Great Britain, France and other parts of Europe (R. p. 268). All of the purchasers of this stock since the 18th of November, 1901, have purchased an equitable interest in the entier corporate assets of the Northern Securities Company, including the Northern Pacific stock transferred to that company by the complainants, and all of them were justified both by the fact of complainants' transfer and by complainants' subsequent conduct, in believing that they were acquiring a valid interest in the transferred Northern Pacific stock (R. p. 272, 275). This point is hereinafter treated in detail.

It appears by the minutes of the Northern Securities Company that on the 22d of January, 1903, the Board of Directors of that company, Messrs. Harriman, Schiff and Stillman being present and taking part in the meeting, and no negative vote being recorded, authorized the sale by the company itself for cash at a price much above par of 75,000 shares of Northern Securities stock (R. p. 319). Purchasers of these shares parted with their money in exchange for an equitable interest in all the corporate assets of the Northern Securities Company (R. p. 272, 275), including the Northern Pacific stock transferred to that company by complainants, and they acquired no other rights whatever. The complainants more than a year after the original transaction were active participants in making the sale of this equitable interest to them.

It appears by the Article XVII. of the amended bill, that if the complainants get back from the

defendant the Northern Pacific stock which they claim, the value of what they get will exceed by the sum or value of over $10,000,000 the aggregate value of all the complainants would receive in a *pro rata* distribution of the assets of the defendant among its shareholders.

This $10,000,000 would be taken away by the complainants from the shareholders to whom they permitted stock to be sold and to whom they sold stock of the Northern Securities Company.

It is difficult to conceive of any principle of equity on which men can go into a combination of this kind as complainants went into this combination, transfer their stock to a holding company, invite the public to come in and purchase interests in the stock so transferred, and then take back the stock because it has risen in value and they can make $10,000,000 out of the transaction. As between the original organizers and directors of the corporation and the general public who came in and purchased stock offered by them for sale and upon the faith of their assertion that the transaction was legal, there can be no question of relative culpability or as to which is entitled to the protection of a court of equity. The subsequent purchasers in the open market had, of course, far inferior knowledge of the facts, and far less opportunity to judge of the validity of the corporate title to its apparent assets; and so far as foreign purchasers were concerned they were not at all chargeable with knowledge of the law. As to all of the subsequent purchasers, their fault, if any, was in relying upon the implied representation of the complainants and their associates that the corporate title to its assets was valid. To permit the men who induced them to part with their money upon the faith of that representation to take those assets away for their own profit, would be a grotesque perversion of equity.

SECOND. If complainants were otherwise entitled to relief, they would have forfeited that right by their

laches and their failure in due time to elect to stand upon a rescission or repudiation of their transfer.

The transfer was made on the 18th of November, 1901. In appears by the tenth article of the bill that on the 10th of March, 1902, the bill of complaint was filed in the Government suit by the Attorney-General of the United States declaring that the transaction was unlawful. Then certainly, if not before, it was the duty of the complainants to elect to claim a rescission of their transfer if they were ever to do so. They did not so elect. On the contrary, they continued to take the benefits and exercise the rights of stockholders in the Northern Securities Company.

On the 17th of July, 1902, four months after the Government bill was filed complainants Harriman and Pierce and the Oregon Short Line Company, continuing to exercise their rights of ownership over the 824,000 shares of stock of the Northern Securities Company which they had received as part consideration of the transfer, pledged that stock to the Equitable Trust Company under the trust indenture set out in the bill of complaint. The terms of the indenture show that they then transferred to every holder of the bonds issued thereunder a part of their interest in the general assets of the Northern Securities Company represented by the pledged stock, for the indenture assures to the bondholders not merely payment of interest upon the bonds, but a proportional share of all the dividends paid by the Northern Securities Company upon the stock pledged.

Nearly a year after the Government bill was filed, the complainant Harriman and his associates Messrs. Schiff and Stillman joined with the other members of the board of directors of the Northern Securities Company in the sale of stock authorized by that board on the 22d of January, 1903.

On the 9th of April, 1903, the decree of the Circuit Court was pronounced in the Government suit adjudging the transaction to have been illegal. Still, the complainants did not elect to proceed as for rescission,

but stood upon their rights as shareholders. It was not until after the 22d of March, 1904, when the defendant company had resolved upon a ratable distribution of its assets among its shareholders, and the complainants found they could make a profit of $10,000,000 over and above their ratable share in such distribution by claiming a rescission based upon facts known to them for years before, that they elected to claim such a rescission.

The facts were known to complainants from the beginning. The unlawfulness of the acts done was brought sharply to their attention by the filing of the Attorney-General's bill. How much of the increase in value of the Northern Pacific stock occurred during the two years following the filing of that bill, this record does not disclose. Presumptively, most of it. How much of that increase of value came from the continued possession of the stock, and the peaceable control of the Great Northern as well as of the Northern Pacific in the same hands during that period of two years' delay, no one can tell—presumptively much of it. It is certain that for two years, with a full knowledge of all the facts, the complainants did not consider it for their advantage to claim a rescission, and did not claim it. It is a fundamental rule that one who claims a rescission must make his election promptly upon learning the facts. He cannot sit on the fence waiting for future events to determine on which side it will be for his advantage to jump. Still less can he jump first on one side and then climb over to the other side, as the complainants are seeking to do in this case.

THIRD. The complainants have not merely failed to elect affirmatively to proceed upon a rescission or repudiation of the transfer of November 18th, but by the trust deed to the Equitable Trust Company set up in the bill they irrevocably elected not to claim a rescission, and to stand upon their title to the Northern Securities stock.

The seventh article of the trust deed was manifestly drafted with a view to what should be done, if the then pending Government suit should be decided in favor of the Government. That article provides that if a majority of the stockholders of the Northern Securities Company shall join in a sale of their stock, then upon the request of the Railway Company the Equitable Trust Company shall join with them ; that in case a majority of the stockholders shall participate in a plan of reorganization or readjustment of the Securities Company, then upon request of the Railway Company the Equitable Trust Company shall join with them; and that in case of the consolidation, union or merger with any other corporation of the Securities Company, *or the sale of its property or the distribution of its assets, the trustee shall receive such amounts of stocks, bonds or other securities, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company shall be entitled to receive, and upon receipt thereof shall surrender the deposited stock certificates.* This duty is absolute; it depends upon no request of the Railway Company. Whenever the Northern Securities Company shall sell its property, it is the duty of the trustee to receive its proportionate share as a stockholder. Whenever the Northern Securities Company shall distribute its assets, it is the duty of the Equitable Trust Company to receive its distributive share as a stockholder. The Equitable Trust Company now, by the voluntary act of the other complainants, holds the 824,000 of Northern Securities stock under this provision requiring it under the contingency which has in fact arisen not to repudiate its title to the stock, but to take its distributive share as a stockholder under the resolutions of the Northern Securities Company set forth in the bill.

The Trust Company which in fact holds the stock has no power under the terms of the trust to repudiate its title. The other complainants in parting with the stock to the Trust Company parted with the power to

repudiate the title which they transferred. No election to repudiate the title is now possible.

FOURTH. The complainants' attempted explanation of their gross *laches* as a reasonable delay during the pendency of the Government suit is not entitled to the favorable consideration of a court of equity. During the prolonged period of their culpable silence, lasting more than two years after the Government suit was begun and more than one year after its decision by the Circuit Court they have permitted changes of condition on the part, of thousands of persons relying upon the Securities Company's ownership of the railway shares (R. p. 272, 275). This is shown by the fact among other things, that during that period there were more than 16,000 transfers of Securities stock (R. p. 266).

But, the charge against complainant is of something more than passive laches. They are confronted also by the consequences of their affirmative and persistent election to get all possible benefits out of their maintenance of the position of the Securities Company and the chance that this court would reverse the Circuit Court. Continuously during the pendency of the Government suit, and with full knowledge of the charge of illegality made in 1902 by the Attorney General, and sustained in 1903 by the decree of the Circuit Court, they have persistently asserted and enjoyed all the rights of ownership resulting from the transaction denounced as illegal in that suit. The charge is not only of inexcusable laches, but also of a final and decisive election on their part inducing, and resulting in, a general change of conditions. Their delay has been too long; their election has been too pronounced, and their attempted excuse is too weak to permit the favorable consideration of their tardy and dubious claim for relief regardless of the rights of others.

> " When a party with full knowledge, or at least with sufficient notice or means of knowledge, of

his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

Pomeroy's Equity Jurisprudence, § 965.

In *Boston Railroad v. New York Railroad* (13 R. I. 264,) certain stockholders sought to set aside a sale of the road. Confessedly this sale was *ultra vires;* but they had stood by and raised no objection until the rights of other parties had intervened, and it was held that they were barred from any relief in equity. The court called attention to the reason for refusing these people any relief—that the property had passed to a new corporation including still other new and different stockholders, and that other bondholders' rights had intervened.

In *Harwood* v. *Railroad Co.* (18 Wallace, 80), a delay of five years in filing a bill to set aside the sale of a railroad on the ground of fraud, was held too late. The court said:

"Without reference to any statute of limitations, "the courts have adopted the principle that the delay "which will defeat a recovery must depend upon the "particular circumstances of each case. This case "does not show a sufficient degree of diligence to "justify the overthrow of a degree of foreclosure un- "der which new rights and interests must necessarily "have arisen."

In *Haywood* v. *Nat'l Bank* (96 U. S. 611, 617), the court was considering a suit in equity brought by Haywood to set aside the sale of certain stocks by the defendant bank, on the ground that they had been sold by the bank to its directors, who were incapacitated by reason of their office, to purchase the stock, it having been pledged by Haywood to the bank. He waited about four years before bringing a suit. In the meantime the stock had gone up. It was held that he could have no relief. The court said:

"If he had the right originally upon any ground, "to repudiate the sale and re-claim the stock, it was "incumbent upon him by every consideration of fair- "ness, to act with diligence, and before any material "change in the circumstances and in the value of the "stock had intervened."

The court also quotes from *Harwood* v. *Railroad Co. (supra)*, as follows:

"The delay which might have been of no conse- "quence in an ordinary case, may be amply sufficient "to bar relief when the property is of a speculative "character or is subject to contingencies, or where the "rights and liabilities of others have been in the mean- "time varied."

See also *Hoyt* v. *Latham*, 143 U. S. 553, 567.

A delay of about twenty-three months was held sufficient to bar an action by a stockholder, by the Supreme Court of Missouri in the case of *Kitchen v. St. Louis R'y. Co.* (69 Mo. 224). The court adopts the rule laid down by the Supreme Court of the United States in the cases above quoted, and says:

"He has no right to lie idly by until new equities "arise, and speculate on the success or non-success of "the investment or transaction of which he com- "plains.

After citing the case of *Graham* v. *Birkenhead & Cheshire* (2 McNaughton & Gordon, 156), where it was held that where stockholders acquiesced for eighteen

months, having had the means of knowing the acts complained of "by not coming earlier they had precluded themselves from asking for the exercise of the extraordinary jurisdiction of the court," the Missouri court goes on to say :

"The doctrine as recognized in the above cases, is "that the option to avoid such a sale as is here com- "plained of, must be exercised in a reasonable time, "and unless so exercised, equitable relief will be de- "nied, especially when new rights, interests and "equities have arisen, and the parties cannot be re- "stored to their original position."

In the case of *Peabody et al. v. Flint* (6 Allen, 56), the court was considering an action in equity brought by minority stockholders of a corporation for conspiracy and fraud, whereby their interests had been sacrificed, against the corporation and its officers and others, who participated therein. It appeared that the bill was filed March 9, 1860 ; the mortgage complained of had been executed August 20, 1856. A lease to another railroad, which was complained of, had been executed October 1, 1858. It was held that complainants were barred by laches. The court said :

"Every day's delay increased the complications and "the difficulty of making an equitable adjustment of "them. *In the meantime, the stock in the corpora-* "*tions must have been frequently changing hands, and* "*there are no means of adjusting the equities growing* "*out of such changes.* A similar remark is applicable "to the holders of the bonds secured by the mortgage. "The nature of the case required the utmost diligence "in order to prevent injustice. * * * *And a de-* "*cree such as they now seek may injuriously affect many* "*persons who have become stockholders or bondholders* "*during the period of this delay.*"

It may be remarked that this case was decided upon demurrer to the bill, the demurrer being sustained.

In *Dunphy* v. *Travelers' Newspaper Association*, 16 N. E. Rep. 426 (Mass.), the same rule is laid down, and it is said :

" It is a familiar principle of equity jurisprudence " that long continued acquiescence in a course of con- " duct by one interested in it, especially when the " rights of others are affected thereby, will induce the " court to refuse him relief upon his subsequent com- " plaint of it."

This action was brought by a stockholder after three years' delay, and the demurrer was sustained.

In the case of *Kinney* v. *Webb* (54 Fed. 34), the Circuit Court of Appeals, speaking through Judge SANBORN, having under consideration a bill to rescind a sale on the ground of fraud, denied relief on the ground of laches. In that case it had been about five years. The court says, on pages 37 and 38:

" If one would invoke the aid of a court of equity to " enforce such a rescission, he must act promptly, " with no vacillation, no unreasonable delay, no " attempt to speculate upon his option. He must " elect to rescind and steadily and consistently pro- " ceed as far as lies in his power, to place himself and " his purchaser *in statu quo.* * * * He may not " speculate upon his option. The vendee has the " right to know whether the claim for rescission is to " be pressed or abandoned, and that speedily."

In *Grimes v. Sanders* (93 U. S. 55, 62), the court says:

" Where a party desires to rescind upon the ground " of a mistake or fraud, he must upon the discovery of " the facts at once announce his purpose and adhere " to it. If he be silent and continue to treat the prop- " erty as his own, he will be held to have waived the " objection, and will be conclusively bound by the " contract as if the mistake or fraud had not occurred. " *He is not permitted to play fast and loose. Delay* " *and vacillation are fatal to the right which had be-* " *fore subsisted.* These remarks are peculiarly applic- " able to speculative property like that here in ques- " tion which is liable to large and constant fluctuations " in value."

The language of the Supreme Court in that case is certainly most applicable to the matter under consideration.

Ninth.

The complainants have failed to disclose any sufficient equity for their claim.

Thus far the general course of our argument has followed lines laid down by courts of common law and leading to the conclusion that in cases such as this the complainant is entitled to no relief from the Court.

But, the complainants' case is one that could not prevail even in equity, or under a concession as liberal as that suggested in the *Pullman-Central* case (171 U. S. 148, *Appendix* p. 307) by Mr. Justice PECKHAM that, the law will imply a promise *by a repudiator* to return the property or to make compensation therefor.

In fact, and as their bill alleges, they are offered exactly the same treatment as is offered to every other of their fellow stockholders, and as has been approved as fair both by the stockholders and by the Vice Chancellor in New Jersey.

They put in 370,230 shares of Northern Pacific common. They are offered 320,706 shares of Northern Pacific common stock.

They put in 410,850 shares of preferred stock. They are offered 246,389 shares of Great Northern stock.

They received $8,915,629 in cash which they are permitted to retain.

No case has been found in the books where the repudiating parties to an illegal contract have been assisted to recover more than their equitable share from the other party, not repudiating, but offering to do equity.

In the present case, justice, and more than justice, has been offered to, and refused by, the complainants. They insist not that they shall share alike with all their fellow participants, but that they shall receive a disproportionate benefit exceeding $10,000,000.

No similar demand for inequality can be found in

any precedent in equity. This would not be material if the complainants had, as they have not, a clear legal right. But, coming into a court of equity they must do equity, and must submit to the rule that equality is equity. Of course, these rules are not disputed—they are only obscured by the complainant's contentions. Nevertheless they apply, and they are decisive as against complainants.

FIRST. There has been an important change in the relative values of the shares of the two railways; so that to grant complainant's demand would inflict sore injustice upon complainant' associate shareholders.

The *second amended bill of complaint* alleges (Article V., R. p. 3) that originally the Northern Securities Company issued its own stock, and in exchange therefor received railway shares upon the following basis, to wit: $180 par value of its own stock for each Great Northern share, and $115 par value of its own stock for each Northern Pacific share.

Mr. Harriman more than once testified that he understood and agreed that the Securities Company stock was to be issued for the shares of the two railways at these relative valuations, and that upon such mutual understanding he delivered the shares belonging to the Oregon Short Line, and received the Securities stock (R. pp. 215, 238, 239).

"The statement was made to me * * * that "they would give us in part payment a holding Com- "pany's stock on the basis of $115 for Northern Pacific, "and if Great Northern were taken in, on the basis of "$180 for Great Northern" (R. p. 238).

Mr. Harriman testified also (R. p. 204) that the Oregon Short Line Company did not lose by its sale to the Securities Company.

The *amended bill of complaint* (Article XVII., R. p. 381) alleged that the value of Northern Pacific shares, now demanded by complainants, exceeds by more than $10,000,000 the aggregate value of the shares of the two railway companies, which they would receive

upon an equal distribution of all such railway shares ratably among and between all stockholders of the Securities Company. This is due to the fact stated by Mr. Harriman in his affidavit (R. p. 160), that at that date the market value of Northern Pacific shares was about $135, and of Great Northern shares is about $170. In other words, the market value of each Northern Pacific share was $20 more, and the market value of each Great Northern share was $15 less, than the values at which in 1901 all such shares were sold by the former holders and were purchased by the Securities Company.

The *second amended bill of complaint* (Article XVII., R. p. 12), under the stress of the situation developed upon the oral argument, tardily supplements the allegations in the two earlier bills, by stating that this excess of the relative value of Northern Pacific shares existed "*at all times mentioned in this bill*". Of course, the truth of this new allegation must be believed by the complainants. Otherwise they would not have been so particular to make it at this late day. But it is not equally apparent to the defendant, which hesitates to believe that anyone, even less keen and less experienced than Mr. Harriman, could have delivered to the Securities Company $82,000,000 of property at a grossly inadequate valuation, whether relative or absolute. Irrespective of any loss of principal by delivering Northern Pacific shares at 115 as compared with Great Northern at 180, the annual return that he then consented to accept in perpetuity was, according to his present view, less by $1,000,000 than would have been his, if in November, 1901, his Northern Pacific shares had been taken in at the present ratio of 135 to 170 which he states represents also the real relative values in November, 1901. His insistence that he will not now accept distribution upon the basis of all original contributions including his own, made with precise knowledge in 1901, indicates that in the course of events values have shifted, and not that when he sold the Northern Pacific at 115 as compared with Great Northern at 180 he did not know what he was doing.

These unqualified averments of the complainants would seem to be sufficient to show that since 1901 there had been an important change and disturbance in the relative values of the railway shares, and that the complainants are endeavoring to obtain the shares which have increased, leaving to their fellow stockholders the shares which have declined in value. Certainly their contention is that, notwithstanding by common agreement all parties have sold to the Securities Company upon a common basis of relative values, that basis shall not be observed on the present distribution, but that another shall be substituted to the advantage of complainants, and correspondingly to the disadvantage of the other shareholders, in the enormous sum of $10,000,000.

We cannot really doubt that in 1901 he knew not only the cost of his Northern Pacific shares, which, as he swears, he sold without loss, but also that he knew enough not to sell those shares at $10,000,000 less than their value as compared with Great Northern shares.

In a discussion solely of equities the fact of a change in relative values must be important. Any such change would affect the interests of the several vendors of the respective shares if another vendor were permitted to withdraw the more valuable asset from the common fund. But even though in 1901 Mr. Harriman's sale to the common fund be assumed to have been for an inadequate price, the price paid him exceeded that received by the vendors of the absolute majority of Northern Pacific common stock, and it would be inequitable to permit him once more to inflict injury upon his fellow shareholders.

SECOND. The proposed ratable distribution takes nothing from complainants for the benefit of Messrs. Morgan and Hill. On the contrary, they and their immediate associates contribute to the other 2500 stockholders in the same just proportion in which it is the duty of complainants to contribute.

Besides Northern Pacific shares, the Morgan-Hill party contributed Great Northern shares at $180.

Judge THAYER found that about 300,000 Great Northern shares were so contributed by them in exchange for $54,000,000 Northern Securities shares.

As Mr. Nichols swears (R. p. 264), upon the ratable distribution, the Morgan-Hill party, would receive only $38,722,400 Northern Pacific, which is $3,000,000 less than their original holdings of common stock and $42,000,000 less than the aggregate amount of their original common stock and the convertible bonds to which they were entitled.

In the same manner, and the same ratio as the Oregon Short Line, the Morgan and Hill party will surrender their rights in Northern Pacific shares, for the common and ratable benefit of nearly 2,500 of their fellow-stockholders in the Securities Company, who will receive 842,070 shares or 55.22 per cent. of the Northern Pacific stock.

THIRD. The holders of Securities stock in an aggregate amount exceeding $200,000,000, issued and acquired subsequent to the sale by Harriman and Pierce, are entitled to the favorable consideration of this court.

The total outstanding issue of Northern Securities stock is		$395,400,000
The amount held by those referred to by Judge THAYER as being "immediately concerned in the organization of the Northern Securities Company", or by Mr. Nichols as "being consulted" (R. p. 264) was	$99,601,600	
The amount held by the complainant is	82,491,871	
		$182,093,471
So that there were issued to or acquired by parties other than any of those originally connected with the Securities Company		$213,306,529
Of these there were issued for cash		7,522,000
So that now there are outstanding		$205,784,529

which were issued to, or are held by, those to whom Judge THAYER refers as not immediately concerned in the organization of the Northern Securities Company."

The original parties were the complainants (1) and the so-called Hill-Morgan party (12), making in all 13 persons, while the total number of stockholders is 2,531 (R. p. 264), scattered over America and Europe (R. p. 268).

There have been issued 86,945 separate certificates for Securities Company stock, of which the large majority are outstanding, and there have been approximately 16,000 transfers (R. p. 266).

As to such of these transfers, as were made pending litigation (an unknown number) the contention of the complainants has been as follows:

"The transferree or assignee, however, got no more "than the original holder; his rights are no greater; "his equities are entirely through the Securities Com- "pany; his legal position is wholly derivative; his "certificate did not purport to transfer so much Great "Northern or so much Northern Pacific; he bought "into the Securities Company for better or for worse, "and his position is no better and no worse than that "of the Securities Company itself. Therefore, restor- "ation of the *status quo* does him no conceivable "wrong and violates no right."

As to these extraordinary proposition, it may be observed that:

(1) No such transferee bought into the Northern Securities Company for better or for worse any more than did Harriman and Pierce; and the position of Harriman and Pierce is no better and is no worse than that of any such transferee.

(2) The Circuit Court, in its decree, expressly recognized the rights of such persons as may now be the holders and owners of Securities stock.

(3) Until after the repudiation by the Oregon Short Line, no purchaser of Securities Company stock

had any reason to suppose that he was not thereby acquiring a ratable interest in all of the assets then in the Securities Company's treasury. The pending Government proceeding constituted no notice to any such purchasers of anything beyond the fact that the Government was seeking to destroy the power of the combination to restrain commerce between the States No such transferee was bound to assume that any judgment in such suit would affect the property interests of the stockholders. Certainly no transferee was bound to assume that the Oregon Short Line would undertake to repudiate its sale of its Northern Pacific shares, and to withdraw from the Securities Company's possession assets which for a valuable consideration it had transferred to the treasury as a common fund for the benefit of all Securities Company stockholders.

It is true that parties to an illegal contract cannot by estoppel make the contract legal. It is not true, however, that the complainants may not have estopped themselves from making use of the decree of illegality as an adjudication that the Company was merely a custodian, and was not an actual owner of the railway shares. The complainants have held the Securities Company out, and have permitted that company to hold itself out, to the world, as the owner of these assets. Every certificate issued by the company under their direction purported to be, not a certificate representing some definite thing deposited, but a certificate of joint ownership in all the assets of the company, without distinction or discrimination. This estoppel exists equally in favor of every transferee of Securities Company stock certificates, and not alone in favor of persons purchasing stock for cash.

This estoppel against complainants cannot be avoided by any contention that all purchasers of such stock certificates had notice of the fact of combination and of the law applicable thereto. Even if all such purchasers, however innocent in actual intent, did take, and now are to be deemed to have taken, the risk of a taint of illegality in the transaction, that falls far short of the assertion now made by complainants that

in fact their transfer was not what they represented it to be, but was merely a deposit in which they then retained and reserved an important interest.

FOURTH. The following table shows the profit of the complainants under the proposed plan as compared with that demanded by them:

I.

Position of complainants under our *offer*, Securities Company *offers*.		
32,070,612 Northern Pacific.		
24,638,919 Great Northern.		
These stocks are conceded now to be worth		$85,181,488
They put in		
37,023,000 Common Stock@115	$42,576,450	
41,085,000 Preferred	41,085,000	
	$83,661,450	
Premium	7,746,050	
	$91,407,500	
Less cash received	8,915,629	
		82,491,871
Complainants net profit under our *offer*		$2,689,617

II.

Position of complainants under their demand.

$71,732,062 N. P. stock worth	$96,838,284	
Less cash tendered	2,539,691	
		$94,298,593
They put in as above		82,491,871
Profit demanded by complainants		$11,806,722

For every Northern Pacific common share other than those of complainants, the Securities Company gave 115 in its own shares. No other Northern Pacific preferred stock was purchased by the Securities Company. As to all other holders of Northern Pacific preferred, that stock was the same as cash at par.

Tenth.

Whatever view be taken of other points, no principle of law or of equity can justify the injunction so far as it relates to 347,090 shares of new common stock.

First. The injunction (p. 350) ties up two several parcels of Northern Pacific common stock. The *first parcel* comprises the 370,230 shares that the Securities Company received from Harriman and Pierce, upon 18th November, 1901. The *second parcel* comprises the 347,090 shares that it received from the Northern Pacific Railway Company on 27th December, 1901.

This second parcel of 347,090 shares never belonged to, and never was in possession of, Harriman and Pierce; and no injunction should have issued in respect of it.

The particular questions concerning this second parcel were never presented, and were not considered in the Government suit.

Second. Originally, in Article IX. of their bill (p. 6; see also p. 375) the complainants asserted a right in a second parcel consisting not of 347,090 shares but of 410,850 shares of new common stock.

This claim was based upon the allegation of the bill verified by Mr. Pierce

"that at the time of such change on the 18th of November, 1901, it was *agreed between* (or 'understood and agreed by'—p. 375) said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant, Northern Securities Company, into common stock of the Northern Pacific Railway Company of the same par value" (*i. e.*, $41,085,000).

This allegation, with a change as to the parties and as to the character of the agreement, is reiterated by Mr. Harriman in his affidavit of May 16, as follows:

"At the time I agreed with *Messrs. J. P. Morgan & Co.* to turn over the stock of the Northern Pacific Company held by the Oregon Short Line Company *it had been understood between them and myself* that *all* of the outstanding preferred stock of the Northern Pacific Company would be converted into common stock."

The allegation of the bill certainly is, and will be seen to be, in defiance of the facts.

The averment of Mr. Harriman is true only if meaning that, *as to the Northern Pacific Company, all* of its $75,000,000 preferred stock was converted into $75,000,000 of new common stock. It is grotesquely misleading, if understood as asserting that any holder of preferred stock had or acquired or exercised any right to obtain new common stock in exchange for his preferred stock. The entire history of the case, developed in transactions to which Mr. Harriman was a party, and concerning which he has testified, refutes any such suggestion and makes it impossible to believe that he ever intended to state, much less to swear, that any right of conversion was ever conceded to the holders of preferred stock. Upon the denial to the holders of preferred stock of any right to take new common stock, turned and finally rested the ultimate control of the Hill-Morgan party as determined in the courts as well as in the financial world.

The testimony on this point will repay careful consideration.

THIRD. The intention of the Hill-Morgan party to retire *all of the preferred stock* without affording holders of the preferred stock the right to participate in the new common stock, was asserted certainly as early as the spring of 1901, and at about that time it was communicated by Mr. Hill to Mr. Harriman, as appears

fully and incontrovertibly from the following averments of Mr. Harriman's affidavit in the present suit (R., p. 187) :

"In pursuance of this policy, the Oregon Short Line Company acquired about $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, which had been purchased prior to May 9, 1901. Its purchases consisted of $41,085,000 par value of preferred stock and $37,023,000 par value of common stock. Such purchases constituted a clear majority of the entire authorized and outstanding issue of the capital stock of the Northern Pacific Railway Company, namely, $155,000,000 par value, divided into $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, and carried the control of the company.

"VI. Subsequently, I was informed by Mr. James J. Hill that he and his associates, together with Messrs. J. P. Morgan & Co. had acquired and then held or controlled a majority of the Northern Pacific common stock, consisting of about $42,000,000 par value thereof, and that *it was intended to retire the preferred stock of the Northern Pacific Company and convert it into common stock without affording the holders of the preferred stock the right to participate in any new securities that might be issued.* This statement of Mr. Hill was confirmed by members of the firm of J. P. Morgan & Co. *The result of such a plan, if consummated, would be to deprive the Oregon Short Line Company of its majority holding of the stock of the Northern Pacific Company and the control which such holding would represent.* The plan as outlined was to retire the existing preferred stock by means of certificates convertible into common stock, to be offered for subscription solely to the holders of existing common stock at the rate of seventy-five eightieths (75-80ths) of their holdings. At that time, and during the entire year of 1901, Mr. Hill and his associates, together with Messrs. Morgan & Co., controlled the board of directors of the Northern Pacific Company, and a majority of such board were their nominees and appointed in their interest. After such proposed conversion, Messrs. Hill and Morgan and their associates would hold in one combination of men acting together a majority of the stock of the Northern Pacific Company."

See, also, Record, pp. 236–239.

The intention thus announced to Mr. Harriman early in 1901 was carried into effect November 13, 1901, at the 83rd meeting of the directors of the Northern Pacific Railway Company, at which Mr. Harriman was present, being then elected a member of the Executive Committee (R. p. 281).

At this meeting were adopted by unanimous vote (including that of Mr. Harriman), the resolutions for the retirement of the preferred stock and the notice thereof to be given to the holders of preferred stock. These resolutions are fully set forth in the record (p. 282–287). Subsequent proceedings for such conversion were taken by the Executive Committee upon November 15 and 18, 1901 (R. p. 287–296). In these proceedings by the Executive Committee, Mr. Harriman participated. At the meeting on Monday, November 18, at two o'clock P. M., it was voted to offer to every holder of common stock the opportunity to purchase at par, to an amount equal to seventy-five eightieths of the par amount of his common stock, certificates of indebtedness of the Northern Pacific Railway Company (part of the total issue of $75,000,000) convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of $100 par value for each $100 of the principal of such convertible certificates remaining unpaid at the date of such conversion (R. p. 293-296).

It is worthy of notice that this decisive action had been taken with Mr. Harriman's participation at or *prior* to November 18, 1901, the date of his sale of the Northern Pacific shares now in question. This being the case, it is difficult to understand, as a statement of fact, the averments of Article IX. of the bill of complaint (R. p. 6; also p. 375) that *at the time of such exchange* on said 18th of November, 1901, it was "agreed between", or that it was "understood and agreed by", said Harriman and Pierce and said Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be

converted into the common stock of the Northern Pacific Railway Company.

Five days prior to that date, Mr. Harriman had voted that no preferred stockholder should have a right of conversion, and upon this very 18th day of November he had voted to offer to common stockholders the exclusive right to take the new common stock. The completeness of Mr. Harriman's understanding that no preferred stockholder would have the right to convert, but that all right to the new common stock would be lodged in the holders of the old common stock, is further shown by Mr. Harriman's other averments in his same affidavit (R. p. 158). On November 18, 1901, Messrs. J. P. Morgan & Co. notified him to deliver the Northern Pacific stock to the Northern Securities Company, and informed him that such company would close the transaction, and that they would receive from it the stock and cash payments agreed upon, which agreement was carried out.

The terms of the agreement and the inducement thereto are stated by Mr. Harriman as follows (R. p. 155, 157–158):

"I was then urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company on the ground that it would be a minority holding under the plan of conversion if consummated, that the majority would be held by the holding company, and that there would probably be no market for any such minority holding. They further stated that upon the organization of the proposed holding company, they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take in the common stock held by them and Mr. Hill and his associates, and all other parties, and they thereupon offered me those terms. I took the matter under consideration and conferred with members of the board of directors of the Oregon Short Line Company. *The conversion under conditions reducing the Oregon Short Line holdings to a minority*

was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash."

In the suit of the State of Minnesota, Mr. Harriman gave the following testimony, which by stipulation became part of the evidence in the Government suit. (R. p. 239):

"Q. Did you finally consent to surrender your holdings on the basis on which you did because you had made up your mind they would carry out the determination you had heard expressed, to retire the preferred stock, and thus take away from you the controlling interest in the stock of the Northern Pacific?

"A. I think I recollect pretty clearly that from our standpoint we thought it was better to accept that price for our stock than to go into a legal contest.

"Q. And you understood that if you did not do that you would have a legal contest on that question?

"A. Well, we took it for granted, naturally, action having been taken determining to retire the preferred stock.

"Q. Well, action was not taken to retire the preferred stock until your negotiations had nearly reached a conclusion?

"A. Yes, but they had not reached a conclusion.

"Q. That is, you waited until the very last moment to see if they would do what you understood they would do?

"A. Well, we were very patient."

The conditions thus presented by Mr. Harriman himself, showing his early and perfect familiarity

with the whole plan for the retirement of the preferred stock for the benefit of the common stock; the offer to purchase the Oregon Short Line holdings of Northern Pacific stock "and to pay therefor in the stock of the holding company *at the rate of 115 for all of our stock*"; and the recognition of himself and of the Oregon Short Line directors that "*the conversion under conditions reducing the Ore-*" *gon Short Line holdings to a minority was then a fore-*" *gone conclusion unless we were prepared to commence* " *litigation which would be protracted*"—these conditions, we repeat, are wholly inconsistent with any understanding or agreement then or thereafter on the part of J. P. Morgan & Co. or of the Securities Company that the outstanding preferred stock of the Northern Pacific Company, or even the portion of it held by the Oregon Short Line Company, would be converted into common stock.

If it had been agreed that the Harriman and Pierce stock was to be converted for their benefit, then the Oregon Short Line directors would not have been contemplating themselves as occupying the dreaded position of a minority stockholder of the Northern Pacific Company. On the other hand, by an outright sale to the Northern Securities Company, they would divest themselves of all interest, either legal or financial, in any use by the Securities Company of the stock so sold. Because they wished to be neither in the minority, nor in litigation, they concluded to make an outright sale, and therefore they had no reason to make any stipulation as to the way in which the buyer should use the stock.

The alleged agreement to convert the preferred stock into common stock is further negatived by the resolutions of the Securities Company directors (adopted with Mr. Harriman's knowledge upon November 18, 1901,) pursuant to which the Harriman and Pierce stock was acquired. Mr. Hill testifies (R. p. 271) that "no other or additional contract, agreement or " understanding, relative to the acquisition of such

" shares by the Northern Securities Company, than is " expressed in such resolution, was ever made or " authorized by said Company."

Mr. Hill's denial of the agreement is supported by the circumstances. Mr. Harriman states that Morgan & Co.'s offer of 115 for *all of the* Oregon Short Line holdings amounted to $89,824,208 in Northern Securities stock. The price actually paid was $91,407,500 (in Securities stock $82,491,871 and in cash $8,915,629). Thus there was actually paid to Harriman and Pierce a price which by the sum of $1,583,292 exceeded the total value of all of the holdings of the Oregon Short Line Company at 115, even though all of those holdings had been common stock. The payment of a sum exceeding the stipulated value of all of the stock, even though the preferred were considered as though converted into common stock, excludes the possibility that there was an agreement by the buyer for the benefit of the vendor that it would convert into common stock the preferred stock thus bought and paid for.

This conclusion is fortified by a consideration of the legal situation. In their brief filed January 23 in support of the petition for writ of *certiorari*, the petitioners' counsel quoted a statement of Judge Hook in the opinion delivered by him for the Circuit Court of Appeals in *Weidenfeld v. Northern Pacific Ry. Co.* (129 Fed Rep., 305, 309), as though he had held that the preferred stock had been converted into the common stock of the Company. This opinion, however, was announced in the suit brought *by a holder of common stock* disputing the right of the Northern Pacific Company *as a corporation* either to retire or to convert its preferred stock. In such case Judge Hook affirmed *the right of the Company* to retire or to convert all of its preferred stock by means of an issue of an equal amount of new common stock. He did not undertake to pass upon questions as between the two

classes of stockholders. *Weidenfeld's case involved no consideration or decision of any right of a preferred stockholder.*

As was observed by Judge HOOK:

"It is true that the preferred stockholders were not "accorded the privilege of subscribing to the new issue "of common stock; but certainly that fact is not a "proper subject for complaint on the part of the ap- "pellant. His holdings were confined to 100 shares "of common stock. He is not the protector or the "conservator of the personal rights of the preferred "stockholders. The claim that their rights were de- "nied may well be left to them to be asserted" (129 Fed. 309).

The question as to *the right of the preferred stockholder* was fiercely asserted and was firmly decided in the Supreme Court of the State of New York in the case of *Hackett v. Northern Pacific Ry. Co.* (36 Misc. Rep. 593). The luminous and convincing opinion of Mr. Justice SCOTT is printed in the Appendix (p. 376). The soundness of his decision that a preferred stockholder had no right to new common stock was everywhere recognized. Until the filing of the amended bill in the present case, no other holder of preferred stock has pretended to assert such a right.

The preferred stock turned over by Harriman and Pierce, was actually retired, and was satisfied on January 2, 1902, as is shown by the affidavit of Mr. Nichols (R. p. 265) and by that of Mr. Mahl, Comptroller of the Oregon Short Line (R. p. 176–182). Mr. Harriman's averment that the facts stated in Mr. Mahl's affidavit had come to his knowledge only a few days preceding May 16, 1904, is without apparent purpose unless it be to relieve himself of the constructive notice of entries in the Securities Company's books, which otherwise might be imputed to him as a member of the Executive Committee of that Company.

Upon this incontestible showing, it is impossible to believe that there was ever any agreement that the preferred stock sold by the Oregon Short Line should be converted into common stock.

FOURTH. The facts already considered show that upon December 27, 1901, as holder of 370,230 shares of common stock acquired from Harriman and Pierce, and in an amount equal to seventy-five eightieths thereof, the Securities Company subscribed for 347,090 shares of the new common stock. This new common stock was paid for by a cheque of the Securities Company upon its bankers J. P. Morgan & Co. for $34,709,062.50, and upon the same day the Northern Securities Company received from the Northern Pacific Railway Company the cheque of that Company, upon the same bankers, for $34,709,000.

This transaction having been criticised by the complainants as a mere exchange of cheques, it is well in this place to observe that the entire transaction involved an actual expenditure by the Securities Company of its own cash to the extent of $2,519,618.50, as follows:

CASH PAYMENTS BY SECURITIES COMPANY

For new common stock	$34,709,062.50
To Harriman and Pierce	8,915,629.00
Total	$43,624,684.50

CASH RECEIPTS BY SECURITIES COMPANY

For par proceeds of preferred stock	41,085,000.00.
Excess of cash payments by Securities Company	$2,519,684.50)

FIFTH. It remains now to consider whether the complainants have any claim in respect of such new common stock received by the Securities Company, not in exchange for preferred stock, but in the exercise of its right of subscription in respect of the common stock by it received from Harriman and Pierce.

Of course the pretense of any stipulation by the purchaser as to the way in which it should use the stock, that it had purchased and had paid for, is as incredible

with reference to the purchase of new common stock, as already we have seen it to be with reference to a conversion of the preferred stock.

But there are additional and cogent reasons compelling the rejection of the suggestion that such a stipulation was in fact made, even though it might have been made by parties not competent in business.

In his testimony again and again quoted in this brief Mr. Harriman declares that no conditions were attached to the sale, and so does Mr. Hill (R. p. 271).

The assertion in the bill of complaint is that there was an agreement that the preferred stock should be converted into common stock. This assertion, though ill founded, is not equivalent to, but excludes, an assertion that the contention there was a very different agreement, viz., that for the benefit of Harriman and Pierce, the Northern Securities Company would exercise its subscription rights to an amount equal to seventy-five eightieths of the common stock purchased from them.

There being, then, no express agreement which would entitle the complainants to the new common stock, they cannot maintain a right thereto upon the theory that such new common stock was an automatic increase or outgrowth of the old common stock transferred by them. The new common stock was not a natural increase of the old common stock, as in the case of a mare with foal or a cow with calf. The mere reception of the old common stock and of the preferred stock by the Securities Company, in and of itself would not have resulted in its reception of the new stock. To procure such new common stock, the Securities Company was obliged to exercise its judgment, to incur risk, and to use a large sum of its own cash or cash assets.

As already shown, exclusive of the Harriman and Pierce preferred stock, the Northern Securi-

ties Company had become possessed of an absolute majority of the total capital stock of the Northern Pacific Railway Company. Therefore, for any purpose of control, the acquisition of more new common stock was wholly unnecessary. The $41,085,000 cash that the Securities Company received upon the retirement of the preferred stock, was available for any of its corporate purposes. It might well be that in view of its existing control of the Northern Pacific, it might choose to use this vast sum for the purchase of other and independent properties, such as its certificate of incorporation authorized it to hold. It did choose to apply these many millions to the purchase of new common stock of the Northern Pacific, not because of any necessity or obligation to make such purchase, but because in the exercise of their own judgment the managers of the Securitie sCompany deemed that such purchase would be wise. The risk of this purchase was altogether that of the Securities Company; for if within the year 1902 the Northern Pacific stock had declined to the low price at which it was selling in 1900, an enormous loss would have fallen upon the Securities Company and not upon the complainants.

Furthermore, as already we have seen, the procurement of this new common stock involved an expenditure by the Securities Company of its own cash or cash assets to the amount of $2,519,684.56 in excess of its net cash receipts from or on account of this transaction.

Such expenditure, and the important elements of judgment and risk, interpose themselves as an insuperable obstacle to any contention that the acquisition of this new common stock was a mere incident to, or was an issue out of, property received by the Securities Company from Harriman and Pierce.

Thus it appears that the complainants are not entitled to this new common stock either upon the theory that in equity the complainants are entitled to

follow the proceeds of stock delivered to the Securities Company, or upon the theory of an agreement—for none existed.

If the complainants' claim to this new common stock be based upon a theory that the Securities Company was a mere custodian of the shares received by it, the answer is that this new common stock did not come into existence until after the sale by the complainants, who of course never held the same or any title thereto. The only relief open to complainants would be a suit in equity to follow the Securities Company's exercise of its optional right, and to endeavor to impress the result thereof with a trust in their favor. To the establishment of any such right a decree of a court of equity would be a pre-requisite, for they would be demanding the conveyance of a title not yet vested in them. To such relief, there would be two absolutely sufficient answers. The first would be that no court of equity would undertake to enforce a trust growing out of an illegal agreement by the complainants relying thereon. The second, would be that, in part at least, the new stock was the result of the Securities Company's use of its own cash or cash assets in the exercise of its own discretion and at its own risk. Such an purchase could not be charged against the Securities Company as an acquisition in trust. No trustee is bound to use his own means for the benefit of a trust estate.

Upon these propositions, the opinion in the *Pullman Central* Case (171 U. S., 138, 159) is decisive. Concerning the right of the claim to new contracts, or to earnings resulting from its use of the property under the illegal lease, Mr. Justice PECKHAM stated the ruling of this Court as follows (*Appendix*, p. 327):

"What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretense of a claim in regard to them by virtue of and through the illegal contract. A resort to the

illegal instrument cannot be permitted for the purpose of sustaining any recovery. * * * * * *

"The contracts and the patents must be eliminated from the value of the property.

"Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

"There is no question of trustee in the case. *Root v. Railway Company*, 105 U. S. 189, 215.

"The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

"As to the claim of the lessor that its business has been broken up, its contracts with railroads termimated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as

the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract itself or upon alleged damages arising out of its non-fulfillment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

"We conclude that the cross-defendant is not liable for the contracts and patents transferred nor for the possible damage the Central Company may have sustained, as above stated."

On the other hand, if the complainants were to claim a right to this new common stock on the basis of an express agreement (though, as we have seen, there was no express agreement), the mere assertion by the complainants of a stipulation as a part of an agreement generally illegal, and their attempt to enforce the same, would be not only futile in itself, but its mere assertion would validate their prayer for the relief, if any, to which otherwise they might be entitled. The rule is thus stated in Story's Equity Jurisprudence (13 ed. vol. 2; p. 301; *Appendix* p. 371).

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to; *and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it.* (See also *McMullen* v. *Hoffman*, *Appendix*, pp. 330, 340; *Trist* v. *Child*, 21 Wall. 441–8).

In closing, it may be observed that upon the record, and conceding to the complainants every one of their claims excepting the alleged and disputed right in respect of the preferred stock, all that they could recover would be $37,023,000 common stock, and $41,085,000 cash to represent the value of the preferred stock, which was a cash asset at par at the time when they sold it. They would have to give credit for the $8,915,629 cash that they received, interest and dividends being properly adjusted. It is impossible that any court should undertake to work out for the benefit of the complainants an agreement which they have repudiated as illegal.

However, all of the complainants' claim lacks equity and it should be denied *in toto*.

Eleventh.

The decree of the Circuit Court of Appeals was right, and should be affirmed with costs.

20 February, 1905.

ELIHU ROOT,
FRANCIS LYNDE STETSON,
Of Counsel for Respondents.

United States Supreme Court

OCTOBER TERM, 1903.

[illegible]

IN EQUITY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

vs.

NORTHERN SECURITIES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

AUTHORITIES.

APPENDIX TO BRIEF OF MR. ROOT AND MR. STETSON.

ELIHU ROOT,
FRANCIS LYNDE STETSON,

Pr. Respondent.

WASHINGTON, 10 February, 1903.

C. G. [illegible], Walker and Center Street, N. Y.

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* NOTE.—See, also, the cases not herein reprinted in full, but cited *post* pp. ix.-xxvii.

II. After delivery of the property for an accepted consideration, the contract has ceased to be executory, even though it was entered into with the expectation of a continuity of benefits no longer susceptible of complete realization.

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Vandalia Case (145 U. S. 393)..... 265
Equitable Soc. v. Wetherill (U. S. C. C. A.).. 359
McIntosh v. Wilson (81 Iowa, 339)..... 63
Atwood v. Fisk (101 Mass. 353)..... 84
Bruer v. Kansas Ins. Co. (100 Mo. App. 540) 112
Ellicott v. Chamberlin (38 N. J. Eq. 604)..... 139
Pollock : Principles of Contract..... 364

III. The indisposition of the court to grant relief is not limited to the cases in which the plaintiff is endeavoring to enforce the contract; a party exhibiting the contract merely to denounce it as illegal will be denied judicial assistance.

Taylor v. Chester (L. R. 4 Q. B. 309)..... 1
Brindley v. Lawton (53 N. J. Eq. 259)..... 146
Hope v. Linden Assn. (29 Vroom, 627)..... 149
Herman v. Jeuchner (L. R. 12 Q. B. D. 561).. 14
Kearley v. Thompson (L. R. 24 Q. B. D. 742) 19
Harse v. Pearl Co. (L. R. [1904] 1 K. B. 558) 35
Hill v. Freeman (73 Ala. 200)..... 43
Watkins v. Nugen (45 S. E. 262)..... 51
McIntosh v. Wilson (81 Iowa 339)..... 63
Atwood v. Fisk (101 Mass. 353)..... 84
Myers v. Meinrath (101 Mass. 366)..... 86
Bagg v. Jerome (7 Mich. 145)..... 102
Block v. McMurry (56 Misc. 217)..... 105
White v. Hunter (23 N. H. 128)..... 128
Ellicott v. Chamberlin (38 N. J. Eq. 604)..... 139
Markley v. Village (51 N. E. 28)..... 229
Moore v. Kendall (52 Am. Dec. 145)..... 237
Equitable Soc. v. Wetherill (127 F. R. 946).. 359

IV. In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both (*a*) because such possession stands as the equivalent of a title in the defendant, and (*b*) because to discourage such transactions, courts will be deaf to the clamor of a complainant in pari delicto.

Myers v. Meinrath (101 Mass. 366)..... 86
Horton v. Buffington (105 Mass. 399)..... 90
Bagg v. Jerome (7 Mich. 145)..... 102
Block v. McMurry (56 Mich. 217)..... 105
Foster v. Wooten (67 Misc. 540)..... 109
Smith v. Bean (15 N. H. 577)..... 125
Watkins v. Nugen (45 S. E. 262)..... 51
McIntosh v. Wilson (81 Iowa 339)..... 63
Traders Nat. Bk. v. Steere (165 Mass. 389).. 98
Harris: Sunday Laws (Sec. 169)..... 375

V. The condition of the possessor is so much better than that even of the original owner, that the possessor can recover the property not only from a stranger but from such original owner, if by chance the latter has been able to repossess himself of the property.

Kinney v. McDermott (55 Iowa 674)..... 60
Smith v. Bean (17 N. H. 577)..... 125
Thompson v. Williams (58 N. H. 248)..... 136
Cohn v. Heimbauch (86 Wis. 176)..... 241

VI. The distinction between mala in se, and mala prohibita has been abandoned, but were this otherwise, there is authority for regarding as malum in se any act contravening public policy and a penal statute.

Irwin v. Curie (171 N. Y. 409, 415)..... 227
Gibbs v. Gas Co. (130 U. S. 396)..... 262
McMullen v. Hoffman (174 U. S. 639)..... 330
Equitable Society v. Wetherill (127 F. R. 946) 359

VII. The doctrine of locus poenitentiae is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice.

Vandalia case (145 U. S. 393)..... 256
Union T. Co. v. Ill. Co. (117 U. S. 434)..... 300
In re Great Berlin S. Co. (26 Ch. D. 616)..... 8

See also

Hardwood v. Railroad Co. (17 Wallace, 80).
Twin Lick Oil Co. v. Marbury (91 U. S. 587).
Grimes v. Sanders (93 U. S. 55, 62).
Haywood v. Nat'l Bank (96 U. S. 611, 617).
McLean v. Clapp (141 U. S. 429, 432).
Hoyt v. Latham (143 U. S. 553, 567).
Townsend v. Vanderworker (160 U. S. 171).
Ward v. Sherman (192 U. S. 168).
Rugan v. Sabin (53 Fed. 415, 418).
Kinney v. Webb (54 Fed. 34).
Boston R. R. v. New York R. R. (13 R. I. 264).
Kitchen v. St. Louis Ry. Co. (69 Mo. 224).
Peabody *et al.* v. Flint (6 Allen, 56).
Dunphy v. Travelers' Assn. (16 N. E. 426).
Graham v. Birkenhead (2 McN. & G., 156).

VIII. The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when necessary to promote equity and justice.

Pullman Co. v. Central Co. (171 U. S. 138), 307, 319
Spring Co. v. Knowlton (103 U. S. 49) 256

IX. In cases presenting no such special considerations of equity, justice or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder.

Scott v. Brown (L. R. [1892] 2 Q. B. 724)... 26
In re Great Berlin S. Co. (26 Ch. D.) 8
McIntosh v. Wilson (81 Iowa 339)..... 63
Bruer v. Kansas Ins. Co. (100 Mo. App. 540).. 112
Thompson v. Williams (58 N. H. 248)..... 136
Markley v. Village (51 N. E. 28)..... 229
Storz v. Finkelstein (46 Neb. 477)..... 115

NORTHERN PACIFIC PREFERRED STOCK RETIREMENT.

Hackett v. Northern Pacific Ry. Co. 376

APPLICATION OF AUTHORITIES TO THE CASE AT BAR.

I.

Evidence of ownership.

Everything in the record, by mere recital and without argument, shows that in fact and by intent of both parties, there was a sale of the Northern Pacific stock to the Securities Company in consideration of a stockholder's interest in that company, and a large sum of money—i. e. the issue to Harriman and Pierce of 824,918 shares of the stock and the payment to them of $8,915,629 in cash.

II.

Estoppel against asserting custodianship.

The complainants are estopped from asserting that the Securities Company is a trustee or bailee. They have publicly held out the Securities Company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

"In *Union Trust Co. v. Illinois Midland Co.*, "117 U. S. 434, after one railroad corporation had "purchased of two others their connecting rail- "roads and their franchises, a receiver had been "appointed of all its property, including the three "railroads, and, under the direction of the court, "and *without objection by any of the parties inter- "ested, had for years administered the whole as a "unit, and incurred expenses and issued certificates "accordingly.* It was held that the *holders of*

Estoppel against asserting custodianship.

" *bonds secured by mortgage of one of the purchased* " *railroads could not, for want of affirmative legis-* " *lative authority for the sale and purchase of that* " *road, claim a priority of lien upon it as against* " *the holders of certificates issued by the receiver for* " *necessary and proper expenses for the whole line;* " and this court, as declared in its opinion de- " livered by Mr. Justice BLATCHFORD, rested this " conclusion ' on the principle that *nonaction on* " *the part of the bondholders* and their trustee " which allowed the court and the receivers to go " on during the entire litigation contracting debts " in respect to the whole line operated as a unit, " and administering the property as one, under " circumstances where, as shown, it was and is im- " possible to separate the interests, as to expendi- " tures and benefits, in respect to the matters now " questioned, and where important rights have ac- " crued on the faith of the unity of the interests, " *amounts to such acquiescence as should operate as* " *an estoppel* ' (117 U. S. 467–469). * * * *

" This distinction is clearly brought out in " *Pennsylvania Railroad v. St. Louis, &c., Rail-* " *road*, above cited, in which it was argued, sub- " stantially as in the present case, that, although " the contract of lease might be void, so that no " action could originally have been maintained " upon it, yet there had been for years *such per-* " *formance of it, in the use, possession and control* " *by the defendants of the plaintiff's road and fran-* " *chise that they could not now be permitted to re-* " *pudiate or abandon it;* and that the case came " *within that class in which it had been held that,* " *where a contract has been so far executed that* " *property has passed and rights have been acquired* " *under it, the courts will not disturb the possession* " *of such property, or compel restitution of money* " *received under such contract.* In answering that " objection, Mr. Justice MILLER, speaking for the " court, said : ' Undoubtedly there are *such decisions* " *in courts of high authority and there is such a* " *principle* very sound in its application to appro- " priate cases." **Central Co. v. Pullman Co.,** *(post,* pp. **279, 300–1.**)

" The property in controversy having been trans- " ferred to the son, to be held and treated by him as " its ostensible owner, to accomplish a purpose pro- " hibited by law, the father lost the right to reclaim it

" by law. It could have been used by the son for his own " purposes." **McIntosh v. Wilson** *(post* p. **63**).

Estoppel against asserting custodianship.

One who takes a promissory note, *bearing date of a secular day*, before maturity, in good faith and for a valuable consideration, may maintain an action thereon, against the maker, *although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee.* **Cranson v. Goss,** *post* pp. **92, 94.**

III.

But whether the Securities Company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose, is barred by the rule In pari delicto potior est conditio defendentis et possidentis.

Whether vendee or custodian, maxim applies.

First. The complainants cannot avoid the bar of the rule, if the Securities Company be regarded as vendee.

Securities Co. as vendee.

1. The complainants and the Securities Company are in pari delicto.

In **Irwin v. Curie** *(post* p. **227**), expounding **Leonard v. Poole** *(post* p. **224**),—an action for accounting between parties to a combination to advance the price of lard—PARKER, C. J., declared that " the persons interested in those transactions were all " of them, under the statutes of this state, engaged in " a conspiracy to commit an act injurious to trade or " commerce, and the contract under which they were " proceeding was *malum in se.*"

In pari delicto.

As vendee.—*In pari delicto.*

In **White v. Hunter** *(post* p. **128**), it was held to be a well-settled rule of law that as to all "*acts* "*and contracts which are unlawful because hostile to* "*public policy, the parties thereto are regarded as being* "*in pari delicto.*"

In **Inhabitants v. Eaton** *(post* p. **68**), the Court, after referring to the several classes of transactions in which the parties are considered not *in pari delicto*, proceeds further to declare "that in all "acts which are unlawful on account of their immor- "ality, *or because they are hostile to public policy, there* "*the parties to the act are in pari delicto.*"

See, also, the numerous decisions printed in full or summarized in this Appendix, wherein the parties were held to be *in pari delicto.*

As vendee.—Contract executed.

2. The complainants transferred property to the Securities Company for a purpose forbidden by law, and in exchange received shares of stock and cash. The illegal contract has been executed in full, or in any event to such a degree as to bar this suit for its rescission and the recovery of the property transferred.

No recovery because of continuing corporate contract.

(**A**) It is executed to such a degree as to bar rescission, even though the contractual obligations of the corporation to its stockholders be regarded as continuing.

In the **Vandalia case** (*post* p. **265**) the complainant, at the time of the suit, had received only 17 of the 999 yearly payments to be made in consideration of its *ultra vires* lease to the defendant; but the Court regarded the illegal contract of lease as so far executed that the lessor could not be heard to assert its illegality or to rescind its lease.

In **McIntosh v. Wilson** *(post* p. **63**), the plaintiff for an illegal purpose, placed property in the hands of his son, to be held by him "*as ostensible owner*" *for an indefinite period*, the profits to be paid to the plaintiff: it was held that the plaintiff had lost the right to reclaim the property by law.

In **Kearley v. Thomson** *(post* p. **19**), the contract was performed as to the first stipulation *(i. e.,* that the defendants should not appear at the public examination of the bankrupt), but was unperformed as to the second stipulation *(i. e.,* that they should not appear at the application for discharge), no application for discharge having been made at the time of suit. It was held that money paid on the illegal contract could not be recovered. As vendee.—No recovery because of continuing corporate contract.

In **White v. Hunter** *(post* p. **128**), the object and purpose of the conveyance was to provide for the support of the grantor and the grantee *during their lives*, and it was held that as the consideration was an immoral one, the *grantor after the transfer could not have maintained an action to recover possession of the land*, and therefore his heir (the plaintiff) could not.

In **Miller v. Larson** (19 Wis. 463), the defense in ejectment was that defendant was in possession of land in pursuance of an agreement by which he had advanced money to carry on a lawsuit for plaintiff, which agreement was champertous and illegal. There was evidence, which was relied on by the plaintiff, showing that *the illegal agreement had not been fully performed at the time of suit.* The decision was that the plaintiff could not succeed in his action. The Court said: "The contract has already been executed; "*if not wholly, at least partially, by both parties* * * * "*If it has been partially executed, and money or labor* "*expended on one side and land and property delivered* "*on the other, in part performance of it, as to such part* "*performance the condition of the parties is the same* "*as if it had been fully performed.*"

Martin v. Wade (37 Cal. 168) was an action for the recovery of money (represented by a promissory note) advanced to a candidate for public office, in consideration for his promise to share with the lender the emoluments of the office. The opinion recites "that the plaintiff's position is that the *contract having been rescinded and annulled before performance*, Wiley (the plaintiff's assignor) was entitled to recover the money he had paid on the contract." The Court decided that *whether a contract against public policy was executory or executed, no action could be brought either* on the contract, *or to recover back the consideration*, or to recover judgment on a promissory note made in consideration of the cancellation of such contract; and furthermore that there *could be no liability or implied promise to repay the money advanced under the contract.*

To the same effect are the many cases of transfers in composition of felonies, etc., where in its very nature the consideration is continuing. See **Inhabitants v. Eaton** *(post* p. **68**); **Atwood v. Fisk** *(post* p. **84**); **Traders Bank v. Steere** *(post* p. **98**); **Adams v. Barrett** (5 Ga. 405); **Rock v. Mathews** (35 W. Va. 531 : 14 S. E., 137).

See also **Ward v. Hartley** (78 S. W. 302).

As vendee. No recovery because of Government's decree.

(**B**) It is executed to such a degree as to bar rescission, even though the decree in the Government suit prevents the corporation from collecting moneys applicable to the payment of dividends to its stockholders.

In **McIntosh v. Wilson** *(post,* p. **63**), the object of the contract—*i. e.*, the enabling of the plaintiff to conduct a pharmacy without a license by keeping his son in possession as *ostensible owner*—failed because of the seizure of the property by creditors of the son. The Court held that by the transfer, the *plaintiff lost the right to recover the property by law,* and *it could have been used by the son for the payment of his debts, and therefore was subject to legal process in favor of the son's creditors.*

In Re Great Berlin Steamboat Co., *(post* p. **8**), the Court pointed out that any further performance of the illegal purpose had been made impossible by the court order for the compulsory winding up of the Company.

In **Shattuck v. Watson** (53 Ark. 147 : 13 S. W. 516) involved the composition of a felony. After the criminal had been prosecuted *through other agencies,* one of the parties sought to disaffirm the contract and to recover back the securities given in consideration for the composition. It was decided that the law would lend no aid to either party to the illegality.

Compton v. Bunker Hill Bank (96 Ill. 301 : 36 Am. Rep. 147) was a suit to set aside a deed. Quoting from the opinion,—"The gist of appellant's "case is that her deed was executed in consideration "of an agreement to compound a criminal offense, "which is in contravention of law, and *she has not "realized therefrom the result that she anticipated.*" The Court *held* that the *contract was executed,* and would not lend its aid to cancel the instrument.

(**C**) It is executed to such a degree as to bar rescission, even if the proposed *pro rata* distribution of corporate assets would violate some term of the contract between the corporation and the complainants, which, in fact, it would not.

As vendee.—No recovery because of proposed distribution.

In **Bruer v. Kansas M. I. Co.** (*post*, p. **112**), the defendant assented to an illegal assignment to Bruer of a policy of life insurance, and received premiums from him, and thereafter denied liability on the policy to Bruer, who brought suit to recover the premiums. It was held that Bruer could not recover.

In **Hooker v. DePalos** (28 Ohio St. 251) defendants in error sued to recover $500 paid by them to plaintiffs in error, on account of the purchase price named in a contract for the sale of lands to constitute prizes in a lottery scheme, to be set on foot by the vendees, which was held to be illegal as against public policy and as contrary to the provisions of a penal statute. The scheme proving a failure financially, and the plaintiffs below finding themselves in danger of indictment, they defaulted the subsequent payments, disaffirmed the contract and brought this suit. It was *held* that the vendee could not maintain the action to recover from the vendor the $500 paid on the contract, the Court being of opinion (to quote from the syllabus of the report) that "when a contract "has been *partially performed by both parties*, "*so that the evil purpose of the contract has* "*been in part effected by the co-operation of* "*both parties, as where the vendor has withdrawn* "*the land from the market, and for some months* "*subjected it to the control of the vendee for the pur-*"*poses of the lottery*, and the vendee has paid part of "the purchase money *and has with the aid of the* "*vendor, set the enterprise on foot, and issued and sold* "*a number of lottery tickets*, then, *as to such part per-*"*formance the condition of the parties is the same as* "*though the contract had been fully executed.* The par-"ties are *in pari delicto*, and the law will aid NEITHER "OF THEM in enforcing further performance, or in "undoing what has been unlawfully done."

In **Scott v. Brown** (*post* p. **26**), the plaintiff sued to recover money given to a broker to be used in purchases of stock at a fictitious premium in the open market, the object being to defraud prospective purchasers. *The broker wholly failed to perform the*

As vendee.—No recovery because of proposed distribution.

agreement, retaining the money himself and delivering his own shares. It was held that the money could not be recovered back.

In **Markley v. Village** (*post* p. **229**) the Court declined to allow a rescission of a conveyance of land made by a village to induce a corporation to establish a manufactory, *although the corporation had wholly failed to perform its agreement.*

In **Thompson v. Williams** (*post* p. **136**) the plaintiff unsuccessfully sought to recover the agreed price of cattle by him sold on Sunday to defendant, who, it appears, previously had obtained judgment against plaintiff for trespass in retaking the cattle, *although no part of the purchase price had been paid.* See also **Kinney v. McDermott** (*post* p. **60**); **Smith v. Bean** (*post* p. **125**).

In **Cohn v. Heimbauch** (*post* p. **241**), a horse had been sold on Sunday (which was illegal), and after delivery to the vendee, had been taken into the possession of the vendor. The vendee sued in replevin for recovery, and obtained judgment, *although the purchase price had not been paid.*

In **Liness v. Hesing** (44 Ill. 113 : 92 Am. Dec 153), it appeared that the plaintiff had sent $20 to the defendant, with the object of inducing the latter to use his influence to get the former nominated for an office, without reference to the fitness of the applicant for the position or the public good, and had promised $20 more if the appointment were secured; that the *defendant received the money, and had used his influence not for the plaintiff, but against him;* and that this suit had been begun by the plaintiff for the recovery of the $20 paid. Whereupon it was held that the transaction on the part of the plaintiff was of such an improper character that the law would not afford him any remedy to recover back the payment.

Black v. Oliver (1 Ala. 449 : 35 Am. Dec. 38) was an action of detinue for the recovery of a negro slave. The evidence showed that the slave in controversy was sold by the defendant in error at a very reduced price to one Sweet, in consideration that he should make her his wife (which was illegal) and emancipate her, and that the condition had not been performed. It was held that the condition subsequent was illegal and void; that the contract of sale was executed in all other respects, and that the court would not interfere in favor of either party.

St. L. R. Co. v. Mathers, 104 Ill. 259. **Same v. Same** (71 Ill. 592; 22 Am. Rep. 122). The mate-

rial facts were as follows: Mathers had conveyed real estate to a railroad company (afterwards consolidated into the St. L. J. & Chi. R. R. Co.) by a trust deed, providing for defeasance in case the company established a depot or station within three miles of a particular point. The *company had established a station within three miles of the designated point and the grantor sought to recover back the land.* The Court held that the condition or agreement was illegal, and that a *reconveyance of the property could not be decreed on account of non-performance by the railroad company*—declaring that where real estate has been conveyed for the *express purpose of doing that which was illegal, a court of equity will not in general interfere*, but will leave the title to the property where the parties have placed it.

As vendee.—No recovery because of proposed distribution.

In **Patterson v. Donner** (48 Cal. 369), the decision is based on the proposition that if a grantee, at the time a deed is given, executes to the grantor a writing stating that if the grantee shall not procure two witnesses to testify to a certain state of facts, "the deed shall be null and void", and also stating that if the grantee shall procure such witnesses then the deed shall take effect as a mortgage, the transaction constitutes a *conveyance of the legal title with an unlawful condition subsequent*, and *the legal title would not become divested by failure to perform the illegal stipulation*, and one who *places the legal title to land in another upon an unlawful condition subsequent cannot recover it by suit at law or in equity.*

Second. Neither can the complainants avoid the operation of the rule by treating the Securities Company merely as custodian, to hold a deposited stock, to collect dividends, &c.

As Custodian.—Maxim applies.

1. The Securities Company is in pari delicto with the complainants. It was an active party to the illegality.

In pari delicto.

In **Leonard v. Poole** (*post* p. **224**),—an action for accounting between parties to a combination to advance the price of lard—the defendant, a participating broker, was held to be *in pari delicto* with his principals.

As Custodian.—*In pari delicto.*

In **Harse v. Pearl L. A. Co.** *(post* p. **35**), it appeared that, relying upon representations made by the insurance agent that a policy upon the life of his mother would be valid (such representations being made by the agent in good faith), the plaintiff, took out such policy and paid premiums thereon. The insurance being illegal, the plaintiff sued to recover the premiums paid by him. It was held that the parties were *in pari delicto*, and the premiums could not be recovered back.

In **Gibbs v. Gas Co.** *(post* p. **262**), a promoter suing for compensation for bringing about an illegal combination, was held to be *in pari delicto* with the principals.

In **Herman v. Jeuchner** *(post* p. **14**), a custodian of money deposited to indemnify him against loss on a bail bond, was held to be *in pari delicto* with the depositor.

In **Equitable Society v. Wetherill** *(post* p. **359**), an insurance broker who in violation of statute paid to the company a premium due from a policy holder, was not allowed to recover from the policy holder.

In **McIntosh v. Wilson** *(post* p. **63**), the plaintiff for an illegal purpose, placed property in the hands of his son, to be held by him "*as ostensible owner*" *for an indefinite period* the profits to be paid to the plaintiff: it was held that thereby the plaintiff lost the right to reclaim the property by law.

See also **In re Great Berlin Steamship Co.**, *post*, p. **8**; **White v. Hunter**, *post* p. **128**; **St. L. R. Co. v. Mathers** (104 Ill. 259; 71 Ill. 592); **Patterson v. Donner** (48 Cal. 369); **Rock v. Mathews** (35 W. Va. 531; 14 S. E. 137).

As Custodian.—Contract executed.

2. The complainants assisted in placing the control of the railway companies in the hands of the Securities Company, and in maintaining that status until the decree in the Government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

(**A**) The assertion of any right to withdraw is barred, even though the decree in the Government suit prevents profitable (or any) continuance of the holding of the railway stocks.

As Custodian.—No recovery because of Government's decree.

In **McIntosh v. Wilson** (*post* p. **63**), the object of the contract—*i. e.*, the enabling of the plaintiff to conduct a pharmacy without a license by keeping his son in possession as *ostensible owner*—failed because of the seizure of the property by creditors of the son. The Court held that by the transfer, the *plaintiff lost the right to recover the property by law*, and *it could have been used by the son for the payment of his debts*, and therefore was subject to legal process in favor of the son's creditors.

In Re Great Berlin Steamboat Company (*post* p. **8**): The plaintiff had made a deposit of money for the purpose of giving the Steamboat Company a false credit in order that expected inquiries from Berlin bankers might be favorably answered. *No such inquiries were made* and it appeared that none would be made. An order for compulsory winding-up having been made, the depositor sought to rescind the agreement and to recover back the deposit. His prayer was denied. *The Court here pointed out that any further performance of the illegal purpose had been made impossible by the order for the winding up of the Company.*

See also **Standard Co. v. Van Alstine** (22 Wash. 670; 62 Pac. 145.)

(**B**) The assertion of any right to withdraw is barred, even if the alleged purpose of the deposit has not been wholly accomplished, and even though it were the fact (which it is not) that the custodian still holds the deposit intact.

As Custodian.—No recovery because purpose fails.

In **Herman v. Jeuchner** (*post* **p. 14**), it was held: A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behavior during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at

As Custodian.—No recovery because purpose fails.

the expiration of that period is to be returned; and *no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, athough the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.*

In **Taylor v. Chester** *(post,* p. **1**), the plaintiff was denied legal assistance to recover a half banknote deposited to secure the payment to the pledgee of a debt founded upon an immoral consideration.

In **Rock v. Mathews** (35 W. Va. 531 : 14 S. E. 137), the delivery of a *trust deed of land* to secure the payment of money promised in composition of a felony, was held to be such an execution of the illegal contract as to preclude the plaintiff from obtaining a rescission of such trust deed.

Griffin v. Piper (55 Ill. App., 213), was a suit to recover membership fees paid by the plaintiff as an associate in an alleged combination of ice-dealers in Chicago, upon common counts of assumpsit and a special count alleging that the defendant was indebted to plaintiff for *money delivered and deposited with the defendant for safe keeping.* The opinion recites that the theory upon which recovery was sought was that the money was still in the possession of the treasurer of the defendant unexpended and that there was a place of repentance, and thereupon sets forth the decision as follows: "Without going into detail "to show that the money paid in has not remained "intact, but has been mingled with much other "money, out of which expenses have been paid, "and of which large investments have been made "in bonds for the use of the association, it is "enough to say that during the whole periods "that the appellants were respectively members, "the money they had paid in was effectively used "for the purpose of the association, as a bond of "union among the members, to keep them up to "their pledges for concerted action in preventing "competition. * * * We must leave these "parties as we find them."

In Re Great Berlin Steamboat Company *(post* p. **8**): The plaintiff had made

a deposit of money for the purpose of giving the Steamboat Company a false credit in order that expected inquiries from Berlin bankers might be favorably answered. *No such inquiries were made* and it appeared that none would be made. An order for compulsory winding-up having been made, the depositor sought to rescind the agreement and to recover back the deposit, on the especial ground that the fraudulent purpose had been in no part accomplished. His prayer was denied. As Custodian.—No recovery because purpose fails.

St. L. R. Co. v. Mathers, 104 Ill., 259. **Same v. Same,** 71 Ill., 592. These cases involved a deed of land *in the nature of a mortgage*, there being a clause providing for defeasance in case the Railroad Company established a station within three miles of a particular place. The Company having *wholly failed to carry out the illegal agreement*, the grantor sought to recover back the land. The rescission was not granted. If, as contended, the law is in such a case to raise and enforce an implied agreement to rescind, then *a fortiori*, an express agreement to the same effect must equally be enforced.

Patterson v. Donner, 48 Cal., 369: This was a similar mortgage with condition subsequent for defeasance in case the grantee did not procure witnesses to testify in an action at law. The grantee failed to perform. Rescission was refused.

See also **Sedalia v. Brady** (78 Mo. App. 585); **Johnson v. Douglas** (32 Wash. 293; 73 Pac. 374).

3. The deposit of the property in the hands of the alleged custodian was part of the illegality, which distinguishes the present case from the stakeholder, agency and third-party cases. Wagering and agency cases distinguished.

(**A**) In the stakeholder cases, the illegality consists in the wager and not in any sense in the deposit subsequent to, though for the purpose of, the wager contract. As Custodian.—Wager and agency cases distinguished.

(**B**) Likewise in the agency and third-party cases, the holding by the agent or third party was perfectly lawful: the illegality lay in some precedent transaction from which arose the fund in the defendant's hands. The relief given involved neither the enforcement nor the rescission of the unlawfnl contract. (See analysis of these cases in **McMullen v. Hoffman,** *post* p. **330.** See also **Smith v. Richmond,** 24 Ky., 1117; 70 S. W., 846).

(**C**) Even in the stakeholder cases, it is recognized that the depositor loses the right to recover after the stakeholder has paid over the fund. By selling shares of its stock, and issuing and reissuing certificates in the usual form—all being done with the assent of complainants—the Securities Company has legally transferred vast interests in the railway shares to innocent third persons. (**Ball v. Gilbert,** *post* p. **75**; **Thornhill v. O'Rear,** *post* p. **45**).

> In **Nudd v. Burnett** (14 Ind., 25), the plaintiff delivered possession of a horse worth $75 in exchange for the defendant's note for $150, which according to its terms was to become null and void in case James Buchanan was not elected President of the United States. The defendant refused to pay the note on demand, and plaintiff sued to recover back the horse, upon the ground that he was repudiating the illegal contract. It was held that the contract was executed on his part by delivery of the horse; that it was too late to rescind; and that "this differs from a suit against a stakeholder, in this, that in the latter class of cases the party repudiates before the contract is executed by delivery to the other contracting party."

As custodian Agency cases distinguished.

(**D**) And in agency or third-party cases, the owner cannot obtain a return of the property, if to give such relief the Court would have to give effect to any part of the illegal contract. In seeking to recover certain of the shares of Northern Pacific stock, the complain-

ants rely upon a material term of the agreement alleged by them, though denied by defendant.

> "The relief sought would require the court to "investigate all of the various transactions of "these parties, from the beginning to the end of "their unlawful enterprise and adjust the differ- "ences between them. This is precisely what the "courts have always refused to do." (**Leonard v. Poole**, *post* p. **224**).

IV.

The doctrine of an implied agreement to return property transferred under an illegal agreement, is applicable only to cases wherein there exist special considerations of public policy, equity or justice.

No basis for implied agreement to return.

1. No public policy will be promoted by granting the prayer of complainants (see opinion of THAYER, J., [128 Fed., 808], upon denial of Harriman's petition to intervene in Government suit). Furthermore, considerations of public policy in the Northern Securities transaction can be invoked only by the Attorney General of the United States (**Minnesota v. Northern Sec. Co.** 194 U. S. 28.)

No public policy.

2. It is difficult to conceive of a case where equity and justice would require the implication of an agreement to return, except under circumstances such as existed in **Pullman v. Central** (*post* p. **307**), or in the repudiated bond cases cited in **Central v. Pullman** (*post* p. **279**), or where stock paid for was not issued because *ultra vires* the corporation as in **Spring Co. v. Knowlton** (*post* p. **256**). Certainly no such considerations prevail in the present instance.

No equitable considerations.

(a) That an agreement to return property received for an illegal purpose, will not be implied by a court of equity in the absence of strong considerations of

No implied agreement. No equity.

justice, is shown by the decision upon the counterclaim in **Higgins v. McCrea** (116 U. S. 671). In that case, the plaintiff, a commission broker, sued for the balance of moneys paid for account of defendant upon the settlement in August, 1883, of certain contracts made in May for the future delivery of produce. The answer in effect averred that the transactions were gambling transactions; that the contracts made for defendant had been cancelled by plaintiff shortly after the making thereof, and that the settlement in August was not of defendant's transactions; and by way of counterclaim the defendant prayed to recover the moneys "paid by him to the plaintiff to promote and carry on said gambling transactions". Upon the evidence, the court found that the contracts *had* been cancelled by plaintiff almost immediately after the making thereof, and this left the defendant, upon the face of his counterclaim, in the position of having paid money to the plaintiff to be used to carry on illegal and criminal gambling transactions (but presumably not used in any such transaction), which money he sought to recover back. Upon the cause of action thus presented by the counterclaim, Mr. Justice Woods, delivering the opinion of the Court, said: "*We do not "see on what ground a party, who says in his pleading "that the money which he seeks to recover was paid out "for the accomplishment of a purpose made an offence "by the law, and who testifies and insists to the end of "his suit that the contract on which he advanced his "money was illegal, criminal, and void, can recover it "back in a court whose duty it is to give effect to the law "which the party admits he intended to violate.*"

To the same effect is the decision **In re Great Berlin Steamboat Co.** (*post* p. **8**), denying an application for the return of money gratuitously deposited with the Company for a fraudulent purpose, the depositor having made no attempt to withdraw the money until winding-up proceedings rendered impossible any further accomplishment of the illegal object.

See also **C. I. & L. Ry. v. S. I. Ry.** (70 N. E. 843.)

No implied agreement.—*Laches.*

(b) But in any event, any equitable rights of the complainants have been lost through their laches and the acquisition by innocent third persons of interests adverse to their claim. *Locus poenitentiae* must be sought seasonably.

In the **Vandalia case** (post p. **265, 278**), wherein the corporation suing had permitted the de-

fendant to operate under the ultra vires lease for less than one-fiftieth of the term, it was held that "so far "as the plaintiff corporation can be considered as "representing the stockholders and seeking to protect "their interests, it and they are barred by laches."

In *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434 (see **Central v. Pullman,** post p. **279, 300**), after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of the three railroads, and, under the direction of the court, and *without objection by any of the parties interested, had incurred expenses and issued certificates accordingly.* It was held that the *holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of the receiver's certificates.*

In **Re Great Berlin Steamboat Co.** *(post* p. **8**), the appellant was seeking in proceedings for the winding up of the company, to recover the balance remaining of a deposit made by him with the company for a fraudulent purpose; and it was held that having left the money on deposit as long as the possibility of carrying out the illegal purpose continued, he had lost whatever right he might have had to reclaim it.

V.

No right of action accrues to complainants because the Securities Company has been compelled to abandon the illegal project by force of the decree in the Government suit.

Abandonment of holding gives no right of action.

In **Central Co. v. Pullman Co.** *(post* **279, 299**), Mr. Justice GRAY refers with approval to that part of the opinion of Mr. Justice MILLER in *Thomas v. Railroad Co.* (101 U. S., 71), where it was "in the most emphatic words, said that in the "case before the court, of a contract forbidden by "public policy and beyond the powers of the de"fendant corporation, it was its illegal duty, *a duty "both to its stockholders and to the public, to re"scind and abandon the contract* at the earliest

"moment, and the *performance of that duty,* "*though delayed for several years, was a rightful* "*act when done, and could give the other party no* "*right of action.*"

See also **People v. Globe Ins. Co.** (91 N. Y. 174).

VI.

No enforceable agreement to return.

It is not understood that complainants contend that there was any contract on the part of the Securities Company to return the stocks to the depositors. But if the complainants do so contend, the relief now asked for would be an enforcement of part of the contract. As well might a usury-exacting lender recover the principal of his loan by disaffirming the contract.

No part of an illegal contract will be enforced. (See **McMullen v. Hoffman,** *post* p. **330; Ellicott v. Chamberlin,** *post* pp. **139, 144**).

St. L. R. Co. v. Mathers, 104 Ill., 259. **Same v. Same,** 71 Ill., 592: These cases involved a deed of land *in the nature of a mortgage*, there being a clause providing for defeasance in case the Railroad Company established a station within three miles of a particular place. The Company *failed to carry out the illegal agreement* (having established a station within three miles of the designated point), and the grantor sought to recover back the land. The rescission was not permitted. If, as contended, the law is in such a case to raise and enforce an implied agreement to rescind, then *a fortiori*, an express agreement to the same effect must equally be enforced.

Patterson v. Donner, 48 Cal., 369: This was a similar mortgage with condition subsequent for defeasance in case the grantee did not procure witnesses to testify in an action at law. The grantee failed to perform. Rescission was refused.

Black v. Oliver (1 Ala. 449: 35 Am. Dec. 38)

was an action of detinue for the recovery of a negro slave. The evidence showed that the slave in controversy was sold by the defendant in error at a very reduced price to one Sweet, upon condition that he should make her his wife (which was illegal) and emancipate her, and that the condition had not been performed. It was held that the condition subsequent was illegal and void; that the contract of sale was executed in all other respects, and that the court would not interfere in favor of either party. No enforceable agreement to return.

See also **Singer Mfg. Co. v. Draper** (103 Tenn. 262; 52 S. W. 879); **Standard Co. v. Van Alstime** (22 Wash. 670; 62 Pac. 145).

[L. R. 4 Q. B. 309 : 6 English Ruling Cases, 488.]

Taylor v. Chester.

1869.

Pledge-Bailment-Immoral Consideration—"In pari delicto potior est conditio possidentis."

The plaintiff deposited with the defendant the half of a 50*l.* bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note :—

Held, that the maxim, *in pari delicto potior est conditio possidentis*, applied ; and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back.

This was an action to recover the half of a 50*l.* Bank of England note. The pleadings, facts, and course of the trial, are fully stated in the judgment of the Court.

Feb. 2. *Hopwood (Holker, Q. C.*, with him), for the defendant. It is a well-known maxim of law, "*in pari delicto potior est conditio defendentis.*" If the whole contract contained in the proceedings were set out in a declaration, it would be quite clear that the plaintiff could not recover. In Chitty on Contracts, p. 579, 6th ed., it is stated : "Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect * * * and the test as to whether a demand connected with an illegal transaction be capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case." The contract is allowed to be impeached on

grounds of public policy: *Holman v. Johnson* (Cowp. at p. 343.) In Story's Equity Jurisprudence, s. 298, it is also laid down that where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of the law as to participators in a common crime, will not interpose to grant any relief; acting upon the well-known maxim, "*in pari delicto portior est conditio defendentis et possidentis.*" So in *Biggs v. Lawrence* (3 T. R. 454), the plaintiffs could not recover for goods sold to the defendant where they knew that the goods were purchased to be smuggled, and they had packed them for that purpose. *Clugas v. Penaluna* (4 T. R. 466) is to the same effect. The replication is no answer to the plea, and the judgment ought to be entered for the defendant on the whole record.

Feb. 3. *Herschell* (*Pope* with him), for the plaintiff. Even if, upon the demurrer, the replication is bad, the plaintiff is entitled to the verdict on the count on detinue. *Mason v. Fernell* (12 M. & W. 674) shows that if the defendant has a special property in the subject-matter of the action, he must plead it specially, and cannot rely on the pleas of non detinet and not possessed. The special plea does not set out the whole truth, and was not proved. If the defendant had pleaded the plea according to the truth, it would have been bad; the replication which was proved must be read with it. The jury have found the issue on the replication for the plaintiff, and he is entitled to have the verdict entered on it. But on the question as raised by the pleadings, it is not the plaintiff, but the defendant who relies upon the immorality. The plaintiff does not claim to succeed upon any contract, but on his right of property in the half-note. The cases which may be cited against the plaintiff are divisible into two classes—first, where it is sought to enforce an illegal contract; secondly, where the person from whom the illegal consideration has moved relies upon the illegality to recover back the money

paid under the contract. But these cases do not apply, because here it is the defendant who, by means of an immoral contract, seeks to detain the note deposited.

(HANNEN, J.—*Parke, B.*, in *Scarfe v. Morgan* (4 M. & W. at p. 281), says: "If an illegal contract is executed, and a property either special or general has passed thereby, the property must remain.")

That has never been decided; if it were law, the Court would have to go into all the circumstances of the illegal contract to see if the property had passed.

If the plaintiff be right in his contention, it will be unnecessary for the Court to consider the question of illegality; and if it decides in his favour, they will not enforce the immoral contract; but if they decide in favour of the defendant, they will uphold an illegal agreement. If the contract to supply the plaintiff with the means to commit immorality be void, the deposit to procure the means is also void: *Cannan v. Bryce* (3 B. & A. 179); and on the same principle a covenant to pay for the price of land sold to the covenantor for an illegal purpose has been held not to be enforceable; *Bridges v. Fisher* (3 E. & B. 642; 23 L. J. [Q. B.] 276).

(MELLOR, J. It is well established by *Pearce v. Brooks* (Law Rep. 1 Ex. 213), and the cases there cited, that if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose, he cannot recover upon it.)

Those were all cases where the Court was asked to enforce the illegal contract

(HANNEN, J. If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment? In this case a special property has passed to the defendant, and according to *Ferret v. Hill* (15 C. B. 207; 23 L. J. [C. P.] 185), where an interest in realty has passed, it cannot be avoided on the ground that it has been gained by a misrepresentation.)

The special property can only be given by the special contract, and the defendant must set up the special contract to detain the note. Suppose the plaintiff had tendered the amount for which the half-note was pledged, the defendant's lien would be at an end; could it then be argued that the plaintiff would not be entitled to recover the half-note?

Holker, Q. C., replied.

Cur. adv. vult.

April 20. The judgment of the Court (MELLOR and HANNEN, JJ.) was delivered by

MELLOR, J. In this case the plaintiff declared on the bailment of the half of a 50*l.* Bank of England note, to the defendant, to be redelivered on request, alleging a refusal by the defendant to redeliver such half-note. The second count was in detinue for the same half-note?

The defendant, after traversing the delivery and detention of the note, and to the second count denying that it was the property of the plaintiff, pleaded separately and specially to both counts, in effect, that the half-note in question had been deposited by the plaintiff with the defendant by way of pledge, to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due.

The plaintiff joined issue on the defendant's pleas, and also replied specially that the alleged debt or sum, in respect of which the defendant justified the non-delivery and detention of the half-note, was for wine and suppers, supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct.

The defendant rejoined, taking issue on the replication, and also demurred to its validity.

On the trial before me at Manchester, the case of the plaintiff was that the note had not been deposited at all with the defendant, but had been fraudulently taken and appropriated by her. The jury, however, did not adopt his view of the facts, but found that the note was deposited by way of security, as alleged by the defendant, and they further found upon the evidence that the debt was incurred and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings, the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for 50*l*, to be reduced to nominal damages in case the note should be returned to the plaintiff.

A rule was accordingly obtained to enter the verdict for the plaintiff, on the ground that the jury had found all the issues tendered by the plaintiff in his favour.

This rule and the demurrer to the replication came on together for argument at the sittings in banco after last Hilary Term, before my Brother HANNEN and myself, and at the close of the argument we took time to consider our judgment.

It was argued on the part of the defendant, in showing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the jury and the facts as admitted by the demurrer, the plaintiff and defendant were *in pari delicto*, and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was argued that it was the defendant who was relying on the illegal transaction as an answer to a claim of the plaintiff, founded on his ownership of the note, and his rights to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that

"*in pari delicto potior est conditio possidentis*," is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the courts will not assist an illegal transaction in any respect:" per Lord ELLENBOROUGH in *Edgar v. Fowler* (3 East, 222); *Collins v. Blantern* (2 Wils. 341); Lord MANSFIELD in *Holman v. Johnson* (Cowp. at p. 343).

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson v. Bloss* (7 Taunt. 246), *Fivaz v. Nicholls* (2 C. B. 501). It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Ferret v. Hill* (15 C. B. 207; 23 L. J. [C. P.] 185), which was cited for the plaintiff; but is the direct result of the transaction upon which the deposit of the half-note took place.

Mr. Herschell's argument was based upon the hypothesis that, in spite of the finding of the jury, the plaintiff was entitled to recover by virtue of his property in the half-note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim.

This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only

have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "*in pari delico potior est conditio possidentis*," clearly applies, and is decisive of the case.

It would also appear from the case of *Scarfe v. Morgan* (4 M. & W. at pp. 281, 282), per PARKE, B., in delivering the judgment of the Court, that, notwithstanding the illegality of the transaction itself out of which the deposit in this case arose, the lien would exist, because the contract was executed and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply "*in pari delicto potior est conditio possidentis.*"

It is, however, sufficient in the present case to determine it on the ground that the plaintiff could not recover without showing the true character of the deposit; and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining "the assistance of the law" to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, and there is nothing to raise any such question in this case.

The result, therefore, will be that the verdict must stand for the defendant on the issues taken on the special pleas, and for the plaintiff on the issue taken on the replication; but as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

[L. R. 26 Ch. D. 616.]

1884.

In re Great Berlin Steamboat Company.

Fraudulent Agreement—Rescinding Fraudulent Agreement— Winding-up.

B., for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained :—

Held (affirming the decision of Bacon, V. C.), that B. could not claim to have the balance paid to him.

The company was formed on the 21st of April, 1882, for the acquisition and working of a concession from the German Government for the running a line of steamers on the River Spree and the ship canal from Berlin to Spandau. The nominal capital was £50,000, in 10,000 shares of £5 each, but no allotment of shares was ever made, and no shares were subscribed for except the seven shares agreed to be taken by the seven subscribers to the memorandum, which they had not paid for.

The Appellant, J. P. Bowden, deposed that about the 21st of March, 1883, he was applied to through his solicitors by the directors of the company to transfer a sum of £1,000 to the credit of the company at their bankers, Messrs. Glyn, Mills & Co., so that they might have a creditable balance in case of inquiries from certain Berlin bankers with whom they were endeavoring to place a number of the shares of the company, it being agreed that the sum was not to be used for the general purposes of the company, and that the company were merely to hold the sum as trustees for him.

The Appellant further deposed that on the 21st of

March, 1883, the following resolution was passed by the board:

"Resolved to accept £1,000 for a period of one month from Mr. J. P. Bowden for the purpose of having it placed at Messrs. Glyn, Mills, Currie & Co. to the credit of the company, for the purpose of having a creditable balance in case of inquiries from Berlin bankers, but not for the general purposes of the company, such money to be returned intact at the expiration of one month. No cheque to be drawn by the company unless countersigned by the financial secretary, *pro tem.*, the company merely holding such sum as trustee for the said J. P. Bowden. Further, to appoint Mr. A. E. Bunn financial secretary, *pro tem.*, for two months certain without salary, or until the £1,000 is repaid, but with power for the said A. E. Bunn to resign at seven days' notice within that period."

The £1000 was paid by Bowden to the credit of the company.

Subsequently the appellant was applied to by the directors to allow sums to be drawn out from the above £1000 for the purposes of the company, and he assented to this. The greater part of it was accordingly drawn out by cheques countersigned by the above-named Mr. A. E. Bunn, who was one of the Appellant's solicitors, and applied for purposes not alleged to be improper, leaving a balance of £99 15s. It appeared that the company never had any other money to its credit than Bowden's £1000.

It appeared that no Berlin banker ever made any inquiry as to the funds of the company, and in November, 1883, a letter was received from Berlin which shewed that no application by any Berlin banker was to be expected.

On the 12th of January, 1884, an order was made for the compulsory winding up of the company. The £99 15s was then standing to the credit of the company. Bowden made an affidavit in opposition, in which he stated himself to be a creditor for £1350, but did not say anything as to his claim to the £99 15s. Bowden claimed to prove against the company for £1350, which appeared not to include the £99 15s.

On the 21st of February, 1884, Bowden took out a summons in the winding-up to have the £99 15s. paid to him. The application was adjourned into Court, and on the 7th of March, 1884, Vice-Chancellor BACON dismissed it with costs.

Bowden appealed, and the appeal was heard on the 7th of May, 1884.

Upjohn, for the Appellant:—

It is alleged that the deposit was made for a fraudulent purpose and therefore cannot be recovered. But the purpose for which the money was deposited failed, so as the fraud (if any) was only inchoate, I have a right to revoke the arrangement and have my money back so far as it has not been applied: *Symes v. Hughes*, Law Rep. 9 Eq. 475; *Taylor v. Bowers*, 1 Q. B. D. 291. The drawings out must be attributed in my favour, *Knatchbull v. Hallett*, 13 Ch. D. 696, if any other moneys have been paid in, this being trust money; but on the evidence it does not appear that the company ever had any other money to its account.

Martin, Q. C., and *Ryland*, *contra*:—

The Vice-Chancellor said that if a man puts money into the hands of the company to give it a fictitious credit that is a fraud, and he cannot then turn round and say that the money is his. As to *Symes v. Hughes*, nothing had occurred to prevent repudiation of the illegal agreement. Here nothing was done to repudiate it till after the commencement of the winding-up. *Taylor v. Bowers* is inapplicable for the same reason. *Knatchbull v. Hallett* does not apply, for this is a case of a fraudulent loan, not of trust. There was a fraudulent intent to deceive not only the Berlin bankers but the public, and this intention continued till the commencement of the winding-up which fixes the rights of the parties. The present is an attempt by a lender to be paid in full.

Upjohn, in reply:

The commencement of the winding-up prevents any subsequent alteration in rights of property, but I say that this was my property all along. The commence-

ment of the winding-up puts an end to the purpose for which the money was advanced, and so takes the case out of the objection that the fraud continues.

BAGGALLAY, L. J.:

In my opinion this appeal fails. On the 21st of March, 1883, a resolution was passed by the directors in these terms. (His Lordship read the resolution.) It is not disputed that the £1000 was placed by the Appellant to the credit of the company at the bank of Glyn & Co. for a fraudulent purpose. *But the Appellant says that the money was never applied for any fraudulent purpose, that the purpose came to an end, and that he is entitled to have the money back as being impressed with a trust in his favour.* What happened was, that about £900 was drawn out pursuant to resolutions of the directors with the consent of the Appellant, for purposes which were not fraudulent, and was applied accordingly. In November last a communication was received by the directors from a person who was negotiating for them at Berlin, from which it appeared that no applications had been made by any Berlin bankers, and that none were to be expected. In the view I take of the case, I think it was then open to the Appellant to say at once, "The purpose for which this money was advanced cannot be carried into effect; pay me back the balance." But the Appellant did not recall his money. It was possible, though not probable, that applications might still be received from Berlin bankers, and that the scheme might be carried out. **The Appellant, however, did nothing to repudiate the arrangement, and so matters remained till the presentation of the petition to wind up. Then, after a winding-up order has been made, he brings forward this claim. There have been cases in which a party who has parted with his property under a fraudulent arrangement, has nevertheless been allowed to recover the property, but**

this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding-up.

COTTON, L. J.:

I am of opinion that the decision of the Vice-Chancellor is right. I think it the just results of the evidence that the balance now in dispute is ear-marked as part of the money which the Appellant advanced. Then the Appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers if inquiries are made—a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by private arrangement it was not to be their money. Then it is said that a person who parts with his property for a fraudulent purpose may repudiate the bargain and get his property back. I give no opionion whether in November last the Appellant could have done so. He did not attempt to do so, but **waited till the event happened which put an end to the purpose for which the money was deposited.** He left the money at the bank as long as the possibility of carrying out the illegal purpose continued, and **it is now too late for him to reclaim it.** *Assuming* that he had the right to repudiate the bargain, he has, in my opinion, lost that right.

LINDLEY, L. J.:

I also am of opinion that the decision of the Vice-Chancellor is correct. I am not satisfied that this was not a case of loan as distingished from trust, and if that is the true view it is fatal to the Appellant's case. But if it was a case of trust, the Appellant must shew what the trust was. He does so, and

shewes an illegal trust, since the purpose of the advance was to give a fictitious credit to the company. The trust at first was to last only for a month. The sum was drawn upon, and the residue was left in the hands of the company to get them credit. If the case is one of debt the Appellant is not entitled to be paid in full. Whether it was loan or trust, I think that the Appellant might have recalled the money at the end of the month. He did not do so, but left it where it was till the commencement of the winding-up. **The object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it is too late for the Appellant to repudiate the bargain and claim the money.**

Solicitors for Appellant: *Arnold E. Williams & Bunn.*

Solicitor for liquidator: *Montagu Hawkins.*

H. C. J.

[L. R. 15 Q. B. Div. 561.]

1885.

IN THE COURT OF APPEAL.

Herman v. Jeuchner.

Illegality—Contract—Bail in Criminal Case—Indemnity of Surety—Deposit of Money with Surety—Action to Recover Money Deposited.

A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behavior during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned; and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.

Wilson vs. Strugnell (7 Q. B. D. 548) as to this point overruled.

Action to recover the sum of 49*l.*

The plaintiff has been convicted of keeping a disorderly house, and had been ordered to find two sureties in 50*l.* each for his good behavior for two years. Being unable to find more than one surety, the plaintiff was imprisoned in default. He then desired the defendant to become surety for him, but the defendant refused, unless the amount for which he was to become surety should be deposited with him for the space of two years. The plaintiff accordingly deposited with the defendant the sum of 49*l.*, who thereupon became surety for the plaintiff and he was released. The plaintiff before the expiration of the two years brought the present action to recover back the 49*l.* deposited

with the defendant, and STEPHEN, J., before whom the action was tried, gave judgment for the plaintiff on the authority of his former decision in *Wilson v. Strugnell* (7 Q. B. D. 548).

The defendant appealed.

Alfred Cock, for the defendant. First, the action is brought too soon: the two years had not expired. Secondly, at the trial, STEPHEN, J., gave judgment for the plaintiff upon the authority of *Wilson v. Strugnell* (7 Q. B. D. 548); but that case was not rightly decided and ought not to be followed. The object of the transaction between the plaintiff and the defendant was that the defendant should not in fact be personally responsible for the plaintiff's good behavior, although he was to be held out to the court as personally liable for the sum of 49*l*. This was an illegal purpose, and the plaintiff cannot recover without proving that it did in truth exist: therefore the principle of *Taylor v. Chester* (Law Rep. 4 Q. B. 309) applies. The plaintiff cannot rely upon *Bone v. Ekless* (5 H. & N. 925), because in that case the illegal purpose had not been carried out, nor upon *Taylor v. Bowers* (1 Q. B. D. 291), because in that case, the plaintiff did not seek to uphold the illegal transaction but was repudiating it.

[BOWEN, L. J. If the illegal purpose had not been carried out, it appears to be clear that the money deposited can be recovered back: *Tappenden v. Randall*, 2 B. & P. 467. But in the present case the illegal purpose seems to have been effected.

BRETT, M. R. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson v. Bloss* (7 Taunt. 246).]

In *Cripps v. Hartnoll* (4 B. & S. 414; 32 L. J. [Q. B.] 381) the promise to indemnify was not made by the person for whose appearance the surety was bound: moreover, that case was decided upon a question as to the construction of the Statute of Frauds, and not

upon a question of illegality. In *Jones v. Orchard* (16 C. B. 614, at p. 624), the Court of Common Pleas seemed to be of opinion that an action like the present was not maintainable.

Stanley Boulter, for the plaintiff. The present case is identical with *Wilson v. Strugnell* (7 Q. B. D. 548); and if that case was rightly decided, the present plaintiff is entitled to succeed. The contract is still executory, and not executed. It may be that the plaintiff must admit that the contract had an illegal object, for otherwise he could not recover until the expiration of the two years; it is no doubt the illegal object which gives him the right to rescind: but the illegality consisted in the payment of the money upon the default of the plaintiff, and the money has never been paid: therefore the illegal purpose has never been fulfilled.

Alfred Cock was not called upon to reply.

BRETT, M. R. In this case the plaintiff has sued upon a contract entered into between himself and the defendant. What is it that determines and constitutes a contract not under seal? It is the consideration and the promise: these two incidents are necessary to constitute every simple contract: taken together, they form the whole of the contract. When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced. In the present case the defendant required the plaintiff to deposit 49*l.* for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become a surety for him; the plaintiff on his part undertook to deposit the 49*l.* That is the substance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the

order of the Court; at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality.

It was first argued that the action is brought too soon, because it is brought before the expiration of the two years. If the contract were legal, the action would have been brought too soon, and in this point of view the action can be maintained only if the contract is illegal. For the defendant it may be said that the illegal object itself would be sufficient to prevent the plaintiff from recovering; and further, that if it is necessary in order to defeat the action that the illegal contract should be performed, the illegal contract has in this case been performed. I will not stop to say whether in order to defeat the plaintiff in an action like this the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for *if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover.* We differ from STEPHEN, J., only in this, that we think that the contract was fully concluded; STEPHEN, J., thought that the contract was not fully concluded. We think that it was fully performed for this reason, that the defendant did not contract with the plaintiff to pay the amount of the recognizance; the payment of that amount was not part of the illegal purpose existing between the plaintiff and the defendant; it was an obligation imposed by the law upon the defendant. **The illegal purpose was fully completed when the defendant became surety. The time for returning the money has not as yet arrived; but**

when it does, I cannot think that the plaintiff will be in any better position than he is now. I cannot agree with the view of STEPHEN, J., or with his decision.

BAGGALLAA, L. J. I will very briefly state my view of this case. If the defendant had been compelled to pay the sum on account of the plaintiff's breach of the condition of the recognizance, it must be admitted that the defendant would be entitled to succeed; the maxim, "*in pari delicto, potior est conditio possidentis*," would apply. But the rule governing the present case is, I think, well stated by MELLOR, J., in delivering the judgment of the Court of Queen's Bench in *Taylor v. Chester* (Law Rep. 4 Q. B. 309, at p. 314). He there said: "The true test for determining whether or not "the plaintiff and the defendant were *in pari delicto*, is "by considering whether the plaintiff could make out "his case otherwise than through the medium and by "the aid of the illegal transaction to which he was him-"self a party." Applying that rule to the present case, I am of the opinion that the defendant is entitled to judgment. I do not think it necessary to refer minutely to the decision of STEPHEN, J., in *Wilson v. Strugnell* (7 Q. B. D. 548), and to the reasoning upon which it is founded. I am far from expressing dissent as to his view that where the illegal purpose has not been effected, the money deposited may be recovered back; **but, on the other hand, I am hardly prepared to say that, in order to prevent a plaintiff from succeeding who sues to recover back money deposited in furtherance of an illegal purpose, the illegal object itself must be fully carried out.**

BOWEN, L. J., concurred.

Judgment the for defendant.

[L. R. 24 Q. B. Div. 742.]
1890.

IN THE COURT OF APPEAL.

Kearley v. Thomson and Another.

Illegal Contract. Partial Performance. Bar to Action for Money Paid.

Where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back.

The defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendant a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants:—

Held, that, though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it.

Appeal from a judgment of the Queen's Bench Division in favor of the defendants.

The action was brought under the following circumstances:—The defendants were solicitors, and acted for a client in presenting a petition in bankruptcy against one William Clarke, against whom a receiving order was made. The costs of the petitioning creditor were ordered to be paid out of the estate. Before the public examination of the bankrupt came on, the plaintiff who was a friend of the bankrupt, had an in-

terview with the defendants, at which a discussion arose as to the defendants' costs in the bankruptcy proceedings, none of which, from want of assets in the bankruptcy, had been paid, and the defendants undertook not to attend on the debtor's public examination, or to oppose his discharge, provided the plaintiff paid them an agreed sum for such costs. The plaintiff accordingly paid to the defendants at the time 20*l.*, for which the following receipt was given: "At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow the further sum of 20*l.*, and in consideration of this sum of 40*l.* we waive all our claims for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge. Thompson & Ward." The further sum of 20*l.* was paid to the defendants. The arrangement was made by the defendants with the consent of their client and for his benefit. The debtor passed his public examination, at which the defendants did not appear. At the time the action was brought, the debtor had not applied for his order of discharge. The plaintiff claimed a return of the 40*l.* that he had paid to the defendants as above mentioned, and the defendants offered to have their costs taxed, and to return to the plaintiff the balance (if any) that might remain of the 40*l.*, after deducting the taxed costs. The plaintiff refused this offer, and brought this action for the return of the money he had paid. The case was tried before *Field*, J., without a jury, and the parties were left to move for judgment. The Queen's Bench Division (*Huddleston*, B., and *Stephen*, J.) ordered judgment to be entered for the defendants.

The plaintiff appealed.

1890. Feb. 20. Crump, Q. C., and Woolf, Q. C., in support of the appeal. The contract was illegal: *Hall v. Dyson* (17 Q. B. 785). The plaintiff is not trying to make out his case through the medium and by the aid

of the illegal transaction, which is the test laid down in *Taylor v. Chester* (Law Rep. 4 Q. B. 309), for determining whether the plaintiff and defendant are *in pari delicto ;* he is trying to set aside the transaction. He can do this so long as the contract is not fully carried out, for the money remains his, and he can recover it back. This is the effect of the judgment of *Mellish*, L. J., in *Taylor v. Bowers* (1 Q. B. D. 291), and of *Lord Esher*, M. R., in *Herman v. Jeuchner*, (15 Q. B. D. 561).

(They cited also *Tappenden v. Randall* (2 B. & P. 467) and *Aubert v. Walsh* (3 Taunt. 277).

Edward Clayton, (Jelff, Q. C., with him), for the defendants. The property in the money passed under the contract to the defendants, and so, if the contract was illegal, the illegality must be the basis of the plaintiff's claim. The plaintiff and defendants are *in pari delicto* and the maxim "*potior est conditio possidentis*" applies. The authorities do not support the proposition that it is necessary, in order to prevent the plaintiff from recovering, that the contract should have been fully performed ; it is sufficient if there has been performance of a substantial part. (He also proposed to submit *(inter alia)* that, under the Bankruptcy Act, 1883, the contract was legal, but was stopped.)

Crump, Q. C., in reply.

1890. March 31. FRY, L. J. I have been asked by the Lord Chief Justice to deliver the judgment in this case, and I may also state that I have had an opportunity of consulting the Master of the Rolls on the judgment I am about to deliver, and he has authorized me to express his concurrence with it.

The facts are shortly these :—A petition in bankruptcy was presented by one Baynes against Clarke, and a receiving order was made. The defendants were the solicitors acting for the petitioning creditor. That being the condition of things, the plaintiff, who ap-

pears to have been a friend of Clarke, intervened, and on October 6, 1887, Messrs. Thomson & Ward, the defendants, wrote this letter to the plaintiff Kearley: "*Re* Clarke. At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow a further sum of 20*l.*; and in consideration of this sum of 40*l.* we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge." That was signed by the defendants. On the following day, it appears that the second sum of 20*l.* was paid, and a receipt was given by the defendants in these terms: "7th October, 1887. *Re* Clarke. Received of Mr. Kearley the further sum of 20*l.* mentioned in our receipt of yesterday." On the same October 7 the public examination of the bankrupt took place, and, in accordance with the stipulation in the letter of the 6th, at that public examination the defendants did not appear.

The tendency of such a bargain as that entered into between the plaintiff and the defendants is obviously to pervert the course of justice. Although the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing. The case of *Hall v. Dyson* (17 Q. B. 785) was referred to in support of the suggestion that this agreement was illegal as interfering with the course of justice, and it was not argued that it was legal. I think, therefore, there can be no doubt the agreement must be taken to be illegal.

As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the

plaintiff who paid the 40*l.* cannot recover it back without showing the contract upon which it was paid, and when he shows that he shows an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins v. Blantern* (1 Sm. L. C. 7th ed. 369), where the Lord Chief Justice says: "Whoever is a party to an unlawful contract, if "he hath once paid the money stipulated to be paid "in pursuance thereof, he shall not have the help of "the Court to fetch it back again; you shall not have "a right of action when you come into a court of "justice in this unclean manner to recover it back." To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the *delictum* is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

There is suggested to us a third exception, which is relied on in the present case, and the authority of which is to be found in the judgment of the Court of Appeal in the case of Taylor v. Bowers (1 Q. B. D. 291). In that case Mellish, L. J., in delivering judgment, says at p. 300: "If money is paid, or goods "delivered for an illegal purpose, the person "who has so paid the money or delivered the

"goods may recover them back before the "illegal purpose is carried out." It is remarkable that this proposition is, as I believe, to be found in no earlier case than Taylor vs. Bowers (supra), which occurred in 1867, and, notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying, for myself, that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice. *But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part. As I have already pointed out in the present case the contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge.* **It was performed as regards the first; but the other application has not yet been made. Can it be contended that, if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment it cannot be so contended with success.** *Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of 100l. by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.*

I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back. We were pressed with the observations of the Master of the Rolls in Herman v. Jeuchner (15 Q. B. D. 561) where it was said that he had recognized the proposition that so long as the contract remained imperfectly performed the money could be recovered back. In my opinion, the language used by the Master of the Rolls does not bear that construction, because in that case the Court thought the contract had been fully performed, and, therefore, no doubt, in speaking of performance he spoke of full performance; but, whatever the construction of those words may be, I have, as I have already stated, the authority of the Master of the Rolls to state his concurrence with the view I have expressed with regard to the partial performance of an illegal contract.

For these reasons, I am of opinion the appeal fails, and should be dismissed accordingly.

Lord Coleridge, C. J. I agree.

Appeal dismissed.

[L. R. (1892) 2 Q. B. 724.]

IN THE COURT OF APPEAL.

Scott v. Brown, Doering, McNab & Co. Slaughter & May v. Brown, Doering, McNab & Co.

Illegality—Stock Exchange—Contract for Purchase of Shares—Agreement to buy shares at a fictitious Premium—Rigging the Market—Conspiracy—Action to recover Money paid on Purchase.

An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a *bona fide* market for its shares, and that the shares were at a real premium, is an illegal transaction and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares.

The plaintiff brought an action against the defendants who were stockbrokers, through whom he had purchased shares in a projected company, to obtain rescission of the contract for the purchase of such shares, and to recover back the purchase-money which he had paid in respect of them to the defendants, on the ground that the defendants, while acting as the plaintiff's brokers had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was with the money to purchase upon the Stock Exchange a number of shares in the projected company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium, which in fact, as the plaintiffs and defendants well knew, they were not:

Held, that the action was based upon an illegal contract, and could not be maintained.

Applications for new trial.

1892. Aug. 1. LINDLEY, L. J. My brother Smith has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.

Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord MANSFIELD in *Holman v. Johnson* (Cowp. 343).

In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial, shows conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced. But his

illegal contract confers no rights on him : see *Pearce* v. *Brooks* (Law Rep. 1 Ex. 213). The illegal purpose of the plaintiff distinguishes this case from *Wetherall* v. *Jones* (3 B. & Ad. 221) and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done ; it is done every day ; but this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the Court below, and he has no right no a new trial.

LOPES, L. J. The defendants in both these actions are members of the London Stock Exchange. On December, 1890, they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital, and the defendants had, previously to such issue, underwritten a part of such share capital, and were holders of a considerable number of shares in the company. The plaintiffs in the second action were solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants upon the ground, amongst others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares. The learned judge held that there was no evidence to go to the jury in support of the plaintiffs' case, and nonsuited them. In my judgment it is unnecessary to determine whether the holding of the learned judge is right in this respect. There is a preliminary matter to be considered, of which the learned judge might have taken, and this Court can and ought to take, judicial notice. The plaintiffs in both actions rely upon a contract contained in certain letters and telegrams passing between the plaintiffs and defendants, between December 6 and 9, 1890, and which are

as follows: (The Lord Justice then referred to the letters and telegrams, and continued:—) I have read these letters and telegrams to shew what the nature of the transaction was. In my judgment it was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in this company, contrary to the fact, to believe there was a market for its shares and that the shares were of greater value than they really were. Putting it shortly—an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal? I am of the opinion that it is, and might be made the subject of an indictment for conspiracy.

Rex v. Berenger (3 M. & S. 67) is an authority on this subject. It was an indictment for conspiracy by false rumors to raise the price of the public government funds with intent to injure those who should purchase, and ELLENBOROUGH, C. J., said (p. 72):—

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous: it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumors, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

I can see no substantial distinction between false rumors and false and fictitious acts; the price of the shares in this case was artificial, and the premium unreal and nominal, to the knowledge of all parties concerned, put forward to induce the public to take shares with which otherwise they would have had nothing to do.

Again, in *Reg. v. Aspinall* (1 Q. B. D. 730; 2 Q. B. D. 48) it was held that an agreement to cheat and defraud by means of false pretences those who might buy shares, was an indictable offence. BRETT, L. J., said (2 Q. B. D. 59):

"If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully—namely, with minds intending to do wrong—agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy."

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal agreement. If the agreement is illegal, the question arises, whether the plaintiffs are not disentitled to recover, and whether they have not forfeited the relief which a court of law in other circumstances would have afforded them. *Begbie v. Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491) is conclusive on this point. It was an action for money had and received, plea never indebted, and it was held that the plaintiff could not recover because he was aware that no exclusive right to use the process in question could be obtained, and had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. COCKBURN, C. J., said (p. 499):

"Another ground of defence insisted on is that the money having been paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company that no exclusive right existed, or could be obtained, the plaintiff cannot maintain an action to recover back the money on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. * * * Under these circumstances we are

of opinion that the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle of the decisions in *Simpson v. Bloss* (7 Taunt. 246); *Jones v. Yates* (9 B. & C. 532), and *Fivaz v. Nicholls* (2 C. B. 501). The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point was taken by the Court and acted upon. The plaintiffs can not, and do not, in this case more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

A. L. SMITH, L. J. The plaintiff Scott applies to the Court to set aside a nonsuit which passed against him at the Guildhall. **He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Company, and for the return of 632*l.* 3*s.* 5*d.*, paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market.** It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the 632*l.* 3s. 5d.

sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant McNab that McNab should therewith purchase 500 shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.

If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumors to endeavour to raise the price of the public funds on a particular day: *Rex v. Berenger* (3 M. & S. 67). It has also been held in *Reg. v. Aspinall* (1 Q. B. D. 730; 2 Q. B. D. 48) that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See *Reg. v. Hudson* (Bell, C. C. 263). Lopes, L. J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment are sufficient. These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the com-

pany by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's 632*l.* 3s. 5d. by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case, as showing the purposes for which the plaintiff, and the defendant McNab, had agreed that the purchases should be made. The agreement between two or more to do an illegal act has been proved.

The next question is, Was it shown that the plaintiff and McNab agreed to carry out this intention by illegal means, viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his 632*l.* 3s. 5d. to McNab to purchase shares with upon the open market, and if that had been all I agree; but the question is, Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer, a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company?

I am of opinion that it was.

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the

same proposition—viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in Taylor v. Chester (Law Rep. 4 Q. B. 309) where the illegality was pleaded, and also in Begbie v. Phosphate Sewage Co. (Law Rep. 10 Q. B. 491), where it was not pleaded, but, the fraud being apparent, the Court would not interfere.

When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to "keep up the price of the shares," which upon the evidence was shewn to be "to create a fictitious premium."

In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion the maxim "*In pari delicto potior est conditio possidentis*" applies, and this Court ought not to assist the plaintiff when he seeks to recover the 632*l.* 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.

Appeal dismissed.

[L. R. (1904) 1 K. B. 558.]

1904.

[In the Court of Appeals.]

Harse v. Pearl Life Assurance Company.

Insurance, Life—Contract—Illegality—Policy on the Life of Another—Absence of Insurable Interest—Recovery of Premiums—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be valid insurance, and the plaintiff, relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums :—

Held, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were *in pari delicto*, and the premiums could not be recovered back.

Decision of the Divisional Court, [1903] 2 K. B. 92, upon this point reversed.

Appeal from the judgment of a Divisional Court, reported [1903] 2 K. B. 92, in favour of the plaintiff upon an appeal from a decision of the judge of the Oxford County Court.

It appeared from the county court judge's notes that in April, 1889, a proposal was made to the plaintiff, by an agent of the defendant insurance company, that he should effect an insurance with the defendants upon the life of a relative. The plaintiff agreed to insure the life of his mother, who was residing with him as his housekeeper, and to whom he made a money allowance. In the proposal form the pecuniary interest in the life insured was stated to be, "Son for funeral expenses." The plaintiff's father was alive, but he was paralyzed and unable to earn any money, and would not be in a

position, in the event of his wife predeceasing him, to pay for her funeral expenses. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life. The proposal form of that policy was signed with the name of the mother, but the plaintiff stated that the policy was effected for his benefit, and the premiums were paid by him. The mother in giving her evidence denied that she had signed the proposal form.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought the action in the Oxford County Court to recover the premiums paid by him under the two policies during the preceding twelve years, amounting to 43*l.* 8*s.* At the trial the judge left the following questions to the jury: "(1.) Had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (2.) Did the agent in either case make a statement which was false in fact? If so, what was it?—No. (3.) Did the agent in either case know that what he was saying was untrue?—No. (4.) Was either policy, or were both, taken out in consequence of what the agent had said?—Yes. (5.) Did the agent in either case represent that the policy had been a good one?—Yes. (6.) Were the agents in what they did, or was either of them, guilty of any fraud, and, if so, in what respect?—No." The jury were unable to agree whether the mother signed the proposal form. The county court judge held as matter of law that under the circumstances the fact that the plaintiff would morally be bound to pay for his mother's funeral expenses, failing the ability of his father to pay for them, gave rise to a sufficient pecuniary interest to satisfy the statute of 14 Geo. 3, c. 48; that the first policy was consequently good, and the premiums paid under it could not be recovered back. He also held with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, for the parties were *in pari delicto*, the representation of the agent as

to the validity of the policies being a representation as to a matter of law, and having been innocently made. He accordingly gave judgment for the defendants. The plaintiff appealed.

The Divisional Court held that the fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life; and, as to both policies, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not in pari delicto, and the premiums could consequently be recovered back.

Judgment was accordingly given for the plaintiff. (1)

The defendants appealed.

Sir E. Clarke, K. C., and *S. T. Evans, K. C. (J. J. Parfitt* with them), for the defendants. With regard to the first policy, it is submitted that the plaintiff had a sufficient insurable interest in his mother's life in respect of the reasonable probability under the circumstances that the expenses of her funeral would have to be defrayed by him: *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (2). That decision also shews that the interest of the insurer need not be a pecuniary interest like that arising from the relation of debtor and creditor. The second policy appears on the face of it to be a valid policy taken out by the mother on her own life. The jury did not answer the question whether the signature on the proposal form was that of the mother or not. The onus of shewing that the policy was void lay on the plaintiff. But, assuming that both policies were void for illegality, the plaintiff is not entitled to recover the premiums paid by him. Where money is paid in pursuance of an illegal contract, primâ facie the payer cannot re-

(1) [1903] 2 K. B. 92.
(2) [1892] 1 Q. B. 864; 8 Times L. R. 143.

cover it, both parties being in pari delicto: *Howard* v. *Refuge Friendly Society.* (1) It was held in *British Workman's and General Assurance Co.* v. *Cunliffe* (2) that, where the agent of an insurance company had falsely represented that a policy would be valid, the premiums could be recovered; but in that case the agent knew that the representation was untrue, and was guilty of fraud in making it. In this case the jury have negatived any fraud on the part of the agent. Assuming that what the agent said in this case really amounted to a representation that the policy would be valid, it was an innocent representation on his part, and therefore cannot prevent the parties from being in pari delicto. Unless there is some misrepresentation of fact or some fraudulent misrepresentation of law by the agent, the premiums paid on an illegal contract of insurance cannot be recovered back, both parties being presumed to know the law. All that the plaintiff has established is an innocent misrepresentation on a question of law which is not sufficient to entitle him to recover the premiums: *West London Commercial Bank* v. *Kitson* (3) *Kearley* v. *Thomson* (4) and *Rashdall* v. *Ford.* (5)

Montague Shearman, K. C., and *Cecil Walsh* for the plaintiff. The plaintiff was making an allowance to his mother and not receiving one, and so the only question that arises as to interest on the first policy is whether the moral obligation to pay for her funeral expenses is sufficient. He would not be under any legal liability to pay them, and nothing short of that would create a sufficient interest to make the first

(1) (1886) 54 L. T. 644.
(2) (1902) 18 Times L. R. 425, 502.
(3) (1884) 13 Q. B. D. 360.
(4) (1890) 24 Q. B. D. 742.
(5) (1866) L. R. 2 Eq. 750.

policy good. The decision in *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (1) was based on the fact that money had been actually expended in supporting the child, as is apparent from the judgments. As to the second policy, it was taken out, not by the mother, but by the plaintiff for his own benefit, and was void for want of an insurable interest, and, under s. 2 of the statute, for not disclosing the name of the person interested. As to both policies, the findings of the jury shew that the plaintiff paid the premiums in reliance on the statements of the agent of the company to the effect that the policies were legal. That was a representation of fact, and the plaintiff, relying on it, has paid the premiums without any consideration, and can recover them back. A representation as to the effect of a document was held in *West London Commercial Bank* v. *Kitson* (2) to be a representation of fact. If the representation is treated as made in respect of a matter of law, the parties were not on the same footing, for the plaintiff was entitled to assume that the defendants' agent had a knowledge of insurance law. It may be admitted that the ignorance of law on the part of the plaintiff would not, standing by itself, enable him to succeed in this action, but, when considered in relation to the fact that the parties were not dealing with the matter upon an equal footing, it is submitted that it will entitle him to recover back money paid under those circumstances. It is not a question between the plaintiff and the agent of the company, for the contract was made with the company, and it is their knowledge that is material. It was their representation, made through their agent, that there was an insurable interest, and if, with the knowledge that they have that there could be no insurable interest, they instruct their agent to make a representation to the contrary effect, the position of the parties is not equal.

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(1) 1 Q. B. 864; 8 Times L. R. 143.
(2) (1884) 13 Q. B. D. 360.

COLLINS M. R. This is an appeal from a decision of a Divisional Court. It appears that the plaintiff effected with the defendants through their agent two insurances on the life of his mother. He continued to pay the premiums for some years till they came to more than the amount insured, and now seeks to recover them back. Dealing with the first policy in point of time, and assuming, though without deciding the matter, that the plaintiff had not a sufficient insurable interest in his mother's life to entitle him to take out a policy with regard to her funeral expenses, there remains the question of his claim to recover the premiums that he has paid. The ground on which the claim is based is that there has been a total failure of consideration, and that depends on the hypothesis that I have adopted of the illegality of the first transaction under the statute of 14 Geo. 3, c. 48; for if the plaintiff had been under any liability to pay the funeral expenses of his mother, the policy would be valid, and the premiums could not be recovered back. On the assumption that the policy was illegal, the plaintiff has paid money to the defendants upon an illegal bargain, and the question is whether he can recover it back. As to the other policy, the plaintiff effected it, on his own shewing, in his own interest. The jury have found as to both policies, in answer to questions 4 and 5 put to them by the county court judge, that they were taken out in consequence of the representation of an agent of the defendants that they were good policies, but that the agent was not guilty of any fraud. The county court judge held that even if both policies were void for want of insurable interest, the representations having been innocently made, the premiums could not be recovered back. It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back. That rule was applied to a case similar to the second of these policies in *Howard* v. *Refuge Friendly*

Society. (1) We therefore begin the discussion with the rule of law that *prima facie* the plaintiff would be debarred from recovering the premiums paid on either policy. In this state of things it is said that what occurred between the plaintiff and the company's agent relieves the plaintiff from the operation of that rule. The statement, however, made by the agent was not a statement of fact, but one of the law, and was made innocently, as the jury have found. Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss. Neither on the findings of the jury nor in the evidence can I find anything that brings the case within any of the classes that I have indicated. Under those circumstances the plaintiff cannot recover back the premiums that he has paid. We have the clear authority of this Court in *British Workman's and General Assurance Co.* v. *Cunliffe* (2) In that case the decision of the Divisional Court was that the money could be recovered back where a person had paid premiums on the statement of an agent that the policy would be valid. This Court affirmed the decision that the money could be recovered, but did so expressly on the ground that the statement on which the assured acted was fraudulently made. This Court to that extent qualified, or at the least did not adopt, the ground of the judgment of the Court below. On the general law and on authority the plaintiff, in my opinion, has failed to establish his right to a return of the premiums, and the appeal must be allowed.

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(1) 54 L. T. 644.
(2) 18 Times L. R. 425, 502.

ROMER L. J. I am of the same opinion. Assuming that the two policies are void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not *in pari delicto* with the defendant company. Can he be said to have established that position? To do this reliance is placed on the statements made by the agent of the company. *In my opinion there was no misstatement of fact, and it is further clear that there was no fraud—that it was not a case of oppression or duress, and that it was not a case of an advantage taken by a clever man over an ignorant one. The agent, like the plaintiff, had forgotten or mistaken the law. The finding of the jury amounts to this—that the agent had the belief that the policies were good.* **Unless it can be said that the statements made by the agent put the defendants in a worse position than the plaintiff, the parties were on an equal footing with regard to the transaction.** I do not think the statement had that effect, nor do I think that agents of insurance companies must be treated as under a greater obligation to know the law than ordinary persons whom they approach in order to effect insurances. It appears to me that the parties must be taken to have been in *pari delicto*, and that the company cannot stand in a worse position than their agent. I agree, therefore, that the appeal should be allowed.

MATHEW L. J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Esson & Mallam, for George Mallam & Son, Oxford.*

Solicitor for defendants: *J. M. Storer, for E. T. Hatt, Oxford.*

A. M.

[73 Ala. 200 : 49 Am. Rep. 48.]

1882.

Hill v. Freeman.

Deed—consideration—illicit intercourse.—A deed executed and delivered in consideration of future illicit intercourse, the grantees being in possession, vests title.

Ejectment. The opinion shows the point.
Heflin, Bowden & Knox, for appellants.
G. C. Ellis and *Bradford & Bishop, contra.*

SOMERVILLE, J.—We understand it to be a first principle, not now to be assailed or even doubted, that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with. Bish. Cont. Sec. 140, 432 ; *Morris v. Hall*, 41 Ala. 510, 536 ; *Boyd v. Barclay*, 1 *id.* 34 ; *Black v. Oliver*, *id.* 449 ; *Jacobs v. Stokes*, 12 Mich. 381 ; *Burt v. Place*, 6 Cow. 431 ; *Liness v. Hesing*, 44 Ill. 113 ; 1 Story Cont., Sec. 543 ; 1 Add. Cont., Sec. 303 ; *Williams v. Higgins*, 69 Ala. 517.

It is of course settled that all illegal executory contracts are void, and no court will permit its aid to be invoked for their enforcement. Bish. Cont., Sec. 458 ; 1 Add. Cont., Sec. 251 *et seq.* ; *Ware v. Jones*, 61 Ala. 288. In *Shiffner v. Gordon*, 12 East, 304, Lord ELLENBOROUGH declared it to be a settled rule that "when a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it."

The present case manifestly falls within the first

principle above enunciated. It is that of an executed contract in which nothing remained to be done by either party. Conceding that the deed from John Hill to the appellee was executed in consideration that one of the grantees would live with him in a future state of illicit intercourse or concubinage, *the title of the land conveyed nevertheless passed to the grantees*, and being in possession under their deed, they cannot be dispossessed by the heirs of Hill, who can have no greater claim or right than the deceased grantor had. It is plain that such a contract, if unexecuted, could not be enforced in any court. Such was the ruling of this court in *Walker v. Gregory*, 36 Ala. 180. But the deed being executed and delivered, and the grantees being in possession, ejectment will not then lie to disposses them. The maxim applies, *in pari delicto potior est conditio possidentis.*

There was no error in excluding the evidence offered by appellants, as the illegality of the consideration upon which the deed was based was immaterial.

The judgment is affirmed.
Judgment affirmed.

[108 Ala. 299: 19 So. 382.]

Thornhill v. O'Rear.

(Supreme Court of Alabama. Jan. 16, 1896.)

Executed Contracts—Illegality—Recovery of Consideration—Wages.

1. One Sunday plaintiff said that "he believed he would raffle off his dwelling house and lot." Defendant said he would take all the chances, and the parties thereupon contracted for the transfer of the property the next day, and put up their watches in the hands of another as a pledge to stand by the proposition. Plaintiff defaulted, and permitted his watch the next day to be delivered to defendant as a forfeit. *Held*, that *the contract became executed by the delivery of the watches*, and being void under the Sunday law (Code. Sec. 1749), and the parties being *in pari delicto*, plaintiff could not recover his watch in detinue.

2. In such case the putting up of the watches was only a pledge of the good faith of the parties to abide the terms of the agreement, and was not a wager.

Appeal from circuit court, Walker County; J. H. McGuire, Special Judge.

This was a statutory action of detinue, brought by the appellant, W. L. Thornhill, against the appellee, Martin O'Rear, to recover the possession of a gold watch. The defendant pleaded the general issue, and upon this plea issue was joined. The facts of the case, and the respective contentions of the plaintiff and the defendant, are sufficiently stated in the opinion.

The plaintiff requested the court to give to the jury the following written charge, and duly excepted to the court's refusal to give the same as asked: (1) "If the "jury believe the evidence they must find for the "plaintiff." At the request of the defendant the court gave to the jury the following written charges, and to the giving of each of them the plaintiff separately excepted: (2) "If the jury believe from the evidence

" that on Monday Thornhill consented that Jim " O'Rear should deliver the watch to Martin O'Rear " and Jim O'Rear did then and there deliver the watch " to Martin O'Rear, then their verdict must be for the " defendant." (3) " Unless the jury believe from the " evidence that Thornhill instructed J. A. O'Rear not " to deliver the watch to Martin O'Rear they will find " for defendant."

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the refusal to give the general affirmative charge requested by him, and the giving of the charges requested by the defendant. Affirmed.

T. L. Sowell, for appellant. Coleman & Bankhead, for appellee.

HARALSON, J. All the authorities hold, if money or property be placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract while it remains in his hands, it may be arrested by the bailor before or after the happening of the event upon which the money is to be paid or the forfeiture depends. While in his hands, it is *in transitu*. He is not a party to the illegal contract, and upon the revocation of his authority, the money or property remains in his hands as a naked trustee for the parties who placed it there. *Wood v. Duncan*, 9 Port. (Ala.) 227; *Shackleford v. Ward*, 3 Ala. 37; *Lewis v. Bruton*, 74 Ala. 317; *Ball v. Gilbert*, 12 Metc. (Mass.) 403; *Fisher v. Hildreth*, 117 Mass. 558; *Vischer v. Yates*, 11 Johns, 25.

But, as was announced in *McKee v. Manice*, 11 Cush. 358, " the law seems to have been held, by the author- " ities, that if after the event is determined, the loser " pays the money to the winner, or permits by his as- " sent or silence, the stakeholder, into whose hands the " same has been placed, to pay it over to the winner, " the loser cannot recover back the same. In such " case, the principle is applied, that the law will re- " fuse its aid to restore the money to the loser, both " parties being *in pari delicto*."

In *Vischer v. Yates*, 11 Johns. 25, it was said by KENT, C. J.: "If, after the determination of the event "against the plaintiff, the money has been actually paid "over to the winner with the plaintiff's consent, or "perhaps without notice to the defendant to the con- "trary, the plaintiff could not have sustained an action "against the winner to recover back the deposit;" citing *Howson v. Hancock*, 8 Term R. 575, in which Lord KENYON said, that there is no case to be found where an action has been maintained to recover the money back again.

All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity; but that when executed, unless controlled by statute to the contrary, the law will not interfere, at the instance of either party to undo that which it was originally unlawful to do, for the reason, that being equally at fault, the law will help neither. *Long v. Railway Co.*, 91 Ala. 522, 8 South. 706, and authorities there collected.

Section 1742 of our Code provides, that all contracts founded in whole or in part on a gambling consideration are void; and any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover such money, thing or its value, by action commenced within six months from the time of such payment or delivery. If the case before us falls within the influence of that statute, it would be an exception to the rule as to executed contracts to which we have just referred. *Samuels v. Ainsworth*, 13 Ala. 366. The facts are, that on Sunday morning, being in the presence of defendant and others, when the subject of raffling came up, the plaintiff stated, that "he believed he would raffle off his dwelling house and lot by chances," stating the proposed scheme, the chances to be 500, at a specified valuation. The defendant said he would take all the chances, to which plaintiff assented, and said he would make out a deed

to the house and lot the next day, and deliver it to defendent, when he could pay him the money for it. Both parties agreed at the same time, to put up their watches in the hands of a stakeholder, as a forfeit, to stand by the proposition as made and accepted, which was done. This statement of facts shows that all the elements of chance were eliminated from the contract, which resulted in being nothing more than an offer by one party to sell the house and lot at a certain price, to be arrived at by calculation, and the acceptance of the offer by the other. There was nothing unlawful in this offer, as made and accepted, if it had been done on any other day than Sunday, but having been made on that day, it was void, and incapable of enforcement. Code, Sec. 1749.

But this suit arises outside the contract of the sale and purchase of the house and lot, namely, out of the transaction of putting up the watches to secure the fulfillment of this contract. It is said this was a bet or wager, which brings the case under the influence of said section 1742 of the Code. As to this, let us see. A wager is nothing more than a bet, "by which two parties agree that a certain sum of money, or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouv. Dict. "Wager." The transaction of putting up the watches was not a wager. It was only a pledge of the good faith of the parties to abide the terms of the agreement, in the shape of liquidated damages for a failure of either to perform his agreement. *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. If the transaction had occurred on any day but Sunday, the idea of gambling, perhaps, would not have occurred to any one. This suit, it will be borne in mind, is not on the contract. It is in detinue by the plaintiff, who receded from the bargain, against the defendant, who stood by it, and to whom plaintiff's watch, put up as a forfeit, had been delivered. The evidence of plaintiff tended to show, that on Sunday, the day of the transaction, shortly after it

occurred, he notified the stakeholder, that he would not stand by the proposition, and not to deliver the watch to defendant; that he demanded the watch from the stakeholder, before he delivered it to defendant, and did not authorize him to deliver it to him; and that on Monday or Tuesday following, plaintiff told defendant he would not abide the proposition made on Sunday before, and wanted his watch, which defendant refused to deliver to him. On the part of defendant it was shown, that plaintiff did not notify him of his intention not to abide the transaction of Sunday, until after the watch had been delivered to him by the stakeholder, and further, that the next day, Monday, plaintiff told the stakeholder, it was defendant's watch, and to turn it over to him, which he accordingly did, and that after he had turned it over to defendant, plaintiff told the stakeholder not to give it to defendant, when he notified him, that he had already turned it over to him.

The attempt of plaintiff here is, to recover this property, because the agreement of forfeiture was entered into on Sunday. It could not, as we have shown, have reference to any illegality growing out of the proposed raffle, which was afterwards abandoned. The condition on which the forfeit was to be delivered to defendant, had taken place. No delivery was made on Sunday, but on Monday or Tuesday following, and thereby, as between the parties to the transaction, it became executed. Whatever element of illegality, if any there may have been in putting up the forfeiture, in the beginning, on Sunday, the plaintiff was as much to blame for, as defendant, and if the watch was delivered according to the terms of the agreement of forfeiture, that agreement became executed, and plaintiff, in a suit in detinue for the property itself, is in no condition to ask the law to reclaim it from the predicament in which he contributed to place it.

It is only in suits on contracts, void under the statute for having been made on Sunday, that the defense of invalidity for having been executed on that day, can be made, if the contract remains unexecuted. If one buy a horse on Sunday, and it is delivered and paid for, it could hardly be contended that either party could sue the other, the one for the horse, or the other for the money he paid for it, because the transaction occurred on Sunday. *Black v. Oliver*, 1 Ala. 450; *Windham v. Childress*, 7 Ala. 357; *Walker v. Gregory*, 36 Ala. 184; *Morris v. Hall*, 41 Ala. 536; *Long v. Railway Co.*, 91 Ala. 522, 8 South. 706. If this suit had been brought in proper form against the stakeholder, and the proof showed that he was notified not to deliver the watch before he did so, a case different from the one we now have, would be presented.

It follows from what we have said, that under the evidence in this case, the plaintiff was not entitled to the general charge as requested. Nor was there any error, of which plaintiff can complain, in giving those charges requested for defendant. Affirmed.

[45 S. E. 262.]

Watkins et al. v. Nugen.

(Supreme Court of Georgia. Aug. 11, 1903.)

Deed—What Constitutes—Executed Contract—Illegal Consideration.

1. The instrument involved in this case was a deed, and not a will.
2. A court of equity will not lend its aid to either party to an executed contract founded upon an immoral or illegal consideration.
3. A deed becomes an executed contract when signed and delivered. It is not essential that possession should be obtained under it.
4. A deed executed and delivered in consideration of a promise to do an immoral or illegal thing is not a gift, but an executed contract founded upon a consideration.

(Syllabus by the Court).

Error from Superior Court, Richmond County; *E. L. Brinson*, Judge.

Action by Robert S. Watkins and others against Eliza Nugen. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. K. Miller, for plaintiffs in error. *Salem Dutcher*, for defendant in error.

COBB, J. This was a suit by Robert S. Watkins and others, claiming to be heirs at law of Wilson Watkins, deceased, to recover from Eliza Nugen a tract of land of which the defendant was alleged to be in possession. According to the allegations of the petition, Wilson Watkins died in 1902, and in 1897 executed a paper conveying to the defendant certain described property, to be held by her "after the expiration of the life estate herein reserved in fee simple forever." This instrument was in the form of a deed, and executed as such. It was made in consideration of the payment of $10 "and in considera-

tion of [the grantor's] interest in the said party of the second part." The paper was duly recorded. It is alleged that the paper is void: (1) Because it is in fact a will, and not properly executed as such. (2) Because it was the result of fraudulent imposition upon the grantor by the defendant, who induced him to believe that the document was a will, and not a deed, and was of no effect whatever until after his death; that it provided for her only in case she survived him and that, notwithstanding the execution of the paper, the grantor would still own the property absolutely. (3) Because the conveyance is founded upon, and is the result of, an agreement to do an immoral and illegal thing, to wit, an agreement on the part of the defendant, a married woman, to live *contra bonos mores* and in open defiance of all public decency and law, in illicit relations for life with the grantor. The petition alleges that the defendant had been living in such relations with Watkins for several years prior to the execution of the paper, and that he was induced to sign the paper on account of representations of the defendant that unless he did so she would cease to continue illegal intercourse with him and that the document was intended to provide for the continuance of further illegal and illicit relations between them, which relations were in consequence thereof kept up by her and him to the time of his death. The petition further alleges that, by reason of the confidential relations existing between the defendant and Watkins, if any title passed under the conveyance, the same is held in trust for the use of plaintiffs as heirs at law. The prayers were for injunction, cancellation, etc. The court dismissed the petition on demurrer at the hearing, and plaintiffs excepted.

1. The paper executed by Watkins was not a will, but a deed conveying the property *in præsenti*, with right of possession postponed until his death. *West v. Wright*, 115 Ga. 277, 41 S. E. 602.

2, 3. It is as well settled as any proposition can be that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon

an illegal or immoral consideration. If the contract is executed, it will be left to stand. If it be executory, neither party can enforce it. *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Adams v. Barrett*, 5 Ga. 404; *Peacock v. Terry*, 9 Ga. 137–147; *White v. Crew*, 16 Ga. 416; *Ralston v. Boady*, 20 Ga. 449; *Bailey v. Milner*, 35 Ga. 330; Fed. Cas. No. 740; *Bugg v. Towner*, 41 Ga. 315; *Thompson v. Cummings*, 68 Ga. 125 (2). In such a case one claiming under a party to the contract as legal representative or heir stands in no better position than the party himself, and the courts will afford him no relief. See *McCleskey v. Leadbetter*, 1 Ga. 551; *Crosby v. DeGraffenreid*, 19 Ga. 290; *Beale v. Hall*, 22 Ga. 432 (8); *Edwards v. Kilpatrick*, 70 Ga. 328. It is argued, however, that a court of equity will interpose to prevent the enforcement of an executory contract founded upon an alleged or immoral consideration, and that the contract involved in this case was executory. It is contended that a deed does not become an executed contract until possession is obtained under it. Even if counsel's premise be conceded, we do not agree to his conclusion. There is no such thing in Georgia as livery of seisin. A deed is executed by signing and delivery. As was said in *Adams v. Barrett*, 5 Ga. 415, "the old doctrine of corporal investiture, etc., has no force now, and a deed is a seisin in law. A deed is a contract executed. Even if not recorded, it passes the title as against the grantor, his heirs and devisees." The petition in the present case, does not, in terms, allege that the deed was ever delivered, but this is to be inferred from the allegations. In the copy attached to the petition, the deed purports to have been delivered, and it is alleged that it was recorded, and from this a presumption of delivery would arise. See *Ross v. Campbell*, 73 Ga. 309; *Gordon v. Trimmier*, 91 Ga. 472, 18 S. E. 404; *Bourquin v. Bourquin*, 110 Ga. 446, 35 S. E. 710. "An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed. An execu-

tory contract is one in which something remains to be done by one or more parties." Civ. Code, § 3632. It is expressly alleged in the petition that the defendant is in possession of the land, and that prior to the death of the grantor she performed her part of the contract. The contract was therefore completely executed when the suit was brought, if not before. By the express terms of the deed, possession by the grantee was postponed until after the termination of the life estate, and under the allegation of the petition, the defendant acquired possession at the earliest moment after the right to do so accrued. Where a deed is executed and delivered in consideration of future illicit intercourse, and the grantee acquires possession under it, neither the grantor nor his heirs can recover the land. *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48, and notes. See, also, 2 Devlin on Deeds (2d Ed.) § 809.

The allegations as to fraud are too loose and general, even if a court would interpose on this ground to prevent the enforcement of an executed contract based on an agreement to do an immoral thing. It is not alleged what means were used to deceive the grantor, nor how he was induced to believe that the contract was not an absolute conveyance. No contract would be set aside on allegations so general as these.

4. Section 3573 of the Civil Code has no application to such a state of facts as is presented by this petition. That section provides: "If a gift be made for a specific purpose, express, or secretly understood, and such purpose is illegal, or from other cause fails or cannot be accomplished, the donee shall hold as trustee for the donor or his next of kin." Without undertaking to trace the history of this section, it is sufficient to say that the transaction involved in this case was not a gift. There can be no such thing as a gift founded upon a consideration. Thorn. Gifts, p. 3; Bisp. Prin. Eq. (6 Ed.) § 66. There may be a gift for an immoral purpose but a contract based

on an illegal consideration is not a gift. Thorn. Gifts § 119 p. 95. The deed now under consideration is not a gift, but an executed contract founded upon an illegal and immoral consideration. As was said by the able counsel for the defendant in error in his brief, "it is a conveyance upon the set consideration of a vested remainder in consideration of concubinage for life--so much land for so much lust." There was no error in dismissing the petition.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

[114 Ind. 80 ; 15 N. E. 804.]

Hutchins v. Weldin.

(Supreme Court of Indiana. March 8, 1888.)

Appeal from circuit court, Stuben county ; R. Wes. McBride, Judge.

Action of replevin, brought by Nelson Hutchins against Leander F. Weldin. Verdict and judgment for defendant, and plaintiff's motion for a new trial overruled. Plaintiff appeals.

Woodhull & Brown, for appellant. *Somers & Roby*, for appellee.

Howk, J. This was an action of replevin brought by appellant, Hutchins, as plaintiff against appellee, Weldin, as defendant, to recover the possession of one dark bay mare, of the value of $50, of which mare plaintiff alleged he was the owner, and entitled to the possession, and that defendant had possession of such mare without right, and unlawfully detained the same from plaintiff. The cause was put at issue, and tried by a jury, and a verdict was returned for defendant, and, over plaintiff's motion for a new trial, judgment was rendered on the verdict. Plaintiff appeals to this court, and assigns here as error the overruling below of his motion for a new trial. In this motion a number of causes were assigned for such new trial, but the causes chiefly relied upon here by plaintiff's learned counsel for the reversal of the judgment below are alleged errors of law occurring at the trial in giving the jury at defendant's request, the following instructions, to-wit: "(3) It is a principle of law that a man who "takes an active part in leading others into error cannot "ask that the consequences of his mistake be thrown on "others. It is also a well settled principle of law "that when an act is done, or a statement made, by a "person, which if denied by him would work an in-

"jury to others whose conduct had been influenced by "the act or statement, the character of an estoppel "attaches, and he will not be allowed to make such "denial. (4) If the contract of sale under which this "property is claimed is void, it is because it is con- "trary to public policy. It is therefore subject to "all the limitations which sound public policy may "dictate ; and courts will treat such contract in the "manner which will be most consistent with sound "public policy, and best calculated to suppress and "discourage such violations of law. One qualification "of the rule is that the rule itself shall not be made "an engine of wrong and injury in the hands of a "wrongdoer against an innocent party. It can never "be good policy to punish the innocent for the crimes "of the guilty. Hence the rule cannot be set up to "the prejudice of any party innocent of all participa- "tion in the wrong, or whose rights have been ac- "quired without notice of it ; and it is a well-settled "principle of law that where goods are obtained by "fraud or under fraud, or under circumstances which "would render the sale void between the vendor and "vendee, and the vendor has furnished, however inno- "cently, to the vendee, any of the evidences of owner- "ship calculated to mislead a purchaser, and the "goods are purchased *bona fide* from the fraudulent "vendee, relying upon such evidences of ownership, "such innocent purchaser will hold as against the "original vendor."

Appellant's counsel contend, as we understand their argument, that the judgment below should be reversed, and a new trial granted, because, they say, the instructions quoted were wholly inapplicable to the evidence and the issues of the case, and tended to mislead and confuse the jury, and to prejudice them against the appellant. Counsel do not claim that these instructions, considered merely as abstract legal propositions, were erroneous ; but they say, substantially, that, although correct principles of law may be enunciated therein, both instructions were

foreign to the issues in the cause, and had no application whatever to the case made by the evidence. We do not agree, however, with the views of plaintiff's counsel in regard to the facts of this case. Plaintiff claimed that he was the owner, and entitled to the possession of the property, described in his complaint, and, further, that defendant had possession of such property without right, and unlawfully detained the same from plaintiff. Of course, plaintiff had the burden of establishing, by sufficient evidence, his claim to the property in controversy. We have carefully examined and considered all the evidence appearing in the record. The evidence is in much conflict, it is true, on some of the questions at issue between the parties; but, while this is so, it cannot be denied that there was evidence before the jury, which, if believed, authorized them to find that the plaintiff herein, by an executed contract of his own seeking and making, had parted with his title to, and right to the possession of, the mare in controversy to one Jacob Whetstone, before the commencement of this action. We need not state what this contract was, as shown by the evidence, further than to say that it was fully executed by both the parties thereto, and plaintiff got all the consideration for the mare he bargained for. But the contract was *contra bonos mores*, and void as against public policy. *Root v. Stevenson's Adm'r.* 24 Ind. 115; *Dumont v. Dufore*, 27 Ind. 263; *Davis v. Leonard*, 69 Ind. 213. Upon this point, the court of its own motion charged the jury, in effect, that, if they believed from the evidence that such contract was executed by the delivery of the mare to Whetstone after he had complied with the terms of plaintiff's proposal, "the law, in such a case, will leave the parties just where it finds them. * * * If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief." Where a contract, void as against sound morals or public policy, has been fully executed by both parties, and suit brought under, upon, or against such contract, "*potior est conditio defendentis.*"

We are of opinion that the instructions of the court given at defendant's request, when construed in connection with those given of the court's own motion, as an entirety,—as they must be, under our decisions,—could not, and did not, mislead or confuse the jury, nor prejudice them against the plaintiff, and they were certainly applicable to some of the phases of the case as presented by the evidence. When all the instructions given are considered with reference to each other and as an entirety, it will be found that they presented to the jury a correct statement of the law applicable to this case, fair alike to plaintiff and defendant, and were not calculated to mislead the jury. In such case, as we have often decided, the judgment below will not be reversed because of mere inaccuracies or loose expressions in any of the instructions, separately considered. *Deig v. Morehead*, 110 Ind. 451, 11 N. E. Rep. 458, and cases there cited.

The motion for a new trial was correctly overruled. The judgment is affirmed, with costs.

[55 Iowa, 674 : 8 N. W. 656].

Kinney vs. McDermott.

[Filed April 20, 1881.]

Plaintiff and defendant made a horse trade on Sunday, defendant leaving his horse with plaintiff, and taking the horse of plaintiff with him. A day or so later defendant, without plaintiff's knowledge, returned the horse of plaintiff he had received and took his own from plaintiff's stable. *Held*, that as the original contract was an unlawful one, the court would render no aid to either, and as plaintiff's possession was *prima facie* evidence of ownership, he might, on the strength of that possession, and the trespass of defendant, maintain replevin for the horse so taken away by defendant.

Appeal from Buena Vista circuit court.

This is an action of replevin, and the amount in controversy is less than $100. There was a trial by jury. There was a conflict in the evidence. The court instructed the jury to return a verdict for the plaintiff. Defendant appeals.

H. W. Weeden, Wm. Wart, and Robinson & Milchrist, for appellant. C. D. Goldsmith, for appellee.

ROTHROCK, J. The trial judge made the following certificate, upon which we are authorized, under the statute, to entertain the appeal:

"(1) On Sunday plaintiff agreed with defendant, at the house of the latter, to give defendant a horse and $25 in exchange for a horse of defendant. This was consented to, and on the same day, pursuant to said agreement, plaintiff left his horse with defendant, and took the horse of the latter away. *The money was to be paid the following Sunday* at the house of plaintiff. On Tuesday, following the exchange, defendant, in the absence of plaintiff, and without his knowledge or consent, returned to the stable of the latter the horse received of him, and took the horse he let plaintiff have away. A day or two later plaintiff replevied the horse

so taken, and has since kept both horses, using the one returned by defendant, and not offering to return either horse or money. Under these facts can the plaintiff recover in his action of replevin? "

"(2) Under the facts hereinbefore stated, can plaintiff recover in replevin when his alleged right of possession, under the issues made in the pleading, depends upon the ownership of the property?"

"(3) Is the plaintiff entitled to recover under the issues in this action, and the facts as stated above?"

A contract made and concluded on Sunday cannot be enforced by action. *Pike v. King*, 16 Iowa, 50. It is illegal, and the law in such cases will leave the parties where it finds them, or rather where they have placed themselves. If one party sells property to another on Sunday, and delivers it, no action will lie for the price agreed to be paid therefor. *Pike v. King*, *supra*.

If the defendant in this action had brought replevin for the horse, instead of taking him by force he would have been defeated, because he would have been obliged to introduce evidence to overcome the presumption arising from plaintiff's possession. By the acts of the parties in violation of law the plaintiff became entitled to the possession of the horse. This possession was such that the defendant could not have recovered by action the price, if sold and not paid for, and could not maintain an action of replevin. He, however, wrongfully and by a trespass, deprived the plaintiff of the possession. The question is, will he be allowed to recover by force what the law would not have aided him to recover peaceably? It is insisted by counsel for appellant that, because the plaintiff claims title to the horse, he was bound to introduce evidence of such title, and could only do so by showing the Sunday contract. But, according to the certificate of the trial judge, the plaintiff was in possession, and the defendant, by force, and without the knowledge

of the plaintiff, removed the horse from plaintiff's stable. The question is, by what right did the defendant possess himself of the horse? The burden was on him to show his right. In doing so he would necessarily be compelled to introduce the Sunday contract in evidence.

In *Smith v. Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said:

"The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vender to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession."

See also, 2 *Parsons on Contracts*, 764, and notes. The author admits there is some conflict of authority upon the question whether a vendee will be allowed to retain the property without paying the price. In our opinion he should, upon the ground that the law will leave the parties where it finds them. It was held in *Pike v. King*, *supra*, that the plaintiff could not recover the value of the property aside from the price agreed upon, or, in other words, could not recover upon the *quatum valebat*.

Affirmed.

[81 Iowa, 339: 46 N. W. 1003.]

McIntosh v. Wilson, Sheriff.

(Supreme Court of Iowa. October 24, 1890.)

Fraudulent Conveyances—Rights of Creditors—Illegal Contracts.

1. A transfer by the son of his interest in a drug-store to his father, the son remaining in possession, and managing the business as his own, is invalid as against the son's creditors who have no notice of such transfer.

2. *Where the father buys the entire interest in a drug-store from his son and the other owners, and permits the son to control the property and carry on the business as his own, for the purpose of avoiding the law prohibiting any person not a registered pharmacist, which the father was not, from running a drug-store, the son's creditors can subject the entire property to their debts,* **and the law will give no assistance to to the father, who put his property in the son's hands for an unlawful purpose.**

Appeal from district court, Wright county, D. R. HINDMAN, Judge.

Action to recover the possession of specific personal property. After the evidence was fully submitted, a verdict for the defendant was returned by direction of the court, and a judgment rendered thereon. The plaintiff appeals.

R. M. Wright, for appellant. Martin & Wambach, for appellee.

ROBINSON, J. In June, 1882, Alexander Latter and Dr. Brackett owned and conducted a drug-store at Goldfield, Iowa. In the month named, Latter sold an undivided one-half of the stock of goods and business to N. M. Melrose and Dr. Morse, and Dr. Brackett sold to them one-third of his share, so that each of the three persons last named owned one-third of the property, and the business was carried on by them as co-partners for a time. Dr. Morse made no payment for his share

and after a few months withdrew from the firm. After his withdrawal, the business was carried on by N. M. Melrose and Dr. Brackett until October, 1883, their interests in the property being equal. On the date last named, Dr. Brackett sold his interest to William Melrose, the father of N. M. Melrose. The latter has paid $400 on account of his purchase. That amount, and whatever sum in addition he put into the business, were loaned him by his father.

When Dr. Brackett withdrew, an arrangement was made which is stated by the son as follows: "I told "father that I did not think I would be able to handle "half of it, and proposed that he should buy out "Brackett, assume my indebtedness, and I would run "the business in my name. He bought out Dr. "Brackett's business, and assumed my debts, and I "took charge of the business in my name. It was be- "cause I held a retail tobacco and liquor license, and "also because my father was debarred by the pharmacy "law from running a drug-store."

On January 1, 1885, the father and son signed an agreement in words as follows: "It is hereby agreed "between Wm. Melrose and N. M. Melrose shall take "charge of the drug business of Wm. Melrose in his "building in Goldfield, Iowa, and do all the business, "buying, selling, etc., and shall receive one-half the "profits for his services; and whenever he (N. M. "Melrose) shall pay to me (Wm. Melrose) one-half of "the amount paid by me for said drug-stock, etc., he "shall become owner of one-half the business."

In January, 1886, a new agreement was made by which the son was to receive $30 per month for his services. He testifies that he then abandoned his plan of buying an interest in the property, but the business was carried on as before. The father was in the store a large part of the time, and gave some directions as to what should be done.

On the 23rd day of March, 1883, Root Bros. obtained a judgment in the district court of Hamilton county against N. M. Melrose for $125.08 damages, and $22.30

costs. On the 28th day of March, 1886, the sheriff of Wright county received an execution issued to satisfy said judgment, and on the same day levied it upon the stock of goods which were used in the business carried on in the name of the son, and claimed by the father, as already stated. Its admitted value is $300. This action was commenced by William Melrose to recover the goods. Before the trial, his death was suggested, and his administrator was substituted as plaintiff. Judgment was rendered in favor of defendant, the sheriff of Wright county, for the amount required to satisfy the execution.

1. The evidence shows that N. M. Melrose owned one-half the stock and business from the time Dr. Morse retired, until October, 1883, when Dr. Brackett sold to plaintiff's intestate. The fact that all the money he had paid on account of the business was furnished by his father did not alter his legal relation to the property. The arrangement by which his father was to assume his debts, and take the property, was not made of record by an instrument in writing duly recorded, as provided by section 1923 of the Code. The son remained in possession and carried on the business, after the arrangement was made the same as before. It does not appear that defendant had any knowledge of the agreement, and we conclude there was not such a transfer of *one-half the property in controversy* as would defeat the levy of defendant, but that it could be enforced to that extent by proper proceedings.

2. A more serious question is presented as to the *remainder of the property.* The judgment which defendant seeks to collect was rendered when the business was owned and carried on by N. M. Melrose and Dr. Brackett and before plaintiff's intestate had acquired any interest in it. It is not shown when the debt upon which it was rendered was contracted, but there is nothing in the record to justify the presumption that credit was given to the debtor on account of any interest he appeared to have in the property in

question. Therefore there is no ground for holding that plaintiff's intestate had so conducted himself with respect to the property as to mislead Root Bros. to their prejudice in the creation of the debt. *It clearly appears, however, that the father authorized his son to remain in possession and control of the property, and to conduct the business in his own name, for an unlawful purpose.* Chapter 75 of the Acts of the 18th General Assembly makes it unlawful for any person not a registered pharmacist to conduct such a business as that carried on by the son. It was held in *State v. Norton*, 67 Iowa, 641, 25 N. W. Rep. 842, that the one who conducts a drug-store is the proprietor within the meaning of the act. The father could not become a registered pharmacist under the provisions of the act, and, to avoid the requirements and penalties provided by law, he arranged for his son to claim and appear to be the actual owner. *Appellant contends that there was not in fact a conveyance of the property by the father to the son, and that the former would not have been estopped to assert his title as against the world excepting claimants for a violation of laws reyulating the practice of pharmacy, and the sale of intoxicating liquors. We do not think the claim can be sustained.* **The father clothed the son with all the visible badges of ownership, and authorized him to declare himself the owner for the purpose of violating the law. Contracts made in violation of law will not be enforced.** *Caldwell v. Bridal*, 48 Iowa, 16; *Reynolds v. Nichols*, 12 Iowa, 403; *Lemon v. Grosskopf*, 22 Wis. 451; 2 Amer. & Eng. Enc. Law, 869–872, and notes. "Contracts intended to promote or requiring the performance of acts forbidden by statute are void." *Dillon v. Allen*, 46 Iowa, 300. A sale and delivery of property on Sunday is illegal and in such a case the law will not enforce the agreement, but will leave the parties where it finds them. *Kinney v. McDermott*, 55 Iowa, 674, 8 N. W. Rep. 656; *Pike v. King*, 16 Iowa, 49.

The property in controversy having been transferred to the son, to be held and treated by him as its ostensible owner, to accomplish a purpose prohibited by law, the father lost the right to reclaim it by law. It could have been used by the son for his own purposes, including the payment of his debts, and it was therefore subject to legal process in favor of his creditors.

As the father claimed to own all the property, what we have said on this branch of the case applies to all. The judgment of the district court is affirmed.

[11 Mass. 368.]

1814.

Inhabitants of Worcester v. Eaton.

The incompetency of a witness to defeat, by his testimony, an instrument to which he is a party, is confined to parties to negotiable instruments.

A conveyance of land made in consideration of a composition of felony cannot be avoided by the grantor.

The grantor in a deed of lands is a competent witness to impeach it, notwithstanding a subsequent deed of the same premises has been made by the grantor to a third party, in consideration of maintenance and support to be provided for the grantor during life.

This was a writ of entry *sur disseisin*, in which the said Inhabitants demand against the said Eaton certain described lands and rooms in a dwelling house, &c., assigned to Betsey Flagg, widow of David F., for her dower, who alleged a seisin of the freehold thereof for her life until disseised by the tenants.

* * * * * *

Parker, C. J.

The defendants claim under a conveyance from Betsy Flagg, who had a life estate in the premises, under an assignment of it by a judge of probate, as her dower in her deceased husband's estate. The consideration of this conveyance was substantially an engagement, on the part of the Inhabitants of the Town of Worcester, to support her during the residue of her life.

The tenant defends under a deed from the same person, executed and delivered almost two years before her deed to demandants, to William C. Fiske and Amos Hudson, for an apparent consideration of 250 dollars, and a deed from the said Fiske and Hudson to him, executed and delivered April 1, 1809.

It is then obvious that the demandants cannot prevail in this suit, unless they can show that the prior conveyance to Fiske and Hudson was void in its execution, or that it is voidable as against the tenant who purchased of them.

It is not stated in the report whether Eaton was a *bona fide* purchnser for a valuable consideration; but that is to be presamed since there is nothing to the contrary in the case.

The demandants attempt to avoid the conveyance to Fiske and Hudson, by showing that the real consideration which passed between the parties was the composition of a felony charged upon the said Betsy Flagg by the two grantees named in the deed, and for proof of this fact at the trial, they produced, besides other evidence, the testimony of the said Betsey, which was received by the judge who tried the cause, and permitted to go to the jury, although objected to by the tenant.

The first question reserved respects the competency of this witness; and it has been objected to her that, being a party to the deed, she should not be permitted, by her testimony, to defeat what, by her free and voluntary act, she had attempted to establish; and also that she was in some measure interested, that is, to secure to the defendants the fund upon the faith of which they had undertaken to maintain her.

But we are of opinion that she is a competent witness, notwithstanding these objections. The rule lately settled in this Court, respecting the competency of witnesses, who are parties to the instruments to be defeated by their testimony, applies exclusively to parties to a negotiable instrument, as was stated in the case of *Churchill v. Suter* (4 Mass. 156).

The other objection cannot prevail, for their is no legal and direct interest in the event of this suit; and the circumstance relied upon to prove her interest proves nothing more than a possible bias, which the jury are to judge of in considering her credibility.

Taking her testimony, then, as correctly given, and as corroborated by other evidence, we must believe that the only consideration of the conveyance to Fiske and Hudson, except a trifling sum which was given for form's sake after the deed was executed, was the expectation on her part of some indulgence, by the means of those grantees, on a complaint or suspicion, that existed against her of having received stolen goods, or some other criminal act conneted with a larceny committed on the said Fiske and Hudson's property by one Gleason, who was aftewards convicted thereof. And, indeed, from the manner in which the cause was put to the jury by the judge, we are obliged to consider the jury as having found, by their verdict, that the deed was given altogether in consideration of an expected release from a criminal prosecution by the intervention of the said Fiske and Hudson, and for no other cause.

And, indeed, from the manner in which the cause was put to the jury by the judge, we are obliged to consider the jury as having found, by their verdict that the deed was given altogether in consideration of an expected release from a criminal prosecution by the intervention of the said Fiske and Hudson, and for no other cause.

The question is, then, whether a deed given under such circumstances is absolutely void, or whether it can be avoided by the entry of the grantor, so that a subsequent conveyance, made by her *bona fide*, and for a valuable consideration, will pass the estate. And we are of opinion that the deed so given is not void; nor was it voidable, even against Fiske and Hudson, by the entry of the grantor, for the reasons mentioned.

A bond or other obligation or a written promise founded upon such a consideration, may be avoided; because the law will not uphold a contract, or permit a party to enforce it, if it was made to secure the price of an unlawful act. Thus, in the case of *Collins v. Blantern* (2 Wils. 347), a bond given for the com-

pounding of a felony was avoided by plea setting forth the illegality for which it was given. But it was holden in that case, and it has been holden in numerous other cases, that where money has in fact been paid upon such consideration it cannot be recovered back again, because *in pari delicto potior est conditio defendentis.*

There have been some cases in England which look as if in all instances where a party has paid money upon an illegal transaction, he may recover it back again in an action for money had and received. But it is now unquestionably settled there that an action for money so paid cannot be maintained where the parties are really *in pari delicto*, and upon looking into all the cases on the subject, some of which have already been referred to, it will appear that a distinction is maintained between those cases in which one of the parties has by an illegal act taken advantage of and oppressed the other, and those in which it is not possible to distinguish between the parties, as to the degree of their criminality. Thus when usury has been paid, it is considered that the lender has availed himself of the distress of the borrower, and has violated the laws to extort from him more than the lawful rate of interest. In this case an action for money had and received will lie for the excess.

In the cases of *Smith v. Bromley* (Doug. 696*n*) and *Browning v. Morris* (Cowp. 790), the doctrine, as laid down by Lord MANSFIELD, is that where certain acts are made unlawful by the statute, to protect unwary and ignorant people from oppression and extortion, there although both parties are guilty of violating the law, yet they are not equally guilty, and that in such cases the party from whom money is exacted shall recover it back from him who practices the oppression. Such are the cases of usury of money paid to a creditor by a bankrupt to produce a signature to a certificate, and moneys paid contrary to the laws regulating lotteries.

But that in all acts which are unlawful on account of their immorality, or because they are hostile to public policy, there the parties to the act are in pari delicto and potior est conditio defendentis.

This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of the common law in this country.

And in the case of *Vandyck & Al. v. Hewitt* (1 East, 98), Lord KENYON again recognizes and adopts Lord MANSFIELD'S distinction, and says that the rule has been settled in all times, that *in pari delicto potior est conditio defendentis.*

It appears there to be the settled law in England, and we are satisfied that it is also the law here, that where two parties agree in violating the laws of the land, the court will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money, or do any other valuable act, on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court; and the law will say: "Our forms and rules are established to protect the innocent and to vindicate the injured, "not to aid offenders in the execution of their "unjust projects;" and if the party who has foolishly paid his money repents his folly, and brings his action to recover it back, the same law will say to him, "You have paid the price "of your wickedness, and you must not have "the aid of the law to rid you of an inconvenience which is a suitable punishment of "your offense."

If, then, the composition of a felony or of a larceny is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a

a court of justice; nor can the other party, if he has paid it, recover it back again.

There must, then, be a distinction between a conveyance of land and money paid on such consideration, or Betsey Flagg could not, on this ground, avoid her deed to Fiske and Hudson by entry or action, so as to convey any title to the demandants. Such a distinction was attempted in the argument, but we find no foundation for it.

A deed of bargain and sale, signed, sealed, delivered, acknowledged, and recorded, is an actual transfer of the land to the grantee as much as the delivery over of a sum of money, or of a personal chattel, is a transfer of either of those. And in addition to the deed in the case at bar, it is in evidence that the original grantee had by deed also conveyed the same land to the tenant, who entered and occupied more than a year before Betsey Flagg entered and made her deed to the demandants.

We are satisfied that her entry was tortious, and that she acquired no right by it to convey, if there is no other defect than the composition which has been spoken of; and if such entry would have been good against Fiske and Hudson, it would not avail her against Eaton, provided he were a *bona fide* purchaser for a valuable consideration, without any knowledge of the illegal transaction between the original parties. But the case suggests another point, which, from the apprehension of the judge who sat in the trial that it was not necessary to be settled, was not fully before the jury; which is, that the deed of Betsey Flagg, under which the tenants claims, was obtained from her by duress of imprisonment, or threats of imprisonment. As we are inclined to think that menaces of imprisonment to a woman, fully made out in evidence, would avoid any deed or other instrument extorted from her by such means, we think there ought to be a more full trial on that point. We do not, however, see any facts stated in the report which would establish this defence

satisfactorily to our minds; but it being a proper subject for the jury to decide upon, and a new trial being necessary, to conform to our opinion upon the other point, we think it proper to suggest that this point of the subject ought to be more fully tried.

With respect to the other questions,—the capacity of the town to take, and the nature of the consideration in the conveyance to the town,—there is no necessity now to decide them; since the question now decided makes a new trial necessary, and these questions may hereafter come before us more directly.

Let a new trial be granted.

[12 Met. 397.]

1847.

Ball v. Gilbert, Trustee.

A wager on the event of an election is illegal and void.

When the parties to a wager on the event of an election place money in the hands of a third person, as stakeholder, he is immediately liable, in the trustee process, to a creditor of either of them.

When one who is charged, in the court of common pleas, as trustee of another, under Rev. Sts. c. 109, appeals to the supreme judicial court, and is charged there also, he is not entitled to any costs on his appeal.

This was an action of assumpsit, in which the declaration alleged that "the said Gilbert, at Boston, on the "seventh day of November, 1844, for value received of "the plaintiff, drew his order, in writing, under his "hand, of that date, directed to James Cheever to pay "to the plaintiff the sum of one hundred dollars; and "the plaintiff, on said seventh day of November, at "said Boston, presented said order to the said Cheever "for his acceptance and payment, which the said "Cheever then and there refused to do; of which the "said Gilbert then and there had due notice, and was "requested to pay the same; whereby he became "liable." There were also the money counts.

The said Cheever, on whom said order was drawn, was summoned as the trustee of the defendant, and the writ was served upon him on the 27th of November, 1844.

At the January term of the court of common pleas, in 1845, the principal defendant was defaulted. At a subsequent term, the trustee filed his answer, which was as follows:

"In September or October, 1844, Henry Davis and "the defendant Gilbert came to my counting room, "and placed in my hands the sum of one hundred and "seventy-five dollars, Gilbert one hundred dollars, and

" Davis seventy-five dollars, which I was requested to " hold and dispose of upon the following terms, as con- " tingencies; that is to say, if Henry Clay was elected " the next president of the United States, I " was to pay the sum of one hundred and " seventy-five dollars to said Gilbert; and if " Henry Clay was not so elected, I was to pay said sum " to said Davis. I was about to make a memorandum " in writing, to which Mr. Gilbert objected, and said " there was no need of any; that Mr. Davis was a gen- " tleman, and would not sue back; and for himself, he " would sooner have his hand cut off than to sue for " it or do anything dishonorable about it. I accord- " ingly made no memorandum, and took the money. " On the 15th of January, 1845, when the result of the " election was ascertained to my satisfaction, I paid " said sum of one hundred and seventy-five dollars to " said Davis, and had not then, nor have at any time " ever received any notice or direction from said Gil- " bert, not to pay over said money, or any part of it, " to said Davis, either personally or in writing from " him, or by any one acting or assuming to act as " agent of said Gilbert. In the latter part of Novem- " ber, 1844, a person whom I suppose, but do not " know, to be Ball, the plaintiff, presented to me a " draft, in the common form, purporting to be signed " by Henry Gilbert, to pay to said Ball (I think) one " hundred dollars, for value received. I do not know " whether the signature was the handwriting of said " Gilbert, or not; and he has never said any thing to " me on the subject, before or since. Said draft had " no reference to any bet made by said Gilbert, nor to " the presidential election; not did it contain any " notice or direction not to pay any money, in my " hands, to said Davis, nor to refund to said Gilbert, " or to pay to said Ball, or any other person, any " money said Gilbert had deposited in my hands. The " person who presented said paper did not direct me " not to pay said money to any person but himself,

"nor give any directions as to said money; nor did he "assume to act, or appear to act, for said Gilbert, but "for himself alone. I have no recollection of any "transaction with said Gilbert, except that described "above, when the said Gilbert placed money in my "hands, to be paid over as then directed, which direc- "tion was never countermanded by said Gilbert, in "any way, to my knowledge."

The court of common pleas charged said Cheever, on his aforesaid answer, and he took an appeal to this court.

W. HILLIARD, for the plaintiff.

HALLETT, for the trustee.

SHAW, C. J. We do not think it necessary, in this case, to enter on the general discussion whether, in this Commonwealth, a wager on an indifferent subject, in which the parties have no other interest than that created by the wager itself, is a legal contract, or one which may be enforced in a court of justice. In England, it has been reluctantly held, until recently, and still is, unless changed by statute, that for an equal wager, upon an indifferent subject, depending upon a contingency, though of a trivial nature, an action may be maintained; *Good v. Elliott*, 3 T. R. 693; though in that case a very able dissenting opinion upon the general ground was given by Mr Justice BULLER.

But even in England, the general rule is held subject to so many restrictions and exceptions, that it remains applicable to very few cases. If the wager be upon a game or other transaction prohibited by law; if it draws into question the rights, feelings, interests or quiet of other persons; if it promote any violation of law, or operate as an incitement to a breach of the peace; if it be contrary to good morals or sound public policy, the wager is void. In Massachusetts, it is believed no action has been sustained upon a wager; perhaps because none has been brought. We are not aware that there has been any direct adjudication on the subject. As far as judicial opinions have been indirectly expressed, they have been adverse to such an

action. *Amory v. Gilman*, 2 Mass. 1. *Babcock v. Thompson*, 3 Pick. 446. And Chancellor KENT, in his Commentaries, considers the law so settled in Massachusetts. 3 Kent Com. (3 ed.) 278.

But it is perhaps useless to speculate upon the general question of the legality of wagers, on different subjects of contingency. The more precise question here is, whether a wager upon the event of an election to a public office, depending upon popular suffrage in this Commonwealth, is valid, and constitutes a legal contract. The answer is too obvious to admit of doubt. And it seems to us, that upon principle, such a wager is equally void, whether it be upon the election of an officer of the United States, of the state government, of a county, town, parish, or other aggregate corporation, depending upon suffrage. The very theory of such popular institutions is, that the person elected to office is placed there by the free choice of the majority of persons free to inquire and judge, free to will and determine, and free to act with purity and intelligence, uninfluenced and unseduced by interested, sinister, or corrupt motives. If the persons voting act otherwise, they act without regard to the fitness of the candidate, or to their own sense of duty. Upon the practical maintenance of this theory, in its purity and perfection, or as near an approximation to it as the infirmities and vices of society will permit, depend the utility, the safety and the stability of all popular institutions, relying upon popular suffrage for their basis and operation. And it is obvious that the more extensive and general the right of suffrage is, the more easily it may be abused and perverted, and the more important it is that its purity should be guarded and preserved. The more general the right of suffrage, the smaller the proportion of power which the vote of each one carries, the more easily is it influenced, and, if voters should ever become venal, the smaller the price at which each can be influenced or controlled.

If one bet can be made on an election, many can be made. If small sums can be staked, large ones can.

So that, on a great and exciting popular election, a large amount of money may depend on the result. All those who are acting together will have a common, and may have a large pecuniary interest in the issue. And it is conformable to the most obvious principles of economy, and dictated by the common motive to human action, self-interest, that those who are to gain or lose a large sum of money, upon the happening of an event which is contingent, should make a reasonable outlay of money, to influence and bring about that event. This, therefore, they will be likely to do, without regard to the social and political merits of the election. It may happen—in fact it does often happen—that a few thousand, or even a few hundred, votes may decide the election of a state; and the election of a state may decide that of the Union. If a few thousand dollars will command or influence such a number of votes, would it not be presuming too much on pure, disinterested virtue, to believe that they would not be applied? And such influence is to be brought to bear, not merely on the few hundreds or thousands, who may turn the scale, but upon the whole body of voters, on both sides.

But money may be applied to effect the result, not only in the coarse, palpable and offensive form of bribery, by the direct purchase of votes, but in other modes quite as efficacious, and not less detrimental to the public interest. It may be applied, by the managers of the respective parties, to the provision of treats and other gratifications; to the opening of houses of entertainment, to which partisans may resort at free cost, where the passions may be stimulated, the moral sense perverted, and all idea of social duty and personal responsibility overwhelmed in mere blind partisan feeling and desire of triumph, which lose sight of the object for which the right of suffrage is conferred. An election so influenced could not be regarded as the expressed will of an intelligent constituency; it would violate the whole theory, on which the right of suffrage is founded, and destroy the con-

fidence of all judicious persons in that particular power of the people, which has been regarded as the principle security for permanent, regulated, constitutional liberty. If it be true that wagers on elections would have any tendency to create such a pecuniary interest in their result, as we have no doubt they have, we can have no hesitation in saying, that all such wagers are illegal and utterly void.

But the position here taken is well supported by authority. It was held, in England, that a wager on the event of an election of a member of parliament was void; but that was a bet between voters, *Allen v. Hearn*, 1 T. R. 56. So in Pennsylvania. *M'Allister v. Hoffman*, 16 S. & R. 147. *Smith v. M'Masters*, 2 Browne, 182. So in New York. The first case was that on an election in which the parties were voters; one party had voted, but by possibility the other party might have voted after the bet was made, and some stress was laid on this circumstance. *Bunn v. Lansing*, 8 Johns. 454. Afterwards the same decision was given upon a bet made after the voting had closed, and it could not influence the particular result. *Lansing v. Lansing*, 8 Johns. 454. And the same decision, on general grounds, was made in several cases. *Vischer v. Yates*, 11 Johns. 23. *Yates v. Foot*, and *Denniston v. Cook*, 12 Johns. 1, 376. *Rust v. Gott*, 9 Cow. 169. The same doctrine has been held in Rhode Island and other states. In Rhode Island, an able opinion was given by Chief Justice EDDY, in the case of *Stoddard v. Martin*, 1 R. I. Rep. 1, and also stated in a very good note in 9 Cow. 175.

Supposing, then, the contract to be illegal and absolutely void, what are the rights and obligations of the respective parties under it. The law will not lend its aid to carry into effect an illegal contract, if it be executory, nor to restore the party who has paid money on it, if executed. They are *in pari delicto*. The winner cannot maintain an action against the loser to recover it if not paid, nor the loser to recover it back when paid.

A question might arise, whether the stakeholder might not stand on the same footing, and be held to be amenable to neither party for money received on such a wager; but we think it clear that in no proper sense can a stakeholder be regarded as a party to the illegal contract, or *in pari delicto*. He is a mere depositary of both parties for the money deposited by them respectively, with a naked authority to deliver it over on the proposed contingency. If the authority is actually revoked before the money is paid over, it remains a naked deposit, to the use of the depositor. *Cotton v. Thursland*, 5 T. R. 405. *Lacaussade v. White*, 7 T. R. 535. It was said by LEBLANC, J., in *Vandyke v. Hewitt*, 1 East., 98, that the authority of *Lacaussade v. White* had been much canvassed in *Howson v. Hancock*, 8 T. R. 575. See also the remarks of MANSFIELD C. J., in 3 Taunt. 284, and of LAWRENCE J., in 8 East, 382, note. But the distinction between those cases is quite obvious. The former was upon an illegal wager, against the stakeholder, after the event had happened, but before the money had been paid by the stakeholder to the winner. It remained in the hands of the stakeholder as a naked deposit, with authority to pay it over upon the contingency; the bringing of the action was a revocation of the authority, so that it became a deposit to the plaintiff's use. In *Howson v. Hancock*, the money had been paid over to the winner; and then it stood upon the same footing as if paid by the loser himself, who, being *in pari delicto*, could not maintain an action to recover it back. The same principle was settled in a case already cited for another purpose. *Vischer v. Yates*, 11 Johns. 23.

We think the money deposited by each party was a simple, naked deposit, respecting which the agreement to pay it over to one, according to the result of the pending presidential election, and not executed by actual payment, was wholly inoperative and void; and then, by implication of law, the money was so deposited to the use of the depositors respectively; and that an action for money had and received would lie for

each party for the amount so deposited by him. So that, at the time of the service of this writ, November 27th, 1844, Cheever held $100 as a deposit to the use of Gilbert, and if he was liable to be charged as trustee at that time, it is no good answer, that afterwards, in February, and when the result of the election was ascertained, he paid over the amount to Davis, the winner. It was a payment in his own wrong.

If it be urged that the contract was voidable, and could only be avoided by the party himself who had made the deposit; that it was a personal privilege to rescind it, which he might exercise or not, by notice to the depositary not to pay over; and that no such notice, or notice of the revocation of his authority, was given personally by the principal defendant to the trustee; we think the argument cannot avail. The contract, as between the parties to the wager, was not voidable only, but absolutely void; not as injurious to the rights of one party, which he may avoid at his election, but as contrary to public policy, and wholly void, and needed not the act nor will of the party to rescind it.

The contract being void between the parties, the money in the hands of the stakeholder becomes a naked deposit to the use of the depositor, and is precisely within the provision of the trustee law. He has effects of the principal defendant intrusted and deposited in his hands, liable to be attached. Rev. Sts. c. 109 § 4.

As an owner of money or other property may give it away without consideration, if he can do it without injury to his creditor or other third person, so he may authorize one holding money for his use to do the same. **If, therefore, such stakeholder has paid over the money, with the authority of the depositor, before notice of the revocation of such authority, and before the right of any third person has intervened, the depositor, as we have seen, cannot recover it back.** In the present case, the money had not been paid over when the attachment

was made; no formal act of revocation on the part of the depositor was necessary; the attachment was an official revocation by rendering the depositor liable by law to answer to the attaching creditor. The service of the process, therefore, being thus a revocation of the authority of the stakeholder to pay over to Davis the money deposited by Gilbert, the depositary, Cheever, became chargeable as the trustee of Gilbert, to the amount of that deposit; and any payment afterwards was a payment in his own wrong.

Trustee charged.

[101 Mass. 363]

1869.

Atwood v. Fisk.

A bill in equity will not lie to compel the surrender or cancellation of an overdue promissory note and a mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement.

AMES, J. It has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand : not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action founded on the illegal contract in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice WILMOT in *Collins v. Blantern* (2 Wils. 350) "all writers upon our law agree on this : No polluted hand shall touch the pure fountain of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again ; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani !*

In this respect the rule in equity is the same as at law. Equity follows the rule of the law and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal con-

tracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are truly *in pari delicto.* 1 Story Eq. 298; *Claridge v. Hoar,* 14 Ves. 59.

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question they could avail themselves of the maxim above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court, in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors or plaintiffs and are apparently in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration why should the court lend its process to one party to the illegality rather than the other? What superior equities in that view of the case have these plaintiffs over the defendants. We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case (*Worcester v. Eaton,* 11 Mass. 375). We see no occasion for the interference of the court as prayed for upon any view of the case.

[101 Mass. 366; 3 Am. Rep. 368.]

1869.

Myers vs. Meinrath.

An action will not lie for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel, on the Lord's day, and retained by the defendant afterwards, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by the defendant.

WELLS, J.:

That contracts made upon the Lord's day are illegal; that no action based upon such a contract can be maintained in a court of law or equity, either to enforce its obligations or to secure its fruits, in favor of either party; are propositions settled beyond controversy.

But such contracts are not altogether inoperative. They may be executed by the parties, and then the same principal of public policy which leads courts to refuse to act, when called upon to enforce them, will prevent the court from acting to relieve either party from the consequences of the illegal transaction. This may indirectly give effect to the executed illegal contract. The purpose of the rule of law, however, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contracts. In such cases, the defence of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff.

Upon this principle, possession, acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it, as a sufficient title. Neither party is allowed to impeach its validity by asserting

the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The Court does not give it effect, but simply refuses its aid to undo what the parties have already done. Chit. Con. (10th Am. ed.) 732. *Johnson v. Willis*, 7 Gray, 164. *King v. Green*, 6 Allen, 139. *Worcester v. Eaton*, 11 Mass. 368.

The plaintiff relies upon certain intimations in the opinion by which the decision of the Court was announced in the case of *Ladd v. Rogers*, 11 Allen, 209. The contract was there held to be illegal, so that no action could be maintained for the price of a horse sold and delivered upon the Lord's day. It was also held that no implied *assumpsit* for the value of the horse arose from the fact that the defendant afterwards retained and treated the horse as his own. This last point was decided upon the general principles applicable to *assumpsit* and not on any ground of taint from the original illegality. The opinion also strongly intimates that the sale was wholly nugatory, passed no property and gave no rights; and that the plaintiff might have maintained trover for the conversion of the horse, notwithstanding the sale and delivery.

The case of *Williams v. Paul*, 6 Bing. 653, arose upon a similar state of facts, with the addition of a subsequent promise to pay. The Court held that the value of the property—not the price agreed for on Sunday—might be recovered upon *quantum meruit*.

There are other authorities to the effect that, where there has been only a partial execution of an illegal contract, the party who has advanced money or delivered property under it may reclaim and recover it. This is sometimes put upon the ground that it is better to encourage the revocation than the fulfillment of such contracts; sometimes upon the ground of a difference in the position of the parties in respect to the illegality of the transactions, or of some advantage taken or fraud committed by one upon the other. Upon this latter ground the case of *Adams v. Gay*, 19 Verm. 358, appears to have been placed. In that

case there had been an exchange of horses on Sunday. The whole transaction was completed on that day. One of the parties, being cheated in the trade, undertook to revoke and was allowed to recover, not on the ground that the whole transaction was void and inoperative, but on the ground of fraud in the other party, and as an exception to the general rule. The judgment did not rest upon that ground; but the doctrine, substantially as above stated, was announced by the court as the reason for refusing to allow the defendant, after argument upon exceptions, an opportunity to set up the defence of illegality under the statute of another state. Upon the point stated in *Adams v. Gay*, that an action lies for fraud in a contract void for illegality, the decisions in Massachusetts are clearly to the contrary. *Robeson v. French*, 12 Met. 24. *Way v. Foster*, 1 Allen, 408. *Gregg v. Wyman*, 4 Cush. 322.

It is a question undoubtedly to be determined by the Court upon considerations of public policy. But those considerations must be general, and not such merely as arise out of the facts of the particular case. Where the payment or delivery is made for the furtherance of an immoral or illegal purpose, the Court will not help the guilty party to revoke, although another, equally guilty, may thereby make an undeserved gain. But where the illegality consists in the time or mode in which the transaction takes place, and not in the character of the transaction itself, the court will undoubtedly regard the position of the parties in respect to the subject matter. Thus in the case of a horse delivered in pursuance of an illegal contract of hire on the Lord's day, although the owner cannot recover upon his contract, and can have no remedy for excessive use or injury to his horse while in the possession of the hirer, yet he is not deprived of his title to the horse, and he may at any time retake possession and thus be restored to all his rights. The fact of an illegal bailment or delivery, without any purpose to pass the title, will not enable the party receiving

the property to convert it to his own use, or withhold it from the owner, without any legal liability therefor. *Dwight v. Brewster*, 1 Pick. 50, 55.

In case of a contract of sale not executed by payment of the consideration, when the contract remains executory on one side, the law which declares the executory part of the contract void might well regard the partial execution ineffectual. It is not necessary, however, to decide the point, inasmuch as in the present case the contract was completely executed on both sides, the parties are *in pari delicto*, and, by refusing to aid either party in the attempt to restore himself to his former position, we leave him in the condition in which he has placed himself by his own illegal conduct. That, as we understand it, is the aim of the courts in applying the general rule upon this subject.

The plaintiff contends that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proof by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. *Gregg v. Wyman*, 4 Cush. 322. *Duffy v. Gorman*, 10 Cush. 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of two offending parties at the instigation of the other.

The decision of the superior court is accordingly affirmed.

Judgment for defendants.

[105 Mass 399.]

1870.

Horton v. Buffington.

The owner of a wagon sold it on a Lord's day to one who resold it to a third person, who was ignorant that his vendor had bought it on a Lord's day. *Held*, that it was not liable to attachment in the hands of this buyer on a writ against the original owner.

AMES, J. It is well settled that contracts made upon the Lord's day are illegal and cannot be enforced. It is equally well settled, however, that after such a contract has been executed and carried into full effect, the law will not aid a party, who has paid money or delivered property in pursuance of its terms, to reclaim what he has so parted with. The policy of the law is to leave the parties in all such cases without remedy against each other. The defence of illegality is allowed, "not as a protection to the defendant, but as a disability in the plaintiff." *Myers v. Meinrath*, 101 Mass. 366.

The case finds that the wagon in dispute, although it may be true that it was sold by Jarvis B. Horton on the Lord's day, was delivered to his brother, Charles A. Horton, was subsequently sold by the latter to the plaintiff, and was in the actual possession and use of the plaintiff at the time of the attachment by the defendant. In the absence of all evidence to the contrary, it may be assumed that the consideration of the first sale was paid.

Under such circumstances, it is difficult to see how the original vendor, Jarvis B. Horton, could have reclaimed it on the ground of any illegality in the contract of sale. The law would not aid him to undo what he had done. He could only impeach the sale by showing the illegality of his own act, which in the case of an executed and completed contract he cer-

tainly can not do. This disability on his part to reclaim it would avail the party holding it, as a sufficient title. *Myers v. Meinrath, ubi supra.*

It had ceased to be the original vendor's property, or liable for his debts, and therefore the attachment under which the defendant seeks to justify was wrongful. *King v. Green*, 6 Allen, 139. *Claridge v. Hoare*, 14 Ves. 59. *Way v. Foster*, 1 Allen, 408. *Gregg v. Wyman*, 4 Cush. 322. *Samson v. Shaw*, 101 Mass. 145.

Exceptions overruled.

[107 Mass. 439 : 9 Am. Rep. 45].

1871.

Joshua Cranson vs. David W. Goss.

One who takes a promissory note, bearing date of a secular day, before maturity, in good faith and for a valuable consideration, may maintain an action thereon, against the maker, although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee.

Action on a promissory note dated December 15, 1869, payable in one year to the order of John Wells, and by him indorsed to the plaintiff. The case was submitted for the opinion of the court on the following statement of facts:

"It is agreed that the plaintiff is a *bona fide* holder "of the note in suit, for a valuable consideration, and "that he obtained it before it was due without notice "of any defect, illegality or other infirmity in it. It "is also agreed that the contract upon which the note "itself was based, was made upon Sunday; and that "the note was made, signed and fully delivered upon "Sunday to the original payee. The note bears date "of the succeeding Wednesday."

GRAY, J.

The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.

The general principle was long ago stated by Lord MANSFIELD with his usual completeness and felicity of expression: "The objection that a contract is immoral "or illegal, as between plaintiff and defendant, sounds "at all times very ill in the mouth of the defendant. It

"is not for his sake, however, that the objection is "ever allowed; but it is founded on general principles "of policy, which the defendant has the advantage of, "contrary to the real justice, as between him and the "plaintiff; by accident, if I may so say. The prin- "ciple of public policy is this: *Ex dolo malo non oritur* "*actio.* No court will lend its aid to a man who "founds his cause of action upon an immoral or an "illegal act. If from the plaintiff's own statement or "otherwise, the cause of action appears to arise *ex* "*turpi causa*, or in transgression of a positive law "of this country, then the court says he has no "right to be assisted. It is upon that ground the "court goes; not for the sake of the defendant, but "because they will not lend their aid to such "a plaintiff. So if the plaintiff and defendant "were to change sides, and the defendant were to "bring his action against the plaintiff, the latter would "then have the advantage of it; for when both are "equally in fault, *potior est conditio defendentis.*" *Holman v. Johnson*, Cowp., 341, 343.

It is upon this principle, that a bond, promissory note or other executory contract, made and delivered upon the Lord's day, is incapable of being enforced, or, as is sometimes said, absolutely void, as between the parties. *Patte v. Greely*, 13 Met. 284. *Merriam v. Stearns*, 10 Cush. 257. *Day v. McAllister*, 15 Gray 433. *Towle v. Larrabee*, 26 Maine, 464. *Pope v. Linn*, 50 Maine, 83. *Allen v. Deming*, 14 N. H. 133. *Finn v. Donahue*, 35 Conn. 216. And it follows that as between them it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first. *Day v. McAllister* and *Pope v. Linn*, above cited. *Ladd v. Rogers*, 11 Allen, 209. *Bradley v. Rea*, 14 Allen, 20.

Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the

effect of his own unlawful act. Thus if the amount of a pre-existing debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again. *White v. Buss*, 3 Cush., 448, 450. *Mills v. Western Bank*, 10 Cush., 22. *Johnson v. Willis*, 7 Gray, 164.

If a chattel has been delivered by the owner to another person on the Lord's day by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all. *Scarfe v. Morgan*, 4 M. & W. 270. *King v. Green*, 6 Allen, 138. *Myers v. Meinrath*, 101 Mass., 366. *Horton v. Buffington*, 105 Mass., 399. *Smith v. Bean*, 15 N. H. 577, *Greene v. Godfrey*, 44 Maine, 25.

If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied. *Simpson v. Nicholls*, 3 M. & W., 240; S. C. 5 M. & W. (Eng. Ed.) 702 note; 3 M. & W. (Am. Ed.) 244 note. *Ladd v. Rogers*, 11 Allen, 209.

But if the whole evidence shows a complete cause of action, independently of any participation of the plaintiff in an illegal transaction, he may recover. Thus an agreement made on the Lord's day for the use and occupation of land is void; but a subsequent entry upon and occupation of the land will sustain an action upon an implied promise to pay what its use is reasonably worth. *Stebbins v. Peck*, 8 Gray, 553; explained

in *Day v. McAllister*, 15 Gray, 433. So if a written or oral request for the performance of services, and promise to pay a certain compensation therefor, is made and received on the Lord's day, but there is no proof of assent to the request on that day, and the services are performed on a subsequent day, before the request has been withdrawn, the promised compensation may be recovered. *Tuckerman v. Hinkley*, 9 Allen, 452. *Dickinson v. Richmond*, 97 Mass., 45. *Sitackpole v. Symonds*, 3 Foster, 229.

The law simply refuses to allow either party to invoke any aid from the court to give effect to an illegal transaction in which he has taken part. An additional illustration of this is afforded by a recent case in this court, in which it was held that if a bargain is made on the Lord's day for a sale of chattels (which is of itself void and incapable of ratification) and the chattels are delivered and accepted on the following day, with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither party can be permitted to prove the terms, either as to price or warranty, agreed between them on the Lord's day. *Bradley v. Rea*, 14 Allen, 20, and 103 Mass., 188.

The same rule has been applied under statutes which merely prohibited any one from doing on the Lord's day "any labor or business of work of his ordinary calling." Where such a statute prevails, one party cannot sue upon a contract made by him on the Lord's day in the exercise of his ordinary calling, even if it is not within the ordinary calling of the other and the parties met on that day at the request of the latter. *Hazard v. Day*, 14 Allen, 487. But upon a contract made on the Lord's day in the exercise of the ordinary calling of one party, the other may sue, if it was not within his own ordinary calling, and he did not know, when he entered into it, that it was within the ordinary calling of the defendant. *Bloxsome v. Williams*, 3 B. & C., 232; S. C. 5 D. & R., 82; 1 C. & P. 294.

See also *Emory v. Kempton*, 2 Gray, 257; *Roys v. Johnson*, 7 Gray, 162.

A promissory note given and received on Sunday, and therefore void as between the original parties, might be equally void in the hands of a subsequent holder who took it with notice of the original illegality. See *Allen v. Deming*, 14 N. H. 133; *Holden v. Cosgrove*, 12 Gray, 216; *Davidson v. Lanier*, 4 Wallace, 447. Even if the note bore date of a Sunday, however, that mere fact would not be conclusive evidence that he took it with such notice; for, though dated on Sunday, it might have been delivered on another day and so valid even as between the original parties. *Hill v. Dunham*, 7 Gray, 543. *Hilton v. Houghton*, 35 Maine, 143.

In the present case, it is agreed that the contract which was the consideration of the note in suit was made on Sunday, and that the note was made, signed and fully delivered on Sunday to the original payee. Clearly therefore he could not have maintained an action upon it.

But it is also agreed that the note bears date of a secular day; and that the plaintiff is a *bona fide* holder of the note, for a valuable consideration, and took it before it became due, without notice of any defect, illegality or other infirmity in the same. The plaintiff therefore, not having participated in any violation of law, and having taken the note before its maturity for good consideration and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of law, to set up his own illegal act as a defence to the suit of an innocent party. The view is supported by the judgments of all the courts, English and American, that have considered the question. *Begbie v. Levi*, 1 Cr. & Jerv. 180; S. C. 1 Tyrwh. 130. *Houliston v. Parsons*, 9 Upper Canada, 681. *Crombie v. Overholtzer*, 11 Upper Canada, 55. *Bank of Cumberland v. Mayberry*, 48 Maine, 198. *State Capital Bank v. Thomp-*

son, 42 N. H., 369. *Vinton v. Peck*, 14 Mich., 287. *Saltmarsh v. Tuthill*, 13 Ala., 390, 406. And it is in accordance with the decisions of this court upon notes made in violation of other statutes, except those against usury and gaming, which last have often contained peculiar provisions, and, as observed by Chief Justice SHAW, "declared that the note should be absolutely void to all intents and purposes, or, as is sometimes said, applied to the contract and not to the party." *Cazet v. Field*, 9 Gray, 329, 331. *Kendall v. Robertson*, 12 Cush. 156. *Williams v. Cheney*, 3 Gray, 215, 222, and 8 Gray, 206. *Phelps v. Decker*, 10 Mass., 267, 278. *Musson v. Fales*, 16 Mass. 332, 335.

Judgment for the Plaintiff.

[165 Mass. 389: 43 N. E. 187.]

1896.

Traders Nat. Bk. v. Steere.

(Syllabus.) If A conveys property to his creditor B, by a contract which is void as against public policy, in a particular which has no reference to creditors, C, another creditor, who has no greater right to maintain an action against B than A, cannot, after the contract has been fully executed, maintain a bill in equity against B, under Pub. Sts. §2 Ch. 11, and St. 1884 c. 285, to reach and apply the property in payment of his claim.

KNOWLTON, J. Under Pub. Sts. c. 151, § 3, this court has jurisdiction in equity to reach and apply in payment of a debt any property of a debtor liable to be attached or taken on execution in a suit at law against him, and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors. Under clause 11, § 2, of the same chapter, and under St. 1884, c. 285, it has jurisdiction to reach and apply in payment of a debt "any property, right, title or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." If the property alleged to be in the hands of the defendants other than Phillips and Steere and Wheeler were property which the plaintiff had a right to take from them and apply in payment of its claims against Phillips, this court would have jurisdiction to give the plaintiff relief.

Upon the allegations of the bill, the contract whereby Phillips transferred his property to the other defendants was illegal, in that it provided for the suppression and concealment of evidence of a crime, and included an agreement not to prosecute him. Such a contract is against the policy of our law, and cannot be enforced in a court of justice. Atwood v. Fisk, 101 Mass. 363. Bryant v. Peck, 154 Mass. 460. But when it is fully executed, neither party to it can maintain an action to set it aside, or to re-

cover back anything that has passed under it. Myers v. Meinrath, 101 Mass. 366. Faxon v. Folvey, 110 Mass. 392. Atwood v. Fisk, ubi supra.

It becomes necessary to inquire whether there are allegations in the bill to show that the plaintiff has any better right than Phillips to maintain an action. The mere fact that the contract was illegal gives no such right. The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors, does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may be set it aside; if it is not, they cannot. We may assume, in accordance with the decision in *Weeks v. Hill*, 38 N. H. 199, and in *Clark v. Gibson*, 12 N. H. 386, that if an insolvent person appropriates a considerable portion of his property for his own benefit, in a way forbidden by law, such an appropriation is *ipso facto* a fraud upon his creditors. Money taken by an insolvent person from his estate and paid to compound a felony is disposed of fraudulently as against creditors, and may be treated by them as still applicable to the payment of their debts. But the payment of one or more creditors in full by way of preference is not fraudulent at common law. It is not a misappropriation of the debtor's property. *Sawyer v. Levy*, 162 Mass. 190. Such a payment does not become fraudulent as against creditors merely because the creditor, when he receives payment and gives up the evidence of his debt, illegally promises as a part of the transaction to compound a felony of which the debtor is guilty. The added illegal element in the contract is condemned by the law because it is against public policy, but it does other creditors no harm. The money paid is no more than is due for the debt, and nothing is taken from the other creditors for an illegal use. See *Oriental Bank v. Haskins*, 3 Met. 332, 340; *Harvey v. Varney*, 98 Mass. 118, 120. They are affected as all other members of the community are affected,

and not otherwise. If it were possible to do so, they would have no right to use the debtor's liability to punishment for his crimes as a means of obtaining an advantage to themselves. *Taylor v. Jaques*, 106 Mass. 291. *Morse v. Woodworth*, 155 Mass. 233.

In the present case the plaintiff corporation does not allege that the conveyance of Phillips to other defendants was made "with intent to defeat, delay, or defraud his creditors." It, therefore, cannot rely upon an express intent to defraud them. There are not even allegations of fact from which such an intent could fairly be inferred. The plaintiff's case must stand solely upon the effect in law of such a conveyance as is set forth.

Now it is alleged that Phillips was indebted to each of the other defendants except Steere and Wheeler upon certain notes and drafts discounted for him, and that he agreed to transfer to them certain property, and they severally agreed to surrender to him the notes and drafts, and the writing which contained the evidence of his criminal fraud, and to conceal his fraud, and never to prosecute him for it. It is further alleged that this contract was executed on both sides according to its terms, and that the property was divided ratably among those to whom it was transferred. A fair interpretation of this part of the bill is that the proceeds of the transfer were accepted in payment and discharge of Phillips's indebtedness to the defendants, and it is entirely consistent with the allegations—indeed, it seems probable from the allegations—that the whole property was not enough in value to pay these claims in full. Certainly there is no allegation that there was more than enough to pay them, or that any of the debtor's property was misappropriated by using it unlawfully to obtain an advantage for himself. The law will not impute to a debtor, by reason of such a transaction, an intent to defeat, delay or defraud his creditors, nor treat the transaction as a violation of their legal rights.

The judgment in *In re Mapleback*, 4 Ch. D. 150, is in accordance with the view which we have expressed.

In that case a debtor owed one of his creditors one hundred pounds, and forged his name upon a bill of exchange for one hundred pounds more, which was discounted at a bank. Just before the bill of exchange became due, the debtor wrote to the creditor confessing his crime, and entreating him to furnish the money to enable the debtor to take up the bill and conceal the crime, and offering to make a conveyance of property as security for the entire indebtedness if he would consent to the arrangement. The creditor furnished the money, and took the conveyance as security for the amount, and also for his former debt. The chief judge in bankruptcy held that the transaction could be avoided by the assignee in insolvency of the debtor, but on appeal the Lords Justices, without expressly deciding whether the transaction was illegal, held unanimously that, if it was, the assignee could not take advantage of it, because it was not a fraud upon creditors nor a fraud against the bankruptcy law.

We are of opinion that the bill before us does not state enough to show that the transfer of the debtor's property was fraudulent as against creditors, and that therefore no cause is shown for setting it aside. *If it were avoided on the ground of illegality of another kind, the property would be found in the hands of the defendants, and the plaintiff would have no equity superior to that of the defendants or of other creditors in regard to the appropriation of it to the payment of Phillips's debts.* As is expressly held in *Weeks v. Hill*, 38 N. H. 199, the defendants would not be subjected to a penalty, and be deprived of their equities as creditors, because of their illegal contract in reference to the debtor's crime.

The plaintiff has no standing to maintain its suit under Pub. Sts. c. 157, on the ground of a fraudulent preference, because it is not proceeding under that statute. Even if the suit were by an assignee in insolvency, a fraudulent preference could not be set aside in insolvency proceedings commenced nearly two years after the conveyance was made.

Bill dismissed.

[7 Mich. 145.]

1859.

John S. Bagg v. George Jerome and Another.

Where a contract in violation of law has been carried into effect, the law will not aid either party to undo what has been done, and to divest a title that has passed.

A mortgage of intoxicating drinks under which possession has been taken by the mortgagee, can not be treated as void under the Prohibitory Liquor Law of 1855, as between the mortgagor and mortgagee, nor as between the latter and the creditors of the former, unless made to defraud such creditors.

Where a chattel mortgage, contains no unlawful provision, it can only be avoided by proof of fraud in fact, which is exclusively a question for the jury. If it were void on its face, it would be the duty of the court to pronounce it so; but the court can not look at facts outside the instrument, and treat them, when found by the jury, as a part of the instrument itself, or instruct the jury if they find such facts, that the mortgage is void; since to do so would be a mere evasion of the statute which refers the question of fraud to the jury.

That a chattel mortgage is given to a trustee to secure demands in favor of several creditors, instead of being given to the creditors themselves, and that it contains a provision that the trustee shall be liable in the premises for his own default or neglect only, are matters the jury may take into account in determining the question of actual fraud, but they do not render the instrument fraudulent in law.

MANNING, J.:

The first section of the act provides that no person shall be allowed to manufacture or sell any spirituous or intoxicating liquors. The second section declares all payments for such liquors shall be considered as having been received without consideration, and against law and equity; and that any money or thing paid therefor may be recovered

back by the person paying the same, his wife, or any of his children; and makes null and void, except as to *bona fide* purchasers without notice, all sales, transfers, grants, releases, quit-claims, surrenders, mortgages, &c., the consideration whereof, in whole or in part, shall have been the sale or agreement to sell such liquors.

At common law all contracts in violation of law are void. The law in such cases, will not aid either party, but leaves them to reap the reward of their own folly. Hence, if the contract is executory it will not enforce it, or give damages for a non-performance; and if executed, it will not undo what the parties themselves have done, by divesting the title that has passed. By the chattel mortgage and delivery the title to the property passed from Bayless to the defendants. It is good against Bayless; and also against his creditors, if not made for the purpose of defrauding them.

The statute provides for a recovery by the vendee, his wife, or any of his children, of the money or other thing given by him in consideration of the liquors, but it makes no provision whatever in behalf of the vendor, or his creditors, but leaves the seller of the liquors at common law. (See *Breck vs. Adams*, 3 Gray, 569.)

The only other question in the case was one of fraud, to be found by the jury. All conveyances made to hinder, delay, or defraud creditors, are void as to them, both at common law and under the statute. The statute, however, has changed the common law in one very important particular, and that is, in declaring the question of fraudulent intent in all such cases, to be a question of fact, and not of law.—Comp. L. 948, Sec. 3201. Before the statute the question of fraudulent intent—the facts being found by a jury—was one of law to be pronounced by the court. It is now, under the statute, a question of fact, to be found, like other facts, by the jury. Whether this change be

a salutary one or not, is not for us to say; it is sufficient that it is made the law of the land by statute. When the instrument, on its face, is one the law will not sanction against creditors, it is the duty of the court to pronounce it fraudulent as to them; but the court cannot look to matters *dehors* the instrument for that purpose. In such case, the fraud, if any, does not consist in the instrument itself, but in the abuse of it; or, in other words, in a party seeking to use it for purposes at variance with what the instrument declares on its face. For the court to treat such extraneous matters, when found by a jury, as a part of the instrument itself, or to instruct the jury that the conveyance is void, if they should find them, would, it seems to us, be nothing more or less than an ingenious device to evade or get around the statute.—See *Jackson v. Dean*, 1 Dough. Mich. 519; *Oliver v. Eaton*, *ante* p. 108.

The mortgage is an ordinary chattel mortgage with two exceptions. It is given to the defendants in error instead of the creditors of Bayless, who are mentioned, with the amount Bayless was owing each one of them, in the recital. And it contains a provision that the defendants in error "shall not be liable in the premises for anything except their own personal default and neglect."

These were matters proper for the jury to take into consideration, with the other evidence in the case, but we see nothing in them rendering the mortgage fraudulent. We are inclined to the opinion that the last clause does not lessen the liability of the defendants in error, as trustees.

The judgment must be affirmed with costs.

The other Justices concurred.

[56 Miss. 217 : 31 Am. Rep. 357.]

1878.

Block vs. McMurry.

1. *Sunday Contract. Cannot be sued on.*

If one by a horse from another on Sunday, the sale is void; but, it being a violation of the public law, the parties are in *pari delicto*, and neither has any remedy against the other on the contract.

2. *Same. Parties in pari delicto.*

The seller of a horse on Sunday cannot recover the animal back from the purchaser, or maintain trover for its value, on the ground that the contract was void and that no title passed.

3. *Same. Parties not in pari delicto.*

If the seller of a horse on Sunday was made drunk by the purchaser thereof, for the purpose of defrauding him, the parties were not *in pari delicto*, and the seller can recover his horse.

SIMRALL, C. J., delivered the opinion of the court.

The proof is that McMurry sold and Kernaghan bought the horse in question on Sunday, Kernaghan paying the price and taking the horse into possession on that day. On the next day, Monday, the testimony tends to show that McMurry made a bill of sale to the wife of Kernaghan, at his request, because there was a judgment against him.

An effort was made to prove (both sides offered testimony on the point), that, at the time of the sale, McMurry was very much intoxicated, so much so that he was incapacitated understandingly to make a contract; and, further, that he was got into that condition by Kernaghan and his associates, so as to take advantage of him.

Block afterwards bought the horse from Kernaghan, and this action of trover and conversion was brought against him by McMurry.

Two propositions have been argued by counsel; first, as to the effect of the statute on transactions had on Sunday; second, whether McMurry was incompetent

to contract, on account of drunkenness. It has been uniformly held, under statutes like ours, that a contract of sale made on Sunday is void. It has been several times so declared in this State. *Hoover v. Pierce*, 26 Miss. 627; *Kuntz v. Price*, 40 Miss. 341; *Miller v. Lynch*, 38 Miss. 346. The cases have generally been suits on the contract itself, or some stipulation connected with it, as in *Murphy v. Simpson*, 14 B. Mon. 419, where there had been what in common parlance is called a "horse swop." Each warranted the soundness of the animal which he exchanged. It was held that an action could not be brought on the warranty.

The authorities, without exception, lay down the rule that the contract, if not within an exception, is void, because it is made a misdemeanor, and punishable, to do secular business on Sunday, which amounts to a prohibition.

This case presents a question which lies behind that. The seller insists that, since the sale is void, no title to the horse passed to Kernaghan, and therefore he has a right to reclaim it or to recover damages for the conversion, either against Kernaghan or any vendee from him. The argument is, if the transaction is utterly void, the original rights of neither party have been affected. It is as though no sale had been made. If the buyer has given an obligation for the price, it is not binding. If he has got possession of the chattel, the possession is without right to support it.

There are adjudged cases which have so ruled, *Dodson v. Harris*, 10 Ala. 569; *Adams v. Gay*, 19 Vt. 458, cited from note to 2 Pars. on Con. 764. But these authorities rest on a misconception and misapplication of the principle and the reason of it. When it is declared that the Sunday contract of sale is void, the precise extent of that doctrine practically is, that the courts will not give the remedies of the law to assist either party engaged in the illegal transaction. They will not help the seller to recover the price; nor can

the buyer maintain an action on any warranty, deceit, or fraud in the sale.

In such case, the seller has parted with his property for the obligation of the buyer, solvable in the future. The courts will lend the seller no aid to get what he was promised for his horse. If all redress is denied to the seller, the principle, in its full and just application, would deny a reclamation by the buyer of the price which he had paid, and to the seller the chattel which he had delivered.

The law observes a strict and impartial neutrality; it will not interpose at the solicitation of either party, but says to both: "This transaction was a violation of the statute; both of you are equally guilty, and each of you must remain in the position in which you have placed yourselves."

The cases of *Dodson v. Harris*, 10 Ala., 569, and *Adams v. Gay*, 19 Vt. 358 (the latter cited from note to 2 Pars. on Con. 764), hold that, the contract of sale being void, if the property has been delivered, the seller may, on another day, demand the property, and, if not returned, may bring trover; but that the possession being permissive, there must be actual demand before suit brought. These authorities refer to cases which hold, that though the note for the property cannot be recovered upon, yet if there is a subsequent promise, that may be the basis of a recovery.

The better doctrine is announced in *Smith v. Bean*, 15 N. H. 578; that is, that when it said the contract is void, it has reference to the question whether there is any legal remedy upon it. "The purchaser has "possession as of his own property, by the assent "of the seller, and the law leaves the parties where "it finds them." The reason was clearly and forcibly stated by Lord MANSFIELD in *Holman v. Johnson*, Cowp. 343: "The object of the statute is for the "benefit of the public, and not the advantage of the "defendant." "It is founded on the policy that no

" court will lend its aid to an illegal act. The parties " will be left where they placed themselves," etc.

The courts of Massachusetts once announced principles in accord with the cases cited from Vermont and Alabama. But the later cases distinctly repudiate that doctrine. Thus, in *Myers v. Meinrath*, 101 Mass. 368, which was trover, brought by a plaintiff who had returned the property which he had received against the other party, who retained what he had got in exchange, the action was not allowed.

In *Horton v. Buffington*, 105 Mass. 399, an attachment would not lie on the property in the hands of a third person, who obtained it from a Sunday purchaser as the property of the original owner, for the reason that the disability of the original owner to reclaim would avail the party holding as a sufficient title. See *Chitty on Con.* (10th Am. ed.) 732.

The courts leave the parties alone, not on any idea of giving effect to the illegal contract, but because it imputes disability to the parties of asserting any right to recover. The series of instructions on behalf of the plaintiff, affirming a right in McMurry to recover because the sale was void, are erroneous.

If the jury should be satisfied that McMurry was intoxicated to the degree that he was not competent to understand the nature and quality of the business, or to make a contract, then the parties are not *in pari delicto*, and he would not be bound by the sale, although made on Sunday.

Judgment reversed and cause remanded.

[67 Miss. 540; 7 So. 501.]

1890.

Foster v. Wooten.

1. SALE. *Personal property. Bill of sale executed on Sunday.*

The execution on Sunday of a bill of sale of personal property, in pursuance of a sale made on Friday, does not affect the validity of the sale.

2. SAME. *Sunday. Executed contract. In pari delicto.*

In such case, the property being delivered, a creditor of the seller cannot, by attachment, afterwards subject the property to his debt upon the ground that, the sale being a Sunday contract, the title did not pass to the purchaser. Granting this to be a Sunday contract, it being executed, the law in such cases is absolute non-action. *Block v. McMurry*, 56 Miss. 217.

3. ANIMALS, *Death of, pending litigation.*

A claimant bonding animals attached, who is without fault, is not liable for the death of the same pending the litigation.

WOODS, C. J. delivered the opinion of the court.

The evidence showed quite clearly that the sale of the stock by L. D. Lewis to A. F. Foster, occurred on Friday. The execution of the bill of sale on the Sunday following was not the consummation of the sale; it was only the manufacture of the evidence of the antecedent sale. If we shall concede, however, that this sale took place on Sunday, we will still be constrained to hold that the third instruction for the plaintiff in attachment was improperly given. Any charge to the jury, considered as a mere abstract proposition, could not rightfully influence the verdict, looking at the uncontroverted facts of the case. This was an executed contract; the stock had been delivered to A. F. Foster, and the

purchase-price paid by him to L. D. Lewis, long before the attachment writ was levied. **Grant, then, that the sale was made on Sunday, what is the rule of law on such state of facts? Nothing more than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them. That is the extent of the rule. It cannot be reasonably insisted that the seller of the stock, L. D. Lewis, could have made any maintainable appeal to any court for the annulment of the trade, and the recovery of the stock. Equally in fault with the buyer, A. F. Foster, the law would decline to afford him any countenance, leaving him just where it had found him, and where his own act had placed him.** With what show of reason can it be contended that the attaching-creditor of L. D. Lewis could take any step for the assertion of any claim to the stock, thus wrongfully sold on Sunday, which L. D. Lewis himself could not take? But this whole question has been too long and too firmly settled to be now disturbed. Neither L. D. Lewis, nor the attaching-creditor could dispossess the Sunday purchaser, or any purchaser under him. See *Block v. McMurry*, 56 Miss., 217, and cases there cited.

It follows, therefore, that the third instruction of the court below for plaintiff in attachment, to the effect that sales of personal property made upon Sunday are void and pass no title to the property, was erroneously given, and was misleading. Granting its correctness in the abstract, in the concrete it was eminently and unwarrantedly prejudicial to the claimant on the trial of her issue. It was doubtless regarded by the jury, and with reason, too, as informing them that the Sunday sale from L. D. Lewis to A. F. Foster being void, and no title having passed thereby, that the title to the stock levied upon was still in said

Lewis, and that said stock was therefore to be subjected to plaintiff's demand, and the issue found against the claimant, the sub-purchaser. This was altogether misleading. The fact (though it was not the fact, as shown by the evidence) that the sale of the stock was made by L. D. Lewis to A. F. Foster on Sunday, had absolutely nothing to do with the case.

The contention of appellant as to the amount of the verdict, is likewise well taken. The jury returned a verdict for the full value of all the horses, though it was undisputed that the two best animals had died, pending the litigation, without fault on the part of the claimant. The court partially remedied this error of the jury by requiring a remittitur of the price of one of the deceased animals, but appears to have taken no account of the other horse, shown to have died also. The verdict therefore remained excessive.

Reversed.

[100 Mo. App. 540 : 75 S. W. 380.]

Bruer v. Kansas Mut. Life Ins. Co.

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

Life Insurance—Assignment of Policy—Invalidity—Recovery of Premiums.

1. A life insurance policy was assigned to plaintiff, under an agreement with the beneficiary that plaintiff should receive a certain amount of the insurance in consideration for paying the premiums. The insurance company, on becoming aware of the contract, denied the validity of the assignment, and plaintiff sued to recover the premiums paid by him. *Held*, that, plaintiff's right being founded on his illegal contract with the beneficiary, and not on the contract of insurance, he could not recover on the ground that the contract of insurance was executory, and that plaintiff could retire from it at any time.

Appeal from Circuit Court, Jackson County ; James Gibson, Judge.

Action by Conrad Bruer against the Kansas Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

R. T. Herrick and I. P. Ryland, for appellant.

J. H. Orr, W. B. Cline, and J. L. Lorie, for respondent.

An action will lie to recover back money paid under an illegal agreement at any time before the agreement is carried out. Anson on Contracts, *264, bottom; Anson on Contracts, *201 ; Anson on Contracts, 267, and note, citing *Taylor v. Bowers*, 1 Q. B. D. (C. A.) 300. This is the leading English case on this subject. *Mount v. Waite*, 7 Johns. 434; *Wheeler v. Spencer*, 15 Conn. 28; *Shannon v. Baumer*, 10 Iowa, 210; *House v. McKenney*, 46 Me. 94; *Bank v. Wallace*, 61 N. H. 24; *Skinner v. Henderson* 10 Mo. 205 ; *Hickerson v. Benson et al.*, 8 Mo. 8, 11, 40 Am. Dec. 115 ; *Adams Express Co. v. Reno*, 48 Mo. 264, 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1004-1007, and notes and cases cited, subject, " *Illegal Contracts* " ; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347 ; 2 Parsons' Contracts, p. 746. A contract of

life insurance remains executory until the death of the assured. 16 Am. & Eng. Ency of Law (2d Ed.) 840; *Cohen v. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; Clark on Contracts, p. 1; Schumaker & Longsdurf's Encyclopedic Law Dictionary, 202; 1 Wharton on Contracts, par. 50; 7 Am. & Eng. Ency. of Law (2d Ed.) 95.

* * * * * *

Ignorance of the illegality of a contract, where there is no moral turpitude, is strong ground for granting relief to the party seeking relief on that ground. 15 Am. & Eng. Ency. of Law (2d Ed.) 1004, 1005, and cases cited from 20 states; *Palace Car Co. v. Transportation Co.* (C. C.) 65 Fed. 158; *Hogben v. Insurance Co.*, 69 Conn., 503, 38 Atl. 214, 61 Am. St. Rep. 53.

Upon the well-founded principles of equity and right plaintiffs should recover the amount paid out by him as premiums. *Supreme Lodge of Knights of Honor v. Metcalf* (Ind. App.) 43 N. E. 893; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Ferry Co. v. Ry. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *McKee v. Phœnix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 99; *Green v. Corrigan*, 87 Mo. 370.

ELLISON, J. The defendant issued a life insurance policy, whereby it insured the life of Mrs. Mercy A. Carey in favor of her son, C. E. Carey, in the sum of $3,000. Afterwards Mrs. Carey and her son assigned the policy to plaintiff. On the day of the assignment, and in connection with it, plaintiff and C. E. Carey entered into a contract whereby it was agreed that plaintiff should pay the premiums on said policy, and on the death of Mrs. Carey he should secure $2,000 of the sum payable in the policy, and C. E. Carey should receive the remaining $1,000. Under this contract, plaintiff paid to the company three quarterly premiums, amounting to $174.39. The defendant assented to the assignment under the impression that plaintiff was a creditor of the insured; but, when it learned of the facts upon which the assignment was based, it wrote plaintiff that it was not lawful for him to take an assignment of the policy merely in consideration of his advancing money to keep up the insurance. After-

wards the company denied any liability to plaintiff; that is to say, denied the validity of the assignment and contract therewith, or that it would become liable to pay plaintiff any part of the policy on the death of Mrs. Carey. The company also denied plaintiff's right to a return of the premiums he had paid. Plaintiff thereupon instituted this action to recover such premiums, and prevailed in the trial court.

Plaintiff had no insurable interest in Mrs. Carey, as a creditor or otherwise, and it is conceded that the contract of assignment, made as stated, was void, as against the policy of the law. We think that plaintiff ought not to be allowed to recover. His right of action is necessarily based on an illegal contract, and being so, he is shut off from aid at the hands of the courts. To prove his case against the defendant, he must necessarily rely upon the manner of his ownership of the policy. In investigating that question, the consideration leading thereto and supporting such ownership would be brought out, and thus his own illegal and wrongful conduct be made to appear.

His case in the brief in his behalf is put upon the idea that the contract of insurance is executory until the death of the assured, and that he has a right to retire from the contract at any time before it becomes executed. The principle of law is not applicable to the facts. The contract whereby he became a party to the transaction was executed. The only thing which gave him any right or interest in the transaction, and upon which he must depend to sustain his claim, in his wrongful act, and it precludes him from obtaining redress at the hands of the law.

We have examined the authorities cited by plaintiff, and have gone over the reasons assigned by him in support of the judgment; and, while not questioning many of the statements of legal principles, we deny their application. The authorities relied upon by defendant will be found collected in briefs of counsel.

The judgment is reversed. All concur.

[46 Neb. 477 : 65 N. W. 195.]

1895.

Storz et al. v. Finkelstein et al.

(Supreme Court of Nebraska, Dec. 7, 1895.)

Contracts—Illegal Considerations—Right of Action.

1. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.
2. Plaintiff sued the defendant for the purchase price of beer, to which the defendant, by way of counterclaim, pleaded payment for a license to sell beer, which as defendant alleged plaintiff had agreed to furnish, to enable defendant to make such sales. By reply, plaintiff alleged a custom, in accordance with which a retail traffic in beer had been carried on by defendant under and by virtue of a license held by the plaintiff, which traffic, in legal effect, was a violation of the statute of Nebraska regulating traffic in liquors. *Held* that, for the purchase of beer sold under these circumstances, plaintiff was not entitled to a recovery against the defendant.
(*Syllabus by the Court.*)

Error to district court, Douglas county; KEYSOR, Judge.

RYAN, C. This action was brought by the plaintiffs in error, a partnership firm, engaged in the manufacture of beer, to recover of defendant the sum of $707.06, the price of certain beer alleged to have been furnished by plaintiffs to defendant in the month of June, 1889. By way of counterclaim the defendant alleged that the beer was furnished him by plaintiffs under a written agreement, which required that the plaintiffs should furnish the license necessary under the laws of Nebraska, that plaintiffs had neglected to provide this license, and that, in consequence of such neglect, the defendant had been required to pay the sum of $1,000 for such license. By reply, the plaintiffs averred that,

if the defendant had taken out a license, it was to enable him to sell vinous and spirituous liquors, and not to enable him to perform his contract with the plaintiffs. There was, also, in the reply this language: "The plaintiffs further allege that there is, and has been since long before September 1, 1888 [the date of a written contract between plaintiffs and defendant] a usage and custom existing and prevailing among brewing companies generally, and particularly in the State of Nebraska, and in the city of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that under said usage and custom said bottling department had been conducted under the liquor license issued to the brewery, and through an agent who receives beer from the brewery, at a fixed price, and who operates the bottling department as a part of and in the interest of the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiffs and the said defendant with knowledge of and with reference to said usage and custom; and that said usage and custom thereby became and is a part of said contract." Upon the trial defendant admitted that he owed plaintiffs the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiffs' action, and for a judgment for costs, for the reason that "the pleadings, upon their face, show that the sales for which plaintiffs sought to recover were made in pursuance of an unlawful contract between the plaintiffs and the defendant, and for the further reason that the contract under which the sales were made contemplated the resale of said beer by the defendant, with the intent and for the purpose, on the part of the said plaintiffs, of enabling the defendant to resell contrary to law." This motion was sustained, and the judgment was accordingly rendered against the plaintiffs for costs.

From the fact that the plaintiffs brought suit for the

price of the beer agreed upon between themselves and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiff's beer. The petition was framed upon the theory that plaintiffs had sold the defendant the beer for which suit was brought, through the use of the word "sale" or any equivalent term was avoided. It is equally clear that, as a retail vendor of liquor, the defendant was, by section 25, c. 50, Comp. St., required to pay a license of $1,000; his place of business being, as it was, in the city of Omaha. By the reply there was alleged a custom, with reference to which the parties litigant had contracted, whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiffs, however, insist that, since the defendant had admitted that he had obtained the beer from plaintiffs, and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted, as the jury was, by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned. The plaintiffs have cited only one adjudged case which is directly in point, and, as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length.

The case referred to is *Manchester & L. R. Co. v. Concord R. Co. (N. H.)* 20 Atl. 383, in which there is quoted, with approval, the following language, found in 2 Mor. Priv. Corp. Sec. 721: "If an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement, who has received anything from the other

party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immortality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case. * * * These doctrines have been repeatedly applied in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and, although the contracts are held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced. It was held, in *White vs. Bank*, 22 Pick., 181, that a suit could be maintained upon an entry in a deposit book made by the defendant's cashier, by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that, where money had been paid by one of two parties to the other, on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is laid down by Lord KENYON in *Hawson vs. Hancock*, 8 Term R., 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum* the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases The rule, as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting: 'When money has been paid upon an ille-

gal contract, it is a general rule that, if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is taken in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover.' 2 Com. Cont. 109." The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows: "Dr. Franklin Bank in account with B. F. White. Cr. 1837, Feb. 10th, to cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier." This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute. The depositor was by no means in *pari delicto*. Therefore, he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in principle was recognized in Bank v. Codd, 18 N. Y. 240, and the liability of the defendant was accordingly adjudged to exist.

The action in *Dill v. Inhabitants of Wareham*, 7 Metc. (Mass.) 438, was to recover back the sum of $500, paid by the plaintiff to the town of Wareham for the privilege of taking oysters within the limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow

the privilege paid for, the suit was brought, as indicated. Chief Justice SHAW, in delivering the opinion of the court, said: "In regard to the sum of $500, as it appears that it was received by the treasurer, and went to the use of the town, and was so received in advance, upon a consideration which has failed, it must be regarded as money had and received by the town to plaintiff's use, and, therefore, the action for that sum will lie." In *Espiscopal Church of Dedham*, 1 Pick., 372, a note had been given by the rector and wardens of the church, upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case, it was an action by the lender of the money to recover the amount loaned. Hence, the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable, as it might have been if the rector and wardens, after having paid the note, had sued the church society to recover the amount so paid. The syllabus in Whitney v. Peay, 24 Ark., 22, begins with the statement: "The state issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof." But this proposition cuts no special figure in the case; for, these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge, and of assignee of such assignee, among themselves, as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledger upon payment of the amount to secure which, originally, such pledge was made, notwithstanding the fact that, by subsequent pledges of the bonds, a loan of a larger sum had been effected. The recovery of judgment in Loan Co. v. Towner, 13 Conn., 249, was for an amount loaned

in Pennsylvania. It was held, in this case, that the laws of Pennsylvania should govern, and that, as the charter of plaintiff had provided that "nothing therein contained should be construed to authorize the company to discount notes," the loan of money upon which the interest was reserved in advance constituted a discount and that, therefore, no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory, which was recognized by the supreme court of errors of Connecticut, is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued, and to loan money under certain restrictions, made a loan, and afterwards took a note as security, in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that, although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in *Vanatta v. Bank*, 9 Ohio St. 27. In *Foulke v. Railroad Co.*, 51 Cal. 365, the opinion was very brief, and was correctly summarized in this language of the syllabus: "The provision in the act concerning railroad corporations, that 'no contract shall be binding on the company unless made in writing,' refers only to contracts wholly executory; but the action against the corporation on such verbal executory contract must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation."

The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was, therefore, held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. *Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 1 McCrary, 247, 2 Fed. 117. In *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*,

73 N. Y. 82, there had been an attempted union of the two church societies, under an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was *ultra vires*, but, while the arrangement existed, it was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor for the church supposed to have been merged in it. The court of appeals held that, for money so paid, the church whose debt had been thus paid was liable. In *Tracy v. Talmage*, 14 N. Y. 162, it was held that, although the vendor was a party to the illegal contract, he was not *in pari delicto*, within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that, where parties to a contract or transaction, not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party. In *Express Co. v. Lucas*, 36 Ind. 361, it was held that an agent who had received money for which the company was liable could not, as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Mor. Priv. Corp. Sec. 721, it is shown to be extremely probable that no court, except such, perhaps, as may have been misled by his statements, has ever enforced the aforesaid principle, laid down by Mr. Morawetz, "that, if an agreement is legally void and unenforceable, by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party must account to the latter for what has been so received." *Equally without judicial sanction is his next proposition,* that, "under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the

case." The correct rule was quoted from the language of Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowp. 343, by EYRE, C. J., in *Lightfoot v. Tenant*, 1 Bos. & P. 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff,—by accident, if I may so say. The principle of public policy is this, '*Ex dolo malo non oritur actio*'. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise '*ex turpi causa*', or the transgression of a positive law of this country, there the court says he has no right to be assisted." After this introduction, Lord MANSFIELD stated the question to be "whether the plaintiff's demand is founded upon the ground of an immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly-stated principles were recognized and enforced in *Spurgeon v. McElwain*, 6 Ohio, 442; *Banchor v. Mansel*, 47 Me. 58; *Hubbell v. Flint*, 13 Gray, 277; *Hull v. Ruggles*, 56 N. Y. 424; *Skiff v. Johnson*, 57 N. H. 475; *Aiken v. Blaisdell*, 41 Vt. 655; *Foster v. Thurston*, 11 Cush. 322; *Hooker v. De Palos*, 28 Ohio St. 251; *Ruckman v. Bryan*, 3 Denio, 340; *McKinnell v. Robinson*, 3 Mees. & W. 434; *Mosher v. Griffin*, 51 Ill. 184; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525. In *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724, an action for divorce, the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027: "When any portion of the consideration is illegal, the promise cannot be enforced, unless there are several promises, and that which relates to the bad consideration can be dis-

tinguished and separated from the others. In other cases the promise is unenforceable. All the text writers so state the rule. See, for instance, Whart. Cont. 339; Anson, Cont. 191; Pol. Cont. 338. The rule is so well settled that a reference to adjudications is unnecessary."

The first paragraph of the syllabus of *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract. Therefore, such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of *Brooks v. Martin*, 2 Wall. 70, which by the supreme court of New Hampshire in *Manchester & L. R. Co. v. Concord R. Co. supra*, was cited as a leading case in support of the erroneous doctrine is stated in Section 721, Mor. Priv. Corp. By this analysis it was clearly shown by Judge COBB that, in the case of *Brooks v. Martin*, a recovery was sanctioned, chiefly because, between the parties litigant, there had existed a partnership, and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may be fittingly closed by quoting from the above-mentioned opinion, delivered by Judge COBB, his quotation from the language of Chief Justice MARSHALL, in *Armstrong v. Toler*, 11 Wheat., 268, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case. *The judgment of the District Court is affirmed.*

IRVINE, C., did not take part in the determination of this case.

[15 N. H. 577.]

1844.

Smith vs. Bean.

A contract for the sale of goods, to be thereafter delivered, was made on a Sunday, and leave was, on a subsequent Sunday, given the vendee to take them.—*Held*, that his possession, acquired on Monday following under such license, and in pursuance of the contract, was good, not only against the vendor, but against the creditors of the vendor also.

Trespass, for taking a pair of oxen. The claim was submitted to referees, who reported that one Boies on the 20th of February, 1836, being Sunday, for a valuable consideration sold the oxen to the plaintiff, to be delivered afterwards. On a subsequent Sunday, Boies agreed that the plaintiff might send and take them from a certain pasture. He did so on the next day. A few days after, the defendant attached them as the property of Boies in the possession of the plaintiff. On these facts the referees awarded that the plaintiff recover a sum named as damages and costs, unless the court should be of opinion that the sale from Boies to the plaintiff was not such a one as would enable the plaintiff to hold the oxen against the attachment; in which case they awarded costs to the defendant.

Parker, C. J. The contract of sale by Boies to the plaintiff was made on the Sabbath. The plaintiff took possession of the oxen on Monday. If Boies had delivered them on that day, the completion of the sale by the delivery being lawful, it would not have formed a legal objection to the sale, that the negotiation respecting it, ending in an agreement to make it, took place at a time when secular labor was forbidden and unlawful. The contract would have been executory until perfected by the delivery, and the perfected contract of sale would have been lawful and binding.

But the report shows no delivery of the oxen by Boies on Monday. The plaintiff took possession of

them on that day; but it was by the direction or permission of Boies, given on the previous day. All that was done by Boies was done on Sunday. If he sold the property, then it was on that day. The contract of sale was made on that day, and the plaintiff took possession of his purchase the next day. If Boies were now seeking to recover the purchase money, we must on these facts hold the sale to have been illegal, giving the vendor no right of action.

It is generally said of such an illegal contract that it is void. 1 Taunt. 175, *Drury vs. De la Fontaine; Allen vs. Deming*, (14 N. H. Rep. 133, 137, 138,) and cases there cited. *Lewis vs. Welch*, (ditto 294, 298.) If this there so, and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will, and being his property it would be subject to attachment and levy by his creditors, in the same manner as if the attempt to sell had never been made.

But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not enterfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said

that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it. (See 5 Barn. & Cres. 406, *Fennell vs. Ridler*, opinion of BAYLEY, J.

The principles to which we have referred settle this case. The plaintiff received the oxen, with the assent of Boies, upon a contract of sale which in effect passed the property as between them, whether the plaintiff paid or not; and if he did not, whether Boies can recover the price of him, or not, is immaterial.

The plaintiff is entitled to hold the oxen against Boies, and may therefore hold them against the creditors of Boies, unless the sale was fraudulent as to creditors. The fact that it was illegal, because against the policy and prohibitions of the law, does not show that it was fraudulent as against creditors; and there is nothing in the case to show actual fraud. The case is within the principle of *Clark vs. Gibson*, 12 N. H. Rep. 386.

Judgment for the plaintiff.

[23 N. H. 128.]

1851.

White v. Hunter.

It is a well settled rule of law, as to all acts and contracts which are unlawful on account of their immorality, or their tendency to promote it, or because they are hostile to the public policy, that the parties thereto are regarded as being in pari delicto, and that in all such cases, the rule of law is, portior est conditio possidentis.

Money paid upon a contract, of the character before stated, cannot be recovered back by the party who paid it.

There is no sound distinction between the case of money paid, and that of land conveyed, upon such a consideration.

In such case, neither the grantor in his life-time, nor his heir after his decease, can recover possession of the land conveyed, against the grantee.

Accordingly, where O. W. had been living in adultery or fornication, with one H. W., and the said O. W., being seized of a tract of land, conveyed it to one H., by a deed executed by himself and said H. W., *and the object and purpose of the conveyance was to provide for the support of the said O. W. and H. W., during their lives,* in the same unlawful intercourse,—it was *held* that *O. W., if alive, could not maintain an action to recover possession of the land, against H.*, and that his son and heir, standing upon the right and title of his ancestor, as it existed at his decease, could not recover the same against the said H.

WOODS, J.:

Oliver White, it is conceded, was once the owner of the premises in question. Both parties claim to have derived title from him. The defendant claims under a deed from said White, duly executed, acknowledged and recorded, in virtue of which she entered and took possession of the premises.

The plaintiff makes title to the premises, as son and heir of Oliver White, and to avoid the effect of the deed to the defendant, claims that the same was given

upon an illegal and immoral consideration, being given for the purpose of upholding and promoting the unlawful and immoral conduct, and facilitating the illicit intercourse of Oliver White, and the so called Hannah White.

It is claimed that the deed of Oliver White is invalid, for the reason that it rests upon an immoral consideration, and the transaction, out of which it grew, is against public policy. And no doubt exists that the consideration is as vicious and unlawful as it is claimed to be.

It appears, however, that in the transaction thus characterized, White, the plaintiff's ancester, was *particeps criminis ;* that he and the defendant were *in pari delicto ;* at any rate, that White was not the least guilty of the two, in the purpose in view ; in fact, that they both participated in the making of the contract, and that they were equally guilty of the unlawful design charged, and of entering into the unlawful arrangement for the purpose of promoting the immoral and unlawful end in view. Upon this ground, the judge, in the court below, ruled that the immorality and illegality of the consideration could not be shown, by the plaintiff, to defeat the deed and enable the plaintiff to dispossess the defendant.

The question is, whether that ruling was correct.

The plaintiff stands upon the right and title of his ancestor, as it existed at his death, and can recover only in case his ancestor could. If his ancestor had no title which he could enforce, then none descended, to the heir. *Oliver White, if living, could not, we conceive, recover the possession of the lands as against the defendant.* The defendant showed a deed from Oliver White, admitted once to have been the owner of the land, duly executed, and himself in possession under the deed. The object of the action is to recover back the possession of the land ; and this, too, upon showing that Oliver White and the defendant, are equally guilty of combining for the promotion of the immorality and crime of the unlawful cohabitation of

said Oliver and Hannah. Mere want of consideration where a consideration is expressed in the deed, is not enough to defeat a deed as between the parties, and cannot be shown for that purpose. *Morse v. Shattuck*, 4 N. H. Rep., 229. In fact, nothing but the immorality and illigality of the consideration, is made the ground for defeating the defendant's deed, and of recovery. And we think the case is precisely analogous, in principle, to that of the payment of money upon an immoral or illegal consideration, in relation to which nearly the whole current of authorities, both English and American, hold that when the parties are found to be *in pari delicto*, the money so paid cannot be recovered back. In such case the clear and well settled doctrine is that *potior est conditio possidentis.*

In *Howson v. Hancock*, 8 D. & E., 575, Lord KENYON said, " *There is no case to be found where, when money* " *has been actually paid by one of the two parties, upon* " *an illegal contract, both being particeps criminis, an* " *action has been maintained to recover it back again.*" " And in *Vandyck & al. v. Hewett*, 1 East 98, it is said, " that " the rule has been settled, at all times, that when " both parties are *in pari delicto, potior est conditio possi-* " *dentis.*"

The language of Lord MANSFIELD, in *Smith v. Bromley*, Doug., 696, note, is this : " If the act is of itself " immoral, or a violation of the general laws of public " policy, then the party paying, shall not recover his " action ; for when both parties are equally criminal " against general laws, the rule is *potior est conditio de-* " *fendentis.*"

In *Lowry v. Bourdieu*, Doug., 467, the same distinguished judge said, " he desired it might be under- " stood that the Court held that, *in all cases where* " *money has been paid on an illegal consideration, it can-* " *not be recovered back, except in cases of oppression,* " *where the parties are not in pari delicto.*"

Mr. Comyns, in his treatise on Contracts, lays down the doctrine that " when money has been paid, upon an illegal contract, it is a general rule, that *if the contract*

be executed, and both the parties are in pari delicto, neither of them can recover from the other, the money so paid." 2 Com. on Contracts, 109. See also, *Browning v. Norris*, Cowp. Rep. 790; *Steers v. Lashley*, 6 D. & L., 61; *Brown v. Twiner*, 7 do., 630; *Clark v. Shee & al.*, Cowp. 197; *McCullum v. Gonslay*, 8 Johns. Rep., 113; *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 368.

WILDE, J., in *White v. Franklin Bank*, 22 Pick. Rep., 181, remarks upon the rule of law in question thus: "They (the defendant's counsel,) insist that when "money has been paid, by one of two parties to the "other, on an illegal contract, both being *particeps* "*criminis*, no action can be maintained to recover it "back. This rule may be correctly stated, in respect "to contracts involving moral turpitude, but where the "contract is merely *malum prohibitum*, the rule must "be taken with some qualifications and exceptions." The exceptions and distinctions suggested and approved by him, are those found in 2 Comyn on Contracts, 109.

Babcock v. Thompson, 3 Pick. Rep., 446, was an action of assumpsit, for money had and received, to recover back money lost on gaming. Chief Justice PARKER delivered the judgment of the Court, "We "have no doubt," said he, "that according to the gen- "eral policy and laws of this commonwealth, all gam- "ing is unlawful; and the plaintiff cannot maintain his "action where he is obliged to show his illegal act, as "the foundation for a recovery. This was pretty fully "considered and settled in *Worcester v. Eaton*, and "we see no reason to change the opinion there ex- "pressed."

In *Burt v. Place*, 6 Cowen's Rep., 431, the case was that the plaintiff conveyed to the defendant a small parcel of land for the consideration of $300 as specified in the deed, in money, but in fact the defendant paid for it ten dollars in cash, and agree to pay $240 in specific articles, and was to retain the remainder of the price for assisting the plaintiff in defending a lawsuit,

then pending before a justice. The defendant sold the land for $250, and the action was brought to recover the value of the land, or the money received upon the sale of it, by the defendant. The plaintiff assisted in defending the suit, but was not a licensed attorney. The objection to the plaintiff's right of recovery was founded on the illegality of the agreement between the parties, a part of the consideration being for maintenance. SAVAGE, C. J., delivered the judgment of the Court. "Maintenance," said he, "being prohibited by "statute, and a part of the consideration being there- "fore illegal, this was sufficient to vitiate the contract. "*The main question then is, can money paid or re-* "*ceived upon an illegal contract, be recovered back? The* "*general rule of law is that it cannot where it is paid* "*upon an illegal consideration, and both parties are* "*equally criminal.*" "The contract was both *malum* "*in se*, and prohibited by statute; and although it is "against conscience for the defendant to keep the "plaintiff's money, the court will not lend its aid to "enable the latter to recover back money thus illegally "paid."

In *Denton v. English*, 2 Nott & McCord, 581, it was decided that an executed contract, founded on an immoral consideration, is binding on the parties at common law.

The language of the court in *Roby v. West*, 6 N. H. Rep., 285, is thus: "The parties stand then, *in pari* "*delicto*, and in such case the illegality of the contract "renders it void. The principle, that no court shall "aid men who found their cause of action upon illegal "acts, is not only a well settled, but a most salutary "principle. It is fit and proper, that those who make "claims which rest upon violations of the law, should "have no right to be assisted by a court of justice."

According to the authorities, then, it would seem to be well settled that in reference to all acts or contracts, which are unlawful on account of their immorality, or their tendency to promote it, or because they are hostile to the

public policy, the parties thereunto, are regarded as being in pari delicto. And in all such cases the rule of law is potior est conditio defendentis.

And so upon the authorities cited, it would seem also to be quite clear, that if this were an action to recover back money paid by one of two parties upon a contract, of the immoral and illegal character of the one under consideration, the action could not be maintained upon the principles already stated.

In the case of money thus paid, it passes into the possession of the party, upon a consideration or agreement, or transaction, unlawful for immorality, or as being against public policy, for which cause the law will not lend its aid to recover it back. The title to the money passes well enough, as against the party guilty of participating in the crime of immorality, made the ground of recovery, or any other party claiming simply by virtue of his title. In other language the party thus guilty, thus particeps criminis, thus in pari delicto, will not be listened to, when he alleges and offers evidence of his own criminalty, or immorality and turpitude, as a ground upon which to establish a claim of right against another, in a court of justice.

Courts of justice will not take cognizance of the claims of such parties, based upon such grounds, but will leave them to be settled by themselves. Such parties are regarded, in reference to transactions of the character under controversy, as not being within the protection of the law, and as not being entitled to redress by the aid of the Courts of justice like other parties, but are left to suffer the consequences of any pecuniary loss or suffering, brought upon themselves by such illegal and immoral acts without any legal redress, as a punishment for their wrongs, and to deter others from lending themselves to the commission of similar vices; 11 Mass. Rep., 378.

Nor can it make any possible difference, whether it be the possession of land or of money, that may be sought through the aid of the court. The title and claim to each in the case supposed, must necessarily stand upon the same footing. The aid of the court would as soon be lent to a party for the one as for the other purpose. In the case supposed, of money paid, the possessor has required title and possession, upon an illegal or immoral consideration, and but for the fact that the claimant has participated equally in the wrong, he might well recover it of the possessor; but for that reason, simply, the court will not, as we have seen, aid to assist him to re-possess himself of his money.

So in the relation to the possession of land; the law will not aid a demandant, under like circumstances, in the attempt to re-possess himself of it, in a case in which he has, as far as he may, parted with his title and possession to the tenant.

We see no principle upon which to hold, that any sound distinction exists, between the cases of money and land, in respect to the claims of parties to the aid of the Court, for the redress of wrongs, in the case supposed. It would be equally against sound policy to aid a party seeking redress, guilty of illegality or immorality in the one case as in the other.

The case of *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep., 368, is a decision directly in point sustaining the opinion expressed in this case. We have examined the reasoning of that case and see no ground to question its soundness. It is there said that "there "must be a distinction between a conveyance of land "and money paid on such a consideration, (which was "the composition of a felony), or Betsy Flagg, (the "grantor), could not, on this ground, avoid her deed to "Fiske and Hudson, by entry or action, so as to con-"vey any title to the demandant. Such a distinction

"was attempted in the argument, but we find no "foundation for it. A deed of bargain and sale, signed, "sealed and delivered, acknowledged and recorded is an "actual transfer of the land to the grantee, as much as "the delivering over of a sum of money, or of a per- "sonal chattel is a transfer of either of those."

It was said, at the argument, that the doctrine of that case is in conflict with the English cases. No cases have been cited, however, which we regard as being inconsistent with it, nor have we been able to discover any.

On the whole, we are satisfied that the ruling of the Court rejecting the evidence offered by the plaintiff, was correct.

Judgment on the Verdict.

[58 N. H. 248.]

1878.

Thompson v. Williams.

Whether a sale of goods on Sunday is to the disturbance of others, the facts not being in dispute, is a conclusion of law.

The vender of goods sold on Sunday cannot recover for their price, when the sale was not a work of necessity or mercy.

The vendee of goods sold on Sunday, in violation of Gen. St., c. 255, s. 3, who has asserted and maintained his title to the goods in an action against the vendor for taking the same from his possession, is not estopped to set up the defense of sabbatical illegality in an action by the vendor to recover for their price.

Assumpsit, for $75, the price of two cows sold by the plaintiff to the defendant on Sunday. Fifteen days after the sale, the plaintiff took the cows from the defendant, claiming that the title was not to pass until the price was paid. For that taking the defendant brought an action of trespass against the plaintiff, and recovered a judgment (the damages being assessed at $75), on the ground (as the record shows) that the cows were the property of the defendant by virtue of the sale on Sunday, and the sale was absolute. That judgment the plaintiff has satisfied.

At the trial of this case the plaintiff was the sole witness. On cross-examination, he testified that on the Sunday of the sale he was in his saw-mill making repairs, when the defendant came in; that no one else was then present; that the defendant wanted to buy the cows, and they talked about a sale of them; that the defendant went down and saw them, and came back to the mill: that one Wiggin came in; that the defendant said he had been down to see the cows, and had made up his mind to give $75 for them; that

the plaintiff said he could not sell them for that, but finally concluded to accept the offer, and the bargain was made and the defendant drove them home ; and that at each interview, they talked a considerable time about the bargain.

The sale was not a work of necessity or mercy. The defendant moved for a nonsuit on the ground that the sale was prohibited by the Sunday Law. Gen. St., c. 255, s. 2. The court denied the motion, and the defendant excepted. There was nothing for the jury, unless the question whether the sale was "to the disturbance of others" was a question of fact. *The plaintiff claimed that the Sunday law is not a defense in this case, and that the defendant, having asserted and maintained his title under the Sunday sale in the former suit, is estopped, in this action, to set up the defense of sabbatical illegality.* Verdict for the plaintiff.

SMITH. J. It is a matter of law, that, whether any one besides the plaintiff and the defendant was present or not, the sale was business of the plaintiff's secular calling done "to the disturbances of others," within the meaning of Gen. St.; c. 255, s. 3. *Varney v. French*, 19 N. H. 233 ; *Smith v. Foster*, 41 N. H. 215 ; *Bank v. Thompson*, 42 N. H. 369 ; *George v. George*, 47 N. H. 35.

The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defense. The maxim, in pari delicto, &c., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the propery illegally sold. It leaves the parties where their illegal contract left them: when executed, it will not assist the party who has parted with his money or property to recover it back ; when executory, it will not compel performance. It would not leave

the parties where their illegal contract left them if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them, Williams was enabled to maintain trespass because Thompson could not be heard to controvert his title. *Smith v. Bean*, 15 N. H., 579; *Coburn v. Odell*, 30 N. H. 540, 542. The verdict must be set aside.

Nonsuit.

[38 N. J. Eq. 604.]

1884.

Mary Ann W. Ellicott, appellant, v. John M. Chamberlin, et al., executors of Amplius B. Chamberlin, deceased, respondents.

1. An agreement for a consideration to renounce an executorship, is illegal, because against public policy.
2. Trustees cannot use their relations with trust property to their personal advantage.
3. The law will not aid either party to an illegal contract, but will leave the parties where it finds them.
4. If the contract be executory it will not be enforced, and if already executed the price paid will not be restored.

On appeal from a decree of the chancellor, whose opinion is reported in *Ellicott v. Chamberlin, 10 Stew. Eq. 470.*

Mr. E. P. Conkling and Mr. J. G. Shipman, for appellant.

Mr. O. P. Chamberlin and Mr. J. N. Voorhees, for respondents.

The opinion of the Court was delivered by PARKER, J.

Elisha Warford executed his will on the 1st day of November, 1862. By the residuary clause he gave to the appellant (who was his only child) all the residue of his estate, both real and personal, to her sole and separate use, to keep the lands devised to her, or have them sold by the executors named in his will, as she saw fit. The persons named therein as executors were George A. Allen and Amplius B. Chamberlin.

On the 4th day of February, 1868, Mr. Warford executed a codicil to his will, by which he appointed Holcombe Warford as executor in place of Mr. Allen. The codicil differed from the will chiefly in its residuary clause, which *directed* the executors to sell all the residue of the personal and real estate and convert it

into money, to be invested by them in city and railroad stocks for the benefit of Mrs. Ellicott during her life. Under this clause they could sell and invest without reference to her wishes.

The testator died in May, 1872, and at the time of his death he was over eighty-seven years of age.

Amplius B. Chamberlin, one of the persons named as executors, was a personal friend of the testator, with whom he had been on very intimate terms for many years, and in whom he reposed much confidence. The will and codicil were executed at his residence, and remained in his possession continuously from the time they were executed until he produced them for probate.

When Mrs. Ellicott was informed of the contents of the codicil she was dissatisfied, because of the absolute power given to the executors by its residuary clause. She filed a *caveat* against the probate of both the will and codicil, and proceedings were instituted before the orphans' court to test their validity.

During the pendency of those proceedings, Mrs. Ellicott was informed that Mr. Chamberlain had said he expected to realize a large profit through the power of sale and investment given him by the codicil. When Mr. Nixon, on behalf of Mrs. Ellicott, served a notice on him, he said he would let her settle the estate if she would give him $25,000. He also told Mr. Nixon that he could make that much money out of it. He told Mr. Tunison he could make $15,000 or $20,000 in settling the estate. When Mr. Tunison asked him how, he replied that he would sell off certain farms, get the money for them, and put it in railroad and city bonds, that there would be a large premium on them, and he would have the premium. These boasting declarations of contemplated improper administration of the estate on the part of Mr. Chamberlin for the purpose of making profit for himself out of his trust, came to the ears of Mrs. Ellicott. He did not hesitate to make the same declarations substantially to Mrs. Ellicott herself. Her son Benjamin says that on

more than one occasion he heard Mr. Chamberlin say to his mother, when asked whether he had any interest in the estate more than his lawful fees and commissions, that he could make $20,000 in settling the estate, selling the different pieces of property, and investing the money as directed in the codicil, and that he would do it. Influenced by these and other similar expressions of Mr. Chamberlin, which came to her knowledge, Mrs. Ellicott became anxious to have him renounce his executorship, and negotiations were opened with that end in view. After numerous interviews between the parties on the subject, it was agreed that Mr. Chamberlin would renounce upon payment to him of the sum of $10,000, together with costs and counsel fees. On the 28th of March, 1874, he signed a formal renunciation. The other executor also renounced, but without any compensation, or promised remuneration therefor. The *caveat* was withdrawn, and Mrs. Ellicott, who has acted as administratrix *pendente lite* since the filing of the *caveat*, was appointed administratrix *cum testamento annexo*.

Mrs. Ellicott, in fulfillment of the agreement, paid Mr. Chamberlin, for counsel and costs, over $1,000. She also paid him at one time, in cash, $200, and at another time $150, on the agreement. In March, 1874, she paid him $4,611.88, and he gave her a receipt, in which he acknowledged the payment of that sum, "on account of my renunciation as executor of the last will and testament of Elisha Warford, deceased." As part of the payment last mentioned, Mrs. Ellicott assigned to Mr. Chamberlin a bond and mortgage given to her by Peter A. Yawger for the payment of $1,300. The payments hereinbefore mentioned made up the sum of $5,000, and for the remaining $5,000, she gave him a promissory note dated March 28th, 1874, payable on or before the 1st day of April, 1875, with interest from the 1st day of April, 1874. On the 2d of January, 1875, there was paid on this note the sum of $2,500, and also one year's interest. No other payments have been made on the note, or on the agreement from which the note originated.

Amplius B. Chamberlin died in the spring of 1879. His executors (the respondents), soon after his death, commenced an action in the circuit court of the county of Hunterdon to recover the balance of said note, whereupon Mrs. Elliott filed a bill in the court of chancery to restrain the suit on the note. The bill also prays for a decree compelling the executors of Amplius B. Chamberlin not only to surrender to her the said note, but to repay her the money she has paid on the same, and also the money she has paid on the contract for renunciation of the executorship, and to re-assign to her the Yaeger bond and mortgage.

The chancellor dismissed the bill, and from his decree Mrs. Ellicott appeals.

There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violating or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives, but he has no right to make merchandise of the confidence reposed in him by a testator.

In the case of *Porter v. Jones*, reported in *52 Mo. 399*, it was held that a promissory note, whereof the consideration was an agreement to resign as administrator, with the view of having another appointed, was void as against public policy. The court said, in that case, that the agreement amounted to trafficking with an important trust; and although an administrator was not a public officer, yet he held a private trust as sacred.

In *Staunton v. Parker, 19 Hun, 55*, it was decided that an agreement to renounce an executorship for a consideration was void. The matter came before the court on appeal from an order of a surrogate, holding,

the renunciation invalid. The court, in its decision, adopted the language of the surrogate, who said "that an executor had the undoubted right to re- "nounce, of his own motion, but a renunciation for a "consideration, a renunciation purchased in any "manner, is another matter. If agreements of "this nature are to be enforced, then testators "may well doubt, not only as to who will carry "out their wills, but whether they will be carried "out at all. The door might then be opened to fraud "and corruption on the part of designing men and in- "triguing descendants, and to imposition on confiding "testators."

A trust is regarded as a matter of honor and conscience, and not to be undertaken with mercenary views. *Manning vs. Manning, 1 Johns. Ch. 527.*

In the case last cited, the chancellor, in discussing the question of commissions and compensation to trustees in general, observed "that if the rule applied "with more force and propriety to one kind of trust "than another, it was that of an executor who gives no "security and who is selected by reason of some special "and sacred confidence, resulting from ties of kindred "or friendship, and charged by the testator in his "dying moments with interests of the greatest human "concern, and which the testator is on the eve of re- "nouncing forever. The request of a testator in such "case in the supplication of a friend."

I cannot conceive of anything more likely to undermine confidence and more directly opposed to public policy than to allow the partiality and friendship of testators, manifested in choosing those whom they wish to settle their worldly estates, to be made the subject of merchandise. There could not be a more marked violation of trust than such traffic.

On the part of the respondents it is urged that the whole sum of $10,000 was not paid to procure Mr. Chamberlin's renunciation of the executorship, but that the money was to be paid in part for services he had rendered the deceased, for advice and assistance

to be given Mrs. Ellicott in settling the estate as administratrix with the will annexed, and for going on her bond as one of the sureties. The evidence does not sustain this view, but shows that the money was to be paid wholly for the renunciation. But even if services performed or to be performed on the part of Mr. Chamberlin had entered into the contract, it was void. A contract is void if only a *portion* of the consideration is illegal as against public policy. It has been held that a contract based wholly or *partly* on an agreement of a trustee of a corporation to resign his trust for a consideration, is illegal. He may resign when he chooses, but he must not make any profit to himself by his resignation. *Forbes v. McDonald*, 54 *Cal. 98.*

It was the duty of Mr. Chamberlin either to renounce voluntarily, without consideration, or to endeavor to prove the will and codicil; and, after the *caveat* was withdrawn, to assert his rights as executor and proceed with the settlement of the estate entrusted to him by the testator. Instead of doing this, proceedings to probate the will and codicil were delayed, and he entered upon the effort to sell his trust. The price demanded at first was enormous, and the price obtained at the close of the barter was exorbitant. He could not possibly have been allowed one-third of the amount he received, in commissions, if he had settled the estate. He performed no service and incurred no risk. It is not the amount of the profit that determines the illegality, for a trustee is not allowed to make any profit out of his trust. The old English rule was to deny even commissions, on the theory that a trusteeship was a matter of honor, not to be compensated by money,

In New Jersey, commissions are given by statute, which, while it fixes rates beyond which they will not be allowed, also provides for their forfeiture by misconduct, or by neglect to state and settle accounts within the time limited, so that it cannot be said that an executor is entitled to any compensation until his

duties have been fully performed, and allowance has been made by order of the court.

There is no doubt that Mrs. Ellicott could have successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defence. But she chose voluntarily to pay the greater part of the money, and she cannot now recover what she has paid. She was a participant in an illegal contract for the purpose (as the evidence shows) of obtaining for herself the administration of the estate.

If a contract be illegal as against public policy, its invalidity will be a defence while it remains unexecuted. If the illegal contract be in part performed and money has been paid in pursuance of it, no action will lie to recover the money back. *Smith on Contracts 259.*

The law will not assist either party to an illegal contract, and the parties being in pari delicto, it will leave them where it finds them. If the contract be still executory, it will not enforce it, and if already executed it will not restore the price paid nor the property delivered. *Setter v. Alvey, 15 Kan. 157.*

Mrs. Ellicott cannot, therefore, compel the repayment of the money she gave Mr. Chamberlain on the agreement or on the note, nor can she compel the assignment to her of the Yawger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed, but she can resist the payment of the balance of the note, for which suit has been brought. Her defense to the note, can, however, be made in a court of law, and therefore the suit in the circuit court, already commenced, should not be enjoined.

The bill was properly dismissed by the chancellor, without costs. The appellant will not pay costs in this court. The decree is affirmed.

Decree unanimously affirmed.

[53 N. J. Eq. 259.]

1895.

James Brindley, administrator, v. Fanny Lawton.

A bill which rests on the allegation that the complainant's intestate gave a certificate of stock to the defendant in consideration for her living thereafter in illicit relations with him, and which prays for a surrender of such certificate, will be stricken out on motion, because it shows that the contract was illegal and immoral.

On motion to strike out, for scandal and impertinence.

Mr. Woodbury D. Holt, for the motion.

Mr. Edwin Robert Walker and Mr. Garrett D. W. Vroom, *contra*.

BIRD, V. C.

The complainant shows that he is the administrator John Brindley, deceased; that the decedent left a widow and three children him surviving; that at the time of his death he actually lived and cohabited with the defendant, Fanny Lawton; that the decedent was, at the time of his death, entitled to the possession and was the owner of a certificate of stock of a certain pottery, which certificate represented twenty shares of the stock of said company of the par value of $100 per share; that said certificate was afterwards ascertained to be in the possession of the defendant, Fanny Lawton, and that when the possession thereof was demanded of her by the complainant she refused to surrender the same, and claimed that it had been given to her by the said John Brindley, deceased, in his lifetime. The bill then charges

"That even if the pretense so last as aforesaid made of the said Fanny Lawton be true, that nevertheless the said gift of stock by your orator's said father to the said Fanny Lawton is absolutely null and void as being against public policy and good morals, because

your orator's said father gave the said stock, if at all, to the said Fanny Lawton as an inducement to, and consideration for, her living with him thereafter in a state of adultery, and that the said Fanny Lawton, in consideration thereof, thereafter did live with your orator's said father in open adultery, and was so living with him at the time of his death."

The motion is to strike this out because it is impertinent and scandalous. Since this is the foundation of the complaint, the whole structure must stand or fall with it. The allegation is that the certificate was given to her upon consideration of her submission to him in committing the crime of adultery. The gift is alleged to have been made *before* the offense against the law and good morals was committed.

Can a court of equity grant relief in such case by compelling the donee to surrender the possession of the thing given as compensation for her part in the offence? Professor Pomeroy, in speaking of contracts that are void or voidable, because of their illegal or immoral character, says:

"Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, or illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution." *2 Pom. Spec. Perf. § 936; 1 Story Eq. Jur. § 296.*

That the contract presented by the bill was illegal and immoral is so declared in the bill itself. Will the court aid either party in asking for a rescission? The answer to this was in the negative in the case of *Ellicott v. Chamberlin, 11 Stew. Eq. 604.* In that case, in order to induce the resignation of an executor, he was offered $10,000. After the payment of $5,000 in cash and the assignment of a bond and mortgage for $1,300, a promissory note was given for the remaining $5,000. After the payment of $2,500 on this note, an action at law was begun for the recovery of the amount due thereon. A bill was then filed in this court presenting the whole transaction and asking that the action at

law be enjoined. The bill was dismissed by the chancellor. An appeal was taken. In delivering the opinion of the court of errors, Mr. Justice PARKER used the following language:

"There is no doubt that Mrs. Ellicott could have "successfully resisted payment of any part of the "money she agreed to give Mr. Chamberlain for the "renunciation of his executorship, had she interposed "defence, but she chose voluntarily to pay the greater "part of the money, and she cannot now recover what "she has paid. She was a participant in an illegal "contract for the purpose (as the evidence shows) of "obtaining for herself the administration of the estate.

"If a contract be illegal as against public policy, its "invalidity will be a defence while it remains unexe-"cuted. *If the illegal contract be in part performed "and money has been paid in pursuance of it, no action "will lie to recover the money back. Sm. Cont. 259.*

"The law will not assist either party to an illegal "contract, and the parties being *in pari delicto*, it will "leave them where it finds them. *If the contract be "still executory it will not enforce it, and if already "executed it will not restore the price paid nor the "property delivered. Setter v. Alvey, 15 Kan. 157.*

"Mrs. Ellicott cannot, therefore, compel the repay-"ment of the money she gave Mr. Chamberlain on the "agreement or on the note, nor can she compel the as-"signment to her of the Yawger bond and mortgage as "prayed for in her bill. To that extent the contract "has been executed, but she can resist the payment of "the balance of the note for which suit has been "brought. Her defence to the note can, however, be "made in a court of law, and therefore the suit in the "circuit court, already commenced, should not be "enjoined."

"The bill was properly enjoined by the chancellor, without costs. *Johns v. Norris, 12 C. E. Gr. 485; Slocum v. Wooley, 16 Stew Eq. 451.*

With these cases before me, it is needless that I should go further.

The motion to strike out must prevail, with costs.

[29 Vroom (58 N. J. Law), 627.]

1896.

James W. Hope, Plaintiff in Error v. The Linden Park Blood Horse Association, Defendant in Error.

1. An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for public good, vested in one acting in a public official capacity, is illegal and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.

2. In an action in which either party to such an agreement seeks redress from the other for his own benefit, he will be left by the courts in the position in which he places himself.

3. If a party to such an agreement, by proof of part of the facts constituting the transaction out of which it grew, makes a *prima facie* case for recovery against another party to the agreement, without disclosing the illegality, the defendant's guilty participation in the transaction will not preclude him from showing that illegality.

On error to the Union County Circuit Court

For the plaintiff in error, Foster M. Voorhees and Frank Bergen.

For the defendant in error, Allen L. McDermott.

The opinion of the court was delivered by

THE CHANCELLOR: The judgment reviewed is in an action upon contract brought by the Linden Park Blood Horse Association to recover from James W. Hope the sum of $5,000 paid by it to him in August, 1893, as hereinafter stated, in which the defendant pleaded the general issue.

The case was tried before the judge at Circuit without a jury.

Errors are assigned upon refusals of the judge to nonsuit and to admit and consider the defence that the money sued for was paid to Mr. Hope in pursuance of a corrupt and illegal agreement.

The plaintiffs below proved that it applied to the township committee of the township of Linden, in Union County, to license it to maintain and use a race-course in that township, under chapter 16 of the laws of 1893 (Pamph. L., p. 28), entitled "An act concerning the maintaining of race-courses in this state, and to provide for the licensing and regulating of the same;" that thereafter it was resolved by the township committee, Mr. Hope being a member thereof and voting in favor of the resolution, that the defendant in error be licensed as it requested, for a period of five years, upon conditions stated, and that it pay to the inhabitants of the township of Linden, for the exercise of the privileges granted by the license, the sum of $5,000 annually during the second, third, fourth and fifth years of that term, and that during the first year, it pay $5,000 to aid in the construction of a sewer projected in the township; the sewer referred to was to be the work of a private corporation called the Roselle Sewerage Company; that upon the adoption of the resolution an agent of the defendant in error, who was present at the meeting, prepared his check for $5,000, payable to his own order, and endorsed it to Mr. Hope, to whom it was also delivered; and that in March, 1894, the $5,000 was yet in Mr. Hope's hands, and was demanded of him by the defendant in error.

Upon this proof, the court refused to nonsuit, and then the defendant below proceeded, under objection, the decision of which was reserved, to prove that after the resolutions of license were adopted, in the midst of confusion, some one remarked that there was something yet to be done, and that the reply was that $5,000 was to be paid, and that thereupon the agent of the defendant in error produced a blank check, and discussion arose as to whom it should be drawn; that the treasurer of the township was named and the treasurer of the sewer company was also mentioned, and that it was finally arranged that the check should be given to Mr. Hope, and be left with him to see that it

got to the proper parties; also that it was suggested, by the agent of the defendant in error, that in making the check payable to Hope, the word "manager" should be added after Hope's name, but upon objection that word was omitted from the check; and also that Mr. Hope was the manager of the Roseell Sewerage Company and a subscriber for its capital stock; and that the corporation was organized to conduct its business for the profit and advantage of its stockholders.

In deciding the case, the judge held that the evidence upon the part of the plaintiff did not show either that there was any illegality in the transaction, or that the transaction was tainted with criminality or in contravention of public policy; that the payment appeared to be a voluntary payment to the defendant, who, therefore, stood as the agent of the defendant in error, charged with the duty of expending the money under its direction, from whom the money might, in legal right, be withdrawn at any time. Hence, he concluded that, at the close of the case of the plaintiff below, a right to recover had been proven.

As to the proofs by the defendant below, Hope, the judge said: "The defence is substantially this: 'That "a stockholder in a private corporation gave his vote "as a public officer in discharge of a public duty in "consideration that the plaintiff would pay "$5,000 into the treasury of the private "sewer company which the defendant was engaged "in promoting. This is a corrupt agreement, which is "as clearly denounced by the law as though the money "had been paid to the defendant for his exclusive "benefit, and it cannot be set up in defence to this ac-"tion. If the plaintiff, in order to make out his case, "had been compelled to show these facts, the law "would not have permitted him to recover back the "money paid for such a corrupt purpose. The defend-"ant is no more favored by the law. He cannot in-"troduce such a state of facts into the case on his own "behalf and set up his own corrupt action as a legal

" defence to this suit. The defense set up by this " testimony is incompetent and inadmissible, and is " overruled."

The court then proceeded to give judgment for the recovery of the $5,000, with interests and costs.

The proposition laid down by the trial judge that the transaction which influenced or induced Hope to give his official vote for the license of the defendant in error, was corrupt and unlawful, is not disputed. It is too well established to admit of question that an agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good, vested in one acting in a public official capacity, is illegal, and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.

The question now mooted is whether the courts will permit a party to such an agreement to show its corrupt and illegal character in defense of an action against him to recover money paid to him in pursuance of its terms.

The trial judge thought that if one party to such an agreement should make out a *prima facie* case for the recovery back of money paid under it, without exhibiting the illegalty, it would not be competent for the person sued, who had been party to the agreement, to show the illegality and defeat such recovery.

The rule is that in an action in which either party to such a contract seeks redress from the other, for his own benefit, he will be left by the courts in the position in which he has placed himself. *Church v. Muir*, 4 Vroom, 320; *Price v. Polluck*, 8 *Id.* 44; *Shallcross v. Deats*, 14 *Id.* 177, 182.

That rule is the application of the maxim *ex turpi causa non oritur actio.* The maxim has its foundation in the public policy of discouraging illegal and corrupt agreements, by holding them to be void, and refusing all judicial aid between the parties to them.

In *Den v. Shotwell*, 3 Zab. 465, 474, Chief Justice GREEN used this language: " But in dealing with illegal " contracts, courts do not and cannot look to the in-

" terest of those who are parties to the illegal transac-
" tion. The law regards the welfare of society as para-
" mount, and, in enforcing the law, courts cannot
" impair its efficiency or cripple its operation by con-
" siderations affecting the interest of those who are
" *particeps criminis.*"

In *Holman v. Johnson*, 1 Cowp. 343 Lord MANSFIELD said: " The objection that a contract is immoral or
" illegal as between the plaintiff or defendant, sounds
" at all times very ill in the mouth of the defendant.
" It is not for his sake, however, that the objection is
" ever allowed, but it is founded in general principles
" of policy, which the defendant has the advantage of,
" contrary to the real justice between him and the
" plaintiff, by accident, if I may say so. The principle
" of public policy is this—*ex dolo malo non oritur actio.*
" No court will lend its aid to a man who founds his
" cause of action upon an immoral or an illegal act.
" If from the plaintiff's own stating, or otherwise, the
" cause of action appears to arise *ex turpi causa*, or a
" transgression of a positive law of this country, there
" the court says he has no right to be assisted. It is
" upon that ground that the court goes, not for the
" sake of the defendant, but because they will not
" lend their aid to such a plaintiff, so if the plaintiff
" and defendant were to change sides, and the
" defendant were to bring his action against the
" plaintiff, the latter would then have the advantage
" of it; for where both are equally in fault, *potior est*
" *conditio defendentis.*"

In *Marlatt v. Warwick*, 4 C. E. Gr., 454, Mr. Justice DEPUE said: " The objection is rather that of the
" public, speaking through the courts, than of the
" defendant as a party to the contract. The law
" disallows all proceedings in respect of illegal
" contracts, not from any consideration of the relative
" position and rights of the parties, but upon grounds
" of public policy."

It appears to me to follow from this view of the foundation of the rule with respect

to illegal and corrupt contracts, that the policy which constrains the courts to deny all relief to the parties, demands that when either of those parties shall offer to show that the cause of action springs from an illegal or corrupt agreement, the courts shall admit and consider the illegal proofs offered to that end. It certainly does not further the salutary effect of the rule, that neither party will be aided by the courts, or satisfy as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction and thus exhibit its illegality, merely because they are offered by a particeps criminis against whom a prima facie case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs, which suppress part of the truth and impose a mutilated state of facts upon the court, in place of the real transaction.

It was said by Chancellor KENT (2 Kent Com. 467) that "the courts of justice will allow the objection "that the consideration of the contract was immoral "or illegal, and be made even by the guilty party to "the contract; for the allowance is not for the sake of "the party who raises the objection, but is grounded "on general principles of policy."

In 2 Stark. Ev. 86, it is said: "Where the illegal "consideration is set forth upon the record, the ob-"jection may be taken either by demurrer or in arrest "of judgment. But where it does not appear on the "record, the defendant may show that the claim is in "reality founded upon an illegal and noxious agree-"ment."

In *Smith v. Applegate*, 3 Zab. 352, which was a suit upon a promissory note, under a plea of the general issue, the defendants were permitted to show the illegality of the transactian of which the giving of the note was a part.

So, in *Nellis v. Clark*, 20 Wend. 24, in a suit upon a note, it was held that the defendant might produce proof of like character. And a similar right in the defendant was recognized in *Harrison v. Hatcher*, 44 Ga. 638; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, and *Smith v. Hubbs*, 10 Me. 71, 78.

A single word may be added concerning the contention by the defendant in error that Mr. Hope is, under all the evidence offered, to be regarded as its agent, to whom it paid the $5,000 for the purpose of conveying it to those who would build the sewer, from whom it might recall its money at any time prior to his payment thereof over, according to his instruction. We think that the facts do not warrant this position, but that, on the contrary, they clearly show that the payment to Hope was regarded as the final disposition of the money so far as the defendant in error was concerned. Hope was recognized as the manager of the sewer company, and to him, as such, the money was paid in execution of the illegal agreement. It is unnecessary to consider what legal effect the fact contended for, if established, would have.

The judgment will be reversed.

For affirmance—None.

For reversal—The Chancellor, Chief Justice DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, MAGIE, BARKALOW, BOGERT, NIXON. 12.

[14 N. Y. 162.]

1856.

Tracy against Talmage, President, &c.,

IN THE MATTER OF THE CLAIM OF THE STATE OF INDIANA *against* LEAVITT, Receiver.

Mere knowledge by the vendor that the purchaser intends to make an illegal use of the property, is not a defence to an action for its price.[2]

But if it is made a part of the contract of sale that the property shall be used for an unlawful purpose, or if the vendor, with knowledge of the intent of the purchaser, do anything beyond making the sale in aid or furtherance of the unlawful design, he cannot recover for the property.[3]

Where an article is purchased with intent to be used in perpetrating a crime, knowledge by the vendor of such intent would be a bar to an action therefor.

Per Comstock, J., in opinion on motion for re-argument.

Where the vendor of stocks to a banking corporation by the contract of sale agreed to, and did receive therefor notes, payable on time, which the corporation was not authorized to make, and from issuing which it was prohibited under a penalty by statute; *Held*, that notwithstanding the contract was illegal and void, the vendor could recover the value of the stocks sold and delivered on an implied undertaking.

Although the vendor was a party to the illegal contract, he was not *in pari delicto* within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other.

Where the parties to a contract or transaction not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party.

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[1] See Curtiss v. Leavitt, 15 N. Y., 9.

[2] Sortwell v. Hughes, 1 Curtis, 244; Backman v. Jenks, 55 Barb. 468; Smart v. White, 73 Me. 338; Feineman v. Sachs, 23 Kas. 626; Distillling Co. v. Nutt, 34 Kas. 729.

[3] Birkett v. Chatterton, 13 R. I. 302.

The cases and distinctions on this subject discussed and pointed out by SELDEN and COMSTOCK, Js.

Tracy v. Talmage, 18 Barb., 456, modified.

Distinguished in *Hull v. Ruggles*, 56 N. Y. 428.

The North American Trust and Banking Company was, in July, 1838, organized in the city of New York as a corporation, under and by virtue of the act "To authorize the business of banking." (*Laws of* 1838, 215.) By the articles of association the capital was $2,000,000, with power to increase the same to $50,000,000. The amount of the capital was subscribed, a small portion thereof paid in in cash, and the residue secured by bonds and mortgages and stocks.

In August, 1838, the company purchased $1,000,000 of Arkansas bonds, paying therefor $300,000 in cash, and issuing certificates of deposit for $700,000, the residue of the price payable monthly, during some fifteen months. Of these bonds $200,000 were deposited with the comptroller of the state as security for bank notes issued to the company, and the residue were sent to Europe, and sold on behalf of the company to meet drafts which it had drawn on its correspondents in London. About the 15th of September, 1838, the company commenced receiving deposits and discounting commercial paper. The company never received from the comptroller bank notes to exceed $330,000. In January, 1839, the Trust and Banking Company purchased of the Morris Canal and Banking Company, a corporation created by the laws of the State of New Jersey, but which had an office and did business in the city of New York, bonds, made by the State of Indiana, to the amount of $1,200,000, at par, and gave therefor, to the Morris Canal and Banking Company, its obligations, in the form of negotiable certificates of deposit, payable with interest at a future day. The most of these bonds were sent to the correspondents of the Trust and Banking Company, in London, and there sold at a discount to raise funds to meet the drafts of the company. In the fall of 1839 the Trust and Banking Company agreed to purchase of the Morris Canal

and Banking Company, bonds of the State of Indiana, amounting to $1,000,000 at par, and to pay for the same, at 98 per cent, in negotiable certificates of deposit, made by the Trust and Banking Company, payable at a future day. This agreement was not in writing. On or about the 28th of October, 1839, these bonds were delivered by the Morris Canal and Banking Company to the Trust and Banking Company, and the latter made and delivered to the former certificates of deposit for the amount of the purchase price. The most of these certificates were for $1000 each. They respectively bore date October 28th, 1839, were signed by the president and cashier of the North American Trust and Banking Company, and stated that James Kay had deposited in the bank a sum, which was named, payable to his order, on the return of the certificate, on demand after a future day, which was specified; each certificate was endorsed by Kay in blank. These Indiana bonds were sent to London by the Trust and Banking Company to be sold to raise funds to meet its drafts and obligations payable there; and they were sold there at a large discount soon after the purchase. Kay, the payee named in and who endorsed the certificates, was a clerk for the Morris Canal and Banking Company; he never deposited any money with the Trust and Banking Company, and had no interest in the certificates. On the 11th of December, 1839, a written agreement was made between the Morris Canal and Banking Company and the State of Indiana, which recited that the former was indebted to the latter for Indiana state stocks, theretofore sold and delivered by the latter to the former, and by which the Morris Canal and Banking Company agreed to deliver to the State of Indiana, among other securities, certificates of deposit in the North American Trust and Banking Company to the amount of $196,000. Subsequently, and during the same month, the Canal and Banking Company transferred and delivered to the State of Indiana $196,000 of the certificates issued to it by the Trust and Banking Company under date of Octo-

ber 28, 1839, and payable after January 1st, 1841, and the same were receipted by the State of Indiana on the back of the agreement last above mentioned. On the 2d of January, 1841, the State of Indiana surrendered to the Trust and Banking Company a portion of these certificates, to the amount of $175,000 and received therefor eighteen other certificates of deposit, in the aggregate, for the same amount, dated on that day, signed by the president and cashier of the Trust and Banking Company, and payable to the order of, and endorsed by James Kay. Five of these certificates were for $9000 each, and thirteen of them for $10,000 each. Each stated that James Kay had deposited, with the Trust and Banking Company, a sum, which was specified, and that the company engaged to repay the holder of this certificate this sum upon the surrender thereof at a future day named, with interest, at the rate of seven per cent per annum. Of these eighteen certificates, the one first due was payable five months from date, and one became payable every month thereafter. The purchase of the Indiana bonds were negotiated and consummated in the city of New York, and all the certificates were issued there.

In August, 1841, the plaintiff herein being a stockholder and creditor of the Trust and Banking Company, commenced this suit against it in the court of chancery. The bill was filed under the Revised Statutes (2 *R. S.*, 463, §§ 39–42), and alleged that the company was insolvent, and that it had violated the law, &c, It prayed that the company might be enjoined from transacting business, that a receiver of its effects might be appointed and the corporation dissolved, &c. In September, thereafter, David Leavitt was appointed receiver, with the usual powers; and in June, 1843, a decree was made in the suit by which the Trust and Banking Company was adjudged to be insolvent, and it and its officers were perpetually enjoined, &c. An order was made in October, 1845, that the creditors of the company exhibit their claims to the receiver or be precluded from sharing in the funds,

and providing that any claimant might enter his appearance in the action; and that if any claim were disallowed by the receiver, it should be referred to referees. Pursuant to this order the State of Indiana, in December, 1845, exhibited the claim in controversy to the receiver. In the notice of the claim furnished to the receiver it was stated that the State of Indiana had a debt against the Trust and Banking Company of $175,000 with interest thereon from the 2d of January, 1841, for a balance due at that date for bonds issued by said state and sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company or otherwise. That this debt was owned by the State of Indiana, and that it should be allowed and paid to it, or that it should be allowed in the name of the Morris Canal and Banking Company for the use and benefit of the State of Indiana, and paid to the latter as the assignee of the demand. Attached to the notice of claim were the eighteen certificates for $175,000, above mentioned, which it was alleged were issued by the Trust and Banking Company for the debt claimed. In March, 1846, the receiver disallowed the claim, and in March, 1847, an order was made referring it to three referees, who, after hearing the proofs, in September 1850 reported against the validity of the claim. The report of the referees contained all the evidence given before them; and stated that they were of opinion, upon the proofs, that the claim was not valid, and that there was nothing due from the Trust and Banking Company or its receiver to the claimant. Other than this the particular conclusions of the referees as to the facts or law did not appear. The evidence proved the facts above stated. It also proved that the Indiana bonds were purchased by the Trust and Banking Company with the intention of selling them to raise money, and that they were so sold, principally in England, at a large discount. There was some evidence tending to prove that the Morris Canal and Banking Company knew at the time of the sale that the Trust and Bank-

ing Company purchased the bonds with this intention. It also appeared that the Trust and Banking Company, both before and after the purchase of the $1,000,000 of bonds in October, 1849, was accustomed to make and issue negotiable certificates of deposit, payable on time; and that during the time it carried on business, it issued negotiable paper, payable at a future day to over $15,000,000. All the certificates issued on account of the Indiana bonds, except those in question, appeared to have been paid. There was evidence tending to prove that in making the sale of the bonds, the Morris Canal and Banking Company was in fact the agent of the State of Indiana. The State of Indiana filed exceptions to the report of the referees, which, in September, 1851, were overruled at a special term of the supreme court held in New York by Justice Edmonds, and the report made by the referees affirmed. An appeal was taken by the State of Indiana, and in 1854, the court, at a general term held in New York, reversed the judgment rendered at special term, and adjudged that the claim was lawful and valid against the Trust and Banking Company, and was justly due and owing to the claimant, with interest from January 2d, 1841, "as the balance remaining unpaid for state bonds sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company, and by the last-mention company transferred to the claimant." The decree fixed and adjudged the amount of the demand to be $343,437.50, being the amount of the $175,000 and interest from January 2d, 1841; and the receiver was directed to pay the same in the due administration of the assets of the company. From this decree the receiver appealed to to this court.

The cause was argued in this court in 1855, and the court ordered a re-argument. It was again argued at the March term, 1856.

Samuel Beardsley, for the appellant.
A. Mann, for the respondent.

SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the State of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is, that it arises upon an illegal contract. Three grounds of illegality are alleged: 1. That the purchase of state stocks by the North American Trust and Banking Company for the purpose of resale, upon speculation, was beyond the scope of its corporate powers, and, therefore, illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase; 2. That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void; 3. That the certificates or post notes delivered in payment for the state stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was *particeps criminis*.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in making a contract, is equivalent in its effect to the violation of a positive penal enactment; because, so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a re-sale, and not to a deposit with the comptroller, seems to be established by the proof; and that such a purchase and re-sale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of *Talmage v. Pell* (3 *Seld.*, 328).

It is contended by the counsel for the claimant, that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of

the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold, will prevent a recovery for the purchase money. Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the court of king's bench, in England, in the case of *Faikney* v. *Reynous* (4 *Burr.*, 2069). The plaintiff and one of the defendants had been jointly concerned in stock-jobbing; and the plaintiff, in contravention of an express statute, had advanced £3000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz., that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord Mansfield said, in speaking of the act of the defendant in giving the bond: "*This* is not prohibited. He is *not concerned* in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction *between these two*."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman* v. *Johnson* (*Cowp.*, 341), where the

plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Faikney* v. *Reynous (supra)*, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: "The seller indeed, *knows* what the buyer is going to do with the goods; but the interests of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does an act which is calculated to facilitate the smuggling, such as packing the goods, in a particular manner, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs* v. *Lawrence* (3 *Term R.*, 454), *Clugas* v. *Penaluna* (4 *id.*, 466), and *Waymell* v. *Reed* (5 *id.*, 590). These were all cases where the plaintiff had sold the goods to the defendant, *knowing* that they were to be smuggled into England; and in each of them the plaintiff was nonsuited. But they all differed from the case of *Holman* v. *Johnson*, in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of *Waymell* v. *Reed*, is very explicit. He says: "In *Holman* v. *Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's *knowledge* of the use intended to be made of the goods; for he actually *assisted* the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman* v. *Johnson*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835, the question again arose in the case of *Pellecat* v. *Angell* (2 *Crompt. Mees. & Ros.*, 311), and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord Abinger says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was an esssential part." It is true, the Chief Baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the Chief Baron goes to show that the domicil of the plaintiff had no influence upon the decision. Bolland, B., says: "I think the distinction pointed out by the Lord Chief Baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one." Alderson, B., says: "If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the

place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman* v. *Johnson* is sound, is further shown by the case of *Hodson* v. *Temple* (5 *Taunt.*, 181), decided by the court of common pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defense to an action brought for the purchase money of the liquors, that the plaintiffs were *particeps criminis*, and could not recover. But Mansfield, Ch. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases, holding one uniform language, and sanctioned by such names as Mansfield, Buller, Kenyon, Abinger and others, I know of but a single English case, viz., that of *Langton and others* v. *Hughes*. (1 *Maule & Sel.*, 593). By a statute of 42 Geo. III., brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used contrary to the statute. In the 51 Geo. III., another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III., that the judges were evidently induced

to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defence. Le Blanc, J., after stating the question, says: "That depends upon the provisions of 42 Geo. III., coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pellecat* v. *Angell* (2 *Crompt., Mees. & Ros.*, 311), can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Faikney* v. *Reynous* and *Holman* v. *Johnson* (*supra*), but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot et al.* v. *Tennant* (1 *Bos. & Pull.*, 551). The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment *non obstante veredicto* was denied. Eyre, Ch. J., argues, that the jury having found that the plaintiff sold the goods "in order that

they should be shipped, &c., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Cannan* v. *Bryce*, (3 *Barn & Ald.*, 179). The defendant had lent money to a firm, which afterwards became bankrupt, for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell* v. *Robinson* (3 *Mees. & Wels.*, 434), which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which

the money was lent; and this is relied upon by the court in both cases in giving their judgment. In the case of *Cannan* v. *Bryce*, Abbott, Ch. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object:" and in the case of *McKinnell* v. *Robinson*, Lord Abinger, in stating the principle by which the case was governed, says: "This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., Abbott, chief justice of the king's bench, Eyre, chief justice of the common pleas, and Abinger, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney* v. *Reynous*, *Holman* v. *Johnson*, &c. *(supra)*. Indeed the whole current of English authority goes to support those cases, with the single exception of *Langton et al.* v. *Hughes (supra)*. They have also frequently been referred to by the courts in this country as containing sound doctrine. *(De Groot* v. *Van Duzer*, 17 *Wend.*, 170; *Merchants' Bank* v. *Spaulding*, 12 *Barb. S. C.* 302; *Armstrong* v. *Toler*, 11 *Wheat.*, 258). In the latter case, Chief Justice Marshall refers to the case of *Faikney* v. *Reynous* in the following terms: "The general proposition stated by Lord Mansfield, in *Faikney* v. *Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of *Talmage* v. *Pell* (3 *Seld.*, 328), decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the State of Ohio, that the bonds should remain in the hands of the agent of the state, to be sold on account of the banking company; and this fact is referred to and relied upon by Gardiner, J., by whom the opinion of the court was delivered. He says: "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling as a means for obtaining money to discharge existing liabilities: that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge, by the agents of the State of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and, provided also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for a lawful object was a contract which each party had a perfect

right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention and deposited them with the comptroller; would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and, if not, then the consequence of the doctrine contended for here, would inevitably be, that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicted of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less, bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not *necessarily per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money.

It follows, from this, that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase money, but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defence, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and consequently, that the contract which provided for their issue and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar, in regard to the nature of corporations and the limita-

tions of their powers, but shall assume it to have been established, for the purposes of this case, at least, that associations under the general banking law, even prior to the act of 1840 (*Laws of* 1840, 306, § 4), had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety fund act of 1829 (*Laws of* 1829, 167), but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle. (1 *R. S.*, 600, § 3.)

It follows, that in issuing the certificates or post notes delivered to the Morris Canal and Banking Company in consideration of the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear. (*Bank of Orleans* v. *Merrill*, 2 *Hill*, 295; *Leavitt* v. *Palmer*, 3 *Comst.*, 19; *Talmage* v. *Pell*, 3 *Seld.*, 328). Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase money? The counsel for the claimants sought upon the argument to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions; and, hence, that the debt created by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear, that the agreement to receive the certificates or post notes was simultaneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question, whether the consent and agreement of the vendors to receive the certificates in payment, will prevent a recovery *in any form* for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but,

on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the Trust and Banking Company as if the money had actually been deposited according to the tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the Trust and Banking Company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being *ultra vires*, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz., *East Anglian Railway Company* v. *Eastern Counties Railway Company* (7 *Eng. Law and Eq. R.*, 505; *McGregor* v. *The Official Manager of the Deal and Dover Railway Company* (16 *id.*, 180); and *The Mayor of Norwich* v. *The Norfolk Railway Company* (30 *id.*, 120).

That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract.[1] But it is quite another question whether such a contract is so tainted with corruption, that the party dealing with the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffimance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can be fairly brought, consistently with either reason or adjudged cases, within the range of the maxim, *ex turpi causa non oritur actio*,

[1] Nassau Bank v. Jones, 95 N. Y. 123.

cannot be considered as settled by the cases referred to; especially, as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of *East Anglian Railway Company* v. *Eastern Counties Railway Company (supra)*, the rule which denied all relief, in equity as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either *malum in se* or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party, which that party was incompetent in law to make, would, indeed, be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations, which are *ultra vires* merely, come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as, in the view I take of this case, it falls clearly within an exception to that rule; and, for the purposes of this question, I shall concede: 1. That the issuing and delivery by the North American Trust and Banking Company of its promissory notes payable on time, was *ultra vires*, and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty, and 2. That the notes issued were calculated and intended for circulation as money, and were, therefore, issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a

series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim, *ex dolo malo non oritur actio* is qualified by another, viz., *in pari delicto melior est conditio defendentis.* Unless, therefore, the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that *in no case* would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained *executory.* This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential, to both classes, that the contract be merely *malum prohibitum.* If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto;* or, 2. In some cases where he elects to disaffirm the contract while it remains *executory.* In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto.* This will clearly appear upon a brief review of some of the leading cases.

The first case which I deem is material to notice is that of *Smith* v. *Bromley (Dough.*, 670, *in note).* The

plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced £40 to the defendant, who was the principal creditor, to induce him to sign the certificate. The action, which was brought to recover this money, was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord Mansfield said: "If the act is in itself immoral, or violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violation of the one sort and the other." Two things are to be noted in this extract. That a distinction is taken between contracts *malum prohibitum* merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from oppression by the other. The first is a valid distinction, which runs through all the subsequent cases—the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of *Jaques* v. *Golightly* (2 *W. Bl.*, 1073) was an action brought to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance contrary to the statute 14 Geo. III., ch. 76. It was urged that the plaintiff being *particeps criminis*, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II., ch. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are *in pari delicto*, seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume, that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *par delictum*. In *Browning* *Morris* (2 *Cowp.*, 790), Lord Mansfield, after referring with approbation to the case of *Jaques* v. *Golightly*, reiterates the argument of Blackstone, J., in that case. He says: "and it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office-keeper."

The question next arose in the case of *Jaques* v. *Withy* (1 *Hen Black.* 65), which is identical with the case of *Jaques* v. *Golightly*, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of *Smith* v. *Bromley* where an undue advantage was taken of the peculiar situation of the plaintiff; and that although some effort is made in *Jaques* v. *Golightly*, and by Lord Mansfield in *Browning* v. *Morris*, *(supra)*, to bring them within the reasoning of that case, they are really placed upon the broad ground that the parties are not *in pari delicto*, and, as evidence of this, the court rely upon the fact that the penalty was im-

posed upon the defendant alone. A similar question came before the court of kings bench in the case of *Williams* v. *Hedley* (8 *East*, 378), where the previous cases were ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a *qui tam* action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the headnote of the reporter, which is this: "Money paid by A to B, in order to compromise a *qui tam* action of usury brought by B against A on the ground of a usurious transaction between the latter and one E, may be recovered back in an action by A for money had and received. For the prohibition and penalties of the statute of 18 Eliz., ch. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, &c., contrary to the statute, and not upon the party paying the composition; and, therefore, the latter does not stand, in this respect *in pari delicto*, nor is he *particeps criminis* with such compounding informer or plaintiff."

These are the leading English cases on this subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, *executed* in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In *Inhabitants of Worcester* v. *Eaton* (11 *Mass.*, 368), Chief Justice PARKER, after referring to the cases of *Smith* v. *Bromley* and *Browning* v. *Morris* (*supra*), and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in

this country." The case of *White* v. *Franklin Bank* (22 *Pick.*, 181), proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The Revised Statutes of Massachusetts *(ch.* 36, *sec.* 57) prohibited banks from making any contract "for the payment of money at a future day certain," under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the 10th day of August; and the action was brought to recover this money. It was objected that the contract was illegal and the parties *particeps criminis*, but the defense was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. WILDE, J., who delivered the opinion of the court, after referring to those cases, and quoting the remarks of Chief Justice PARKER in *Inhabitants of Worcester* v. *Eaton*, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of *Lowell* v. *Boston and Lowell Railroad Company* (23 *Pick.*, 24) where the objection was raised that the parties were *particeps criminis*, the same justice says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both

parties are wrong-doers." The same doctrine was reiterated in *Atlas Bank* v. *Nahant Bank* (3 *Met.*, 581). The principle of these cases was also adopted by our own supreme court in the case *Mount* v. *Waite* (7 *John.*, 434). The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets contrary to the policy of a statute passed in 1807. KENT, Ch. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se.* I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto.*"

This case is the last of the class to which I shall refer; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle or public property to which it stands opposed. On the contrary, I concur in the sentiment which Judge Wilde, in *White* v. *Franklin Bank*, expresses thus: "To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact, that in very many cases it is a mere

legal fiction. If we take the present case as an example, if is plain that it would not have been easy for the Morris Canal and Banking Company with the charter of the Trust and Banking Company and the restraining act both before them, to determine whether the issue of these certificates in payment for state stocks would violate either; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, with the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not, might be made to constitute the most available portion of their capital; and unauthorized dealing in large amounts, with foreign states or corporations not familar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not *in pari delicto.*

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case, so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of §§ 3, 6 and 7 of the act concerning unauthorized banking. (1 *R. S.*, 712). It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defence is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have

referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defence which rests upon the ground that the act of the banking company in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone, does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust and Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply *ultra vires*, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this state, and known as the Utica insurance cases, not as authority for my conclusion, but by way of illustrating the distinctions to which I have averted. The first of these is *The Utica Insurance Company* v. *Scott* (19 *John.*, 1). The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes; and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass; but there is a material distinction between *the security and the contract* of lending. The lending of money is not declared to be void, and, therefore, whenever money has been lent, it may be recovered, although the security itself is void." Judgment was,

however, given for the defendant in that case, because the action was brought upon the note alone. The next case was that of *The Utica Insurance Company v. Kipp* (8 *Cow.*, 20). This, also, was an action upon a note discounted by the insurance company; but the declaration also contained a count for money lent. The plaintiff recovered: and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal, does not avoid what was lawful. *The action for money lent, is rather a disaffirmance of the illegal contract.*" Similar decisions were made in three subsequent cases, viz: *The Utica Insurance Company* v. *Cadwell (Wend.*, 296); *Same* v. *Kipp*, (3 *id.*, 369); and *Same* v. *Bloodgood* (4 *id.*, 652).

These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. In *New Hope Company* v. *Poughkeepsie Silk Company* (25 *Wend.*, 648), Nelson, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of The Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubtedly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, and the court, in the Utica insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the insurance company recovered, viz., *The Utica Insurance Company* v. *Kip*, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of

which is to enforce the performance of an agreement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant *from retaining the benefit which he derived from an unlawful act*, there it is consonant to the spirit and policy of the law that he should recover." (1 *Comyn on Contracts, part* 2, *ch.* 4, *art.* 20.) Comyn cites, as authority for this passage, the case of *Jaques* v. *Withy* (1 *Hen. Bl.*, 65), which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not *in pari delicto* with the defendant; and on turning to that case it will be seen that the passage is copied *verbatim* from the argument of Sergeant Adair, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica insurance cases is built, in part at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles, appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But, notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation, by the court, of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is undisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which

the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica insurance cases; by which that part of the contract which embraces the loan (in this case, the sale) is separated from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void.[1] Recoveries are not had in such cases upon the basis of the *express* contract, which is tainted with illegality; but upon an implied contract founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the State of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation, like that existing in this case. (*Bank of Columbia* v. *Patterson, Adm.*, 7 *Cranch*, 299; *Danforth* v. *Schoharie Turnpike Company*, 12 *John.*, 227; *Bank of U. S.* v. *Dandrige*, 12 *Wheat.*, 64.)

It follows, from these principles, that if the Morris Canal and Banking Company was the claimant upon the record, it would be entitled to recover, not the specific balance due upon the certificates, nor the price agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far

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[1] McGregor v. Donelly, 67 Cal., 151.

as it has been executed by payment, or its equivalent, undisturbed.

The only remaining question is, whether the State of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the supreme court both at special and general terms, the Canal and Banking Company acted in the sale of the stocks as the agent of the State of Indiana, then, of course, the latter, as the principal, is the proper party here. But aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the state its entire claim against the Trust and Banking Company, growing out of the sale of the stocks, and would, if necessary, compel any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court upon well settled principles, will regard what ought to be done as having been done.

The judgment of the supreme court should be modified in accordance with these principles, and the proceedings remitted.

MITCHELL, J., delivered an opinion in favor of affirming the judgment of the supreme court at general term. He was of the opinion that the evidence did not establish that the Morris Canal and Banking Company, or the State of Indiana, had knowledge when the bonds were sold that the Trust and Banking Company purchased them for an illegal purpose, or with intent to make an illegal use of them, and that the last-named company, at the time of the purchase, in 1839, had authority to make and issue notes or certificates payable at a future day. He held, that associations organized under the general banking law were not subject to the provisions contained in the safety fund act (*Laws of* 1829, 165, § 35), prohibiting moneyed corporations subject to the provisions of that act from issuing bills or notes, payable on time; and that such

associations might lawfully issue such notes for a legitimate purpose, until prohibited by the act of 1840. (*Laws of* 1840, § 4).

DENIO, Ch. J., was also in favor of affirming the judgment, on substantially the same grounds as those stated by Judge MITCHELL.

COMSTOCK, HUBBARD, T. A. JOHNSON and WRIGHT, Js., concurred in the foregoing opinion delivered by Judge SELDEN, and were in favor of modifying the judgment in accordance with the principles stated in that opinion.

A. S. JOHNSON, J., dissented. He was in favor of reversing the judgment rendered at general term and affirming that rendered at special term.

Judgment modified.

Motion for Reargument.

At the ensuing September term of the court the counsel for the receiver, the remittitur having been stayed, made a motion for a reargument of the foregoing case. On such motion Messrs. N. Hill, Samuel Beardsley and G. C. Bronson, of counsel for the receiver, submitted the following printed argument:

Until the decision of this case, it was supposed to be well settled that a loan of money, which the lender knows is to be applied to an illegal purpose, is an illegal contract, and that a sale of goods, which the seller has notice the purchaser intends to use in an illegal way is also illegal: that where land is demised, knowingly to be used for an illegal purpose, the agreement for the payment of rent is illegal and void: and that the same rule applies where personal property is knowingly let to be used in violation of law. These are general rules, to some of which exceptions have been allowed by certain cases commonly known as revenue cases, which will be hereafter considered. But the authorities in favor of the general principle have been supposed to be entirely decisive. (*Chit. on Contracts*, 420–423, 695; *McKinnell* v. *Robinson*, 3 *Mees. & Wels.*, 435; *Peck* v. *Briggs*, 3 *Denio*, 107; *Ruckman* v. *Bryan*, *id.*, 340; *Griffith* v. *Wells*, *id.*, 226; *Cannan* v. *Bryce*, 3 *Barn & Ald.*, 179; *Langton* v. *Hughes*, 1 *Maule & Selw.*, 593; *Lightfoot* v. *Tenant*, 1 *Bos. & Pul.*, 356; *Story on Confl. of Laws*, 2d ed., §§ 253, 254; *Talmage* v. *Pell*, 3 *Seld.*, 328; *Bank of Michigan* v. *Niles*, 1 *Doug., Mich.*, 401; *S. C.*, *Watkins' Ch., Mich.* 99; *The Gas Company* v. *Turner*, 5 *Bing., N. C.*, 666; *S. C.*, 6 *id.*, 324; *Cundell* v. *Dawson*, 4 *M. G. & S.*, 376; *Brown* v. *Duncan*, 10 *Barn & Cress.*, 93; *Smith* v. *Mawhood*, 14 *Mees. & Wels.*, 452; *White* v. *Buss.*, 3 *Cush.*, 448; *Hodgson* v. *Temple*, 5 *Taunt.*, 181; 23 *Am. Jurist*, 1, and onward.)

But the opinion of the court in this case seems to be in direct conflict with the principle which has been stated; for His Honor, Judge Selden, in pronouncing that opinion, says: "It is no defence to an action brought to recover the price of goods sold that the vendor *knew* that they were bought for an *illegal* purpose, provided it is not made *a part of the contract* that

they *shall be used* for that purpose; and, provided also, that the vendor has done nothing *in aid or furtherance* of the unlawful design," beyond the mere sale with knowledge of the illegal intent of the purchaser.

We commenced by stating general rules of law applicable to contracts, and not exceptional cases, as smuggling contracts made in a foreign country, or domestic contracts, where property is sold to be used in violation of a mere revenue law, the sale not being expressly prohibited; and we understand Judge SELDEN to affirm a general principle, and not an exception to one. Special contracts, like those last mentioned, if maintainable at all, must stand upon principles peculiar to themselves, but which have no application to the case in which the opinion of Judge SELDEN was given.

The first case referred to by his honor as an authority for his opinion is *Faikney* v. *Reynous*, (4 *Burr.*, 2069). In that case, the plaintiff and another person had met with heavy losses in stock-jobbing transactions in which they had been jointly engaged. An act of parliament prohibited the payment of all such losses, thereby making it illegal to do so; yet the plaintiff had paid the amount thus lost, for one-half of which the defendant and another person gave the bond on which this action was brought; and it was held that the plaintiff might recover. Judge SELDEN says the question in that case was "somewhat analogous" to the one on which his opinion was pronounced, although he does not explain in what the analogy consists. In the case before him, the question was, whether a sale of property, knowing it was bought for an illegal purpose, was a legal contract. The purchaser, as it was assumed the seller knew, intended thereafter to "make an illegal use of the property purchased." But in *Faikney* v. *Reynous* the plaintiff had previously made the illegal payment; and the question was whether a bond to reimburse what had already been advanced illegally was valid.

It was not contemplated in that case that the plaintiff should thereafter make any illegal use of the money to be paid on the bond, or of any other money. He had already broken the law by making the illegal payment, and the only design of the bond was to restore to him what he had voluntarily and illegally parted with. Thus in *Faikney* v. *Reynous*, the question was whether it was legal to engage to repay money previously advanced in violation of law; whereas in this case the question was whether an agreement to sell and transfer

property, knowing it was bought to be used thereafter for an illegal purpose, was a lawful contract.

We can see no analogy between these cases, nor can we see upon what principle the judgment in the first is an authority for the last. It might be added, if that were necessary, that *Faikney* v. *Reynous*, is of no authority for any purpose, having been overruled and wholly discredited. (23 *Amer. Jur.*, 18-21; *Paley's Agency, by Dunlap*, 118-120, *and notes; see at large the article above referred to in the Amer. Jurist; Aubert* v. *Maze*, 2 *Bos. & Pul.*, 371; *Mitchell* v. *Cockburn*, 2 *Hen. Black.*, 379; *Exparte Bell*, 3 *Vesey, Jun.*, 372; *Exparte Daniels*, 14 *Vesey*, 191; *Ottley* v. *Brown*, 1 *Ball & Beat*, 360; *Cannan* v. *Bryce*, 3 *Barn & Ald.*, 179; *Bensley* v. *Bignold*, 5 *Barn & Ald.*, 335.)

Judge Selden next refers to a class of cases which he regards as "identical in principle,—these are his words,—with the case before him; that is *Hadman* v. *Johnson (Cowp.*, 341); *Biggs* v. *Lawrence* (3 *Durn. & East.*, 454); *Clugas* v. *Penaluna* (4 *Durn & East.*, 465); *Wamell* v. *Reed* (5 *Durn. & East.*, 599); *Pellicat* v. *Angell* (2 *Crompt., Mees. & Ros.*, 311).

These cases show that a sale of property out of England, the seller not being a British subject, is valid, although he knows that the purchaser intends to smuggle the property into England. But this, as the cases also show, is because the contract, being made in a foreign country and by a seller not a British subject, is in no sense made under or in reference to the law of England. Had the seller been a subject of the British crown, the contract, although made in a foreign country, would have been illegal, as it also would have been if made in England, whether the seller were a subject or an alien.

These foreign contracts, resting on the grounds stated, would seem to me to be in no respect "*identical in principle*" with domestic contracts.

The next case referred to by Judge Selden is *Hodgson* v. *Temple* (5 *Taut.*, 181). That was a contract made in England, under English law; and it must be admitted that the language of Sir James Mansfield, Ch. Jr., as there stated, is broad enough to include such a case as that in which the opinion in question was given, and if applicable to such a case, is an authority more or less controlling for that opinion. Chief Justice Mansfield is reported to have said that "*the merely* selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his

just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Now, in order to understand the true meaning of this remark, and to allow it all the force which it is justly entitled to, it is necessary to see what the case was in which it was made; for a remark, although general in its terms, must be understood as having a particular reference to the subject under consideration, and cannot in reason be allowed to have a broader application. A general observation of a judge, in giving judgment, may be perfectly correct in reference to the case before him, and yet may be as clearly wrong when applied to a case of a different character, although falling within the general terms used.

The case of *Hodgson* v. *Temple* was an action to recover for spirituous liquors sold and delivered by the plaintiff to the defendant, to be used in his rectifying distillery, as the plaintiff knew. The defendant, as the plaintiff also knew, was at the same time a licensed retailer of such liquors, and as such was prohibited from being concerned in a distillery. It was argued that the plaintiff, having sold the spirits with knowledge that the purchaser intended to use them in violation of law, could not recover; and we admit that if the general rule, which disables a party from recovering for goods sold to be used illegally, applies to such a case as that was, the plaintiff was not entitled to recover, and the judgment rendered was erroneous. But this rule, although it applies universally where anything is prohibited with a view to morality or public policy, and also where the object is to protect buyers and consumers against the frauds of manufactures or sellers; yet, according, to the English revenue cases, it does not apply where the design of the prohibition is merely to secure the due collection of revenue, the sale itself not being forbidden. Such was the case of *Hodgson* v. *Temple*. The sale of liquor, although the plaintiff knew it was bought to be used illegally, was not prohibited; the prohibition was, that the defendant, a retailer, should not also be a distiller. Had the sale been prohibited, it would have been illegal although the sole object in view was the collection of revenue. (*Chit. on Contr.*, 420, 698; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 153, 157; *Smith* v. *Mawhood*, 14 *Mees & Wels.*, 452.) But the prohibition in the case of *Hodgson* v. *Temple* being only personal to the defendant, that he, a retailer, should not be concerned in distilling, &c., a sale to

him of spirits, which he intended to use in violation of the prohibition, was not illegal; the object of the prohibition being merely the due collection of revenue.

The soundness of the class of cases to which *Hodgson v. Temple* belongs has frequently been questioned in England, and learned judges there and in this country have not hesitated to affirm that the distinction on which they proceed "cannot be maintained upon the basis of any sound and fair argument." (*Territt* v. *Bartlett*, 21 *Verm.*, 188; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 153, *Parke, B.*; *Greenleaf's Overruled Cases*, 64, 255; *Booker* v. *Wood*, 3 *N & Man.*, 96, *Littledale, J.*; *Story's Confl. of Law*, §§ 253–255.) This consideration certainly admonishes us not to treat these cases as evidence of any general rule of law applicable to illegal contracts, for that would be to bring them into direct conflict with all the cases on that subject. The truth is, they are at best exceptional cases, maintaining peculiar views as applicable to a particular class of contracts. And looking at them as decided on a principle applied to sales of property which the purchaser intends to use in violation of a mere revenue statute, it is plain that, whether sound or unsound, they can have no bearing on the present case.

The general principal which forbids a recovery by a seller, for goods sold by him with knowledge that the purchaser intends to use them illegally, is thus stated by Chief Justice Shaw, in *White* v. *Buss* (3 *Cush.*, 448). He says, it is "well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms or by affixing a penalty to it is unlawful, and it will not promote in one form that that which it declares wrong in another."

These views are undeniably correct, unless, perhaps, where the law which a purchaser intends to violate is a prohibition, having reference merely to the collection of revenue. That exception, if allowable at all, was obviously not in the mind of the chief justice when he prepared this opinion, nor was it at all necessary to advert to it in that case. He intended to state a gen-

eral principal, and did so with his accustomed clearness and force. Chitty, in stating the same principle, expressly excludes revenue prohibitions. He says, "where a statute *having in view* the protection or general benefit of the *public*, or the prevention of a *fraud*, expressly or impliedly renders it illegal to make or use certain articles in a particular manner, or for certain special purposes, *the price of goods sold with a knowledge* of the intention to contravene the provisions of the act, and in furtherance of the illicit object, cannot be recovered." (*Chit. on Contr.* 422-424, *Amer. ed.*, 1840.)

Such is the general rule. But where the design of the purchaser is to use the property bought in violation of a mere revenue prohibition, the sale, according to the English cases, is not illegal, although the seller has full notice of that illegal intent. The case of *Hodgson* v. *Temple* was of that peculiar character, and was decided on that distinction, as is fully shown by subsequent cases. (*Brown* v. *Duncan*, 10 *Barn. & Cres.*, 93; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 149; *Wetherill* v. *Jones*, 3 *Barn. & Adol.*, 221; *Smith* v. *Mawhood*, 14 *Mees. & Wels.*, 452; *Cundell* v. *Dawson*, 4 *M., G. & S.* 376; *Chit. on Con'r.*, 420-423; *Griffith* v. *Wells*, 3 *Denio*, 226; *Law* v. *Hudson*, 11 *East.*, 300; *Wheeler* v. *Russell*, 17 *Mass.*, 258; *Bensley* v. *Bignole*, 5 *Barn. & Ald.*, 335; *Tyson* v. *Thomas*, *McC. & Y.*, 119; *Little* v. *Poole*, 9 *Barn. & Cres.*, 192; *Foster* v. *Taylor*, 5 *Barn. & Adol.*, 887; *Johnson* v. *Hudson*, 11 *East*, 180; *Spurgeon* v. *McIlwaine*, 6 *Hammond*, 442.)

The law intended to be violated, in the present case, had no reference to revenue, but was intended to promote sound policy and the public interest; and, therefore, as we respectfully submit, the case of *Hodgson* v. *Temple*, if rightly decided, is inapplicable, as an authority.

Judge Selden, after quoting the smuggling cases already mentioned, and *Hodgson* v. *Temple*, adds: "Opposed to this series of cases, holding one uniform language and sanctioned by such names as Mansfield, Buller, Kenyon, Abigner and others, I know of but a single English case, viz., that of *Langton and others* v. *Hughes* (1 *Maule & Selw.* 593)", which he thinks "was not very well considered;" nor, as he remarks, does it "appear to have been followed either in England or in this country," but was "virtually overruled by the subsequent case of *Pellicat* v. *Angell*, (2 *Crompt., Mees. & Ros.*, 311)." On these grounds, his honor says it "can

have but little weight in opposition to the numerous authorities, to which "he had referred, going to establish the contrary principle."

That *Langton* v. *Hughes* is exactly in point to maintain the converse of the position of Judge Selden, is, in effect, conceded by him, and will fully appear by examining the case. If, as is observed by the learned judge, it has not "been followed either in England or in this country," it is, as we suppose, simply because no case precisely like it has come up for judgment. It has, as far as we know, never before been called in question, and has been over and over again referred to as sound in principle. (*Cannan* v. *Bryce*, 3 *Barn. & Ald.* 179; *The Gas Light Company* v. *Turner*, 5 *Bing. N. C.*, 666; *Cundell* v. *Dawson*, 4 *M., Gr. & S.*, 376; *Forster* v. *Taylor*, 5 *Barn. & Adol.*, 887; *De Begnis* v. *Armistead*, 10 *Bing.*, 107; *McKinnell* v. *Robinson*, 3 *Mees. & Wels.*, 434; *Peck* v. *Briggs*, 3 *Denio*, 107; *Ruckman* v. *Bryan*, *id.*, 340; *Ruckman* v. *Pitcher*, 1 *Comst.*, 409; *Ex parte Bell*, 1 *Maule & Selw.*, 751; *Morgan* v. *Groff*, 5 *Denio*, 364; *Perkins* v. *Savage*, 15 *Wend.*, 412; *De Groot*, v. *Van Duzer*, 20 *id.*, 396; 23 *Am. Jurist*, 14; *Haydon* v. *Davis*, 3 *McLean*, 278; *Story on Confl. of Laws*, §§ 253–255.) How *Langton* v. *Hughes*, which was the case of a contract made in England, could have been "virtually overruled" by the case of *Pellicat* v. *Angell*, where the contract was made out of England, and not under English law, no reference on the argument or in the decision of that case being made to the former, is what we cannot understand; nor are we able to see that the case of *Langton* v. *Hughes* is at all "in opposition" to either of the authorities referred to by Judge Selden. That it stands in direct antagonism to the position of the learned judge, is, in effect, stated in his opinion; and how far it should be regarded as a dubious case may be determined by looking at the authorities referred to at the commencement of this review. Loans of money, sales of goods, demises of real estate and the letting of personal property, all stand on one and the same principle. If the design is known to be a violation of the law, no court of justice will aid either party.

Judge Selden next refers to a class of cases in which, as he says, "*the express objects of the plaintiffs*," in selling the goods or lending the money, was, "that they should be used for an unlawful purpose; and that such purpose *entered into* and *formed a part* of the contract of sale or loan." *Lightfoot* v. *Tenant* (1 *Bos. & Pul.*,

551), *Cannan* v. *Bryce* (3 *Barn. & Ald.*, 179), and *McKinnell* v. *Robinson* (3 *Mees. & Wels.*, 434), are referred to as such cases.

We are unable to see that in either of these cases the plaintiff had any such object as is imputed to him, or that it "*formed a part of the contract*" that the money or property should be applied to the "unlawful purpose" which the defendant had in view. It was no part of the contract of the plaintiff that the defendant should violate the law, although means were advanced and furnished, knowing that the defendant intended to use them in that way.

In *Lightfoot* v. *Tenant*, the action was on a bond given by the defendant to the plaintiff, for goods sold and delivered the plaintiff, the seller knowing that the defendant intended to dispose of them in a manner prohibited by an act of parliament. In one aspect of the case, as viewed by Chief Justice Eyre in pronouncing judgment, the plaintiff might have been interested in the ultimate illegal use to be made of the property, which would certainly have been a fatal objection to a recovery. But the case was not determined on this ground alone, for it was held to be a good defence to the action, if the goods were sold "*to the defendant for the purpose of enabling him*" to dispose of them illegally. The defendant bought them for such a purpose, as the plaintiff knew, but it formed "*no part of the contract*" that they should be so used by the defendant.

In *Cannan* v. *Bryce*, the plaintiff lent money to the defendant to enable him to pay stock-jobbing losses, such payments being prohibited by statute. This loan was held to be illegal, because the plaintiff knew that the money was obtained to be applied to this illegal purpose, and not because it was "*part of the contract*" that it should be so applied. It is unnecessary to speak particularly of the case of *McKennell* v. *Robinson*. It affirms, as the others do, that a loan or sale to a party for the purpose of enabling him to accomplish an illegal object, is itself illegal. Neither of these cases, as we read them, countenances the suggestion that the loan or sale is only illegal when the lender or seller makes it "*a part of the contract*" that what is lent or sold shall be used or applied illegally.

In the case of *Talmage* v. *Pell* (3 *Seld.*, 328), referred to by Judge Selden, it is true that it was made a part of the contract that the stocks should be sold. That, certainly, did not make the sale an innocent one;

it was, no doubt, illegal with that ingredient in it; and the case does not intimate that, but for this stipulation, the sale would have been legal. It was argued, on the sole ground that bare knowledge of the illegal purposes in making the purchase of the stocks, made the sale illegal, and we suppose the court intended so to hold, without qualification or restriction. The court did not suggest that the sale would have been legal, but for the agreement that the stocks should be sold, nor was any such distinction taken by counsel on the argument.

We have now adverted to all the cases on which Judge Selden rests his opinion on the point referred to; and we respectfully submit that they wholly fail to sustain it. We therefore dismiss this point and proceed to an examination of other parts of the opinion.

Where a statute, violated by an illegal contract, was made for the protection of a particular class of persons against another, one of the parties to the contract falling within the class intended to be protected by the statute, there, although both concur in the violation, yet the party entitled to protection may disaffirm the contract, and recover for what he has paid or advanced on it; and this, although no statute in terms gives to him such a right of action.

This is on the supposition that he may have been oppressed, deluded or imposed on by the other party to the contract, and is, therefore, entitled to redress. Such is the theory as to statutes of this character; and the same relief, under like circumstances of oppression, imposition, hardship or undue influence, may be given by the common law; for, where "one holds the rod and the other bows to it," the parties cannot be in *pari delicto*. (*Smith on Contracts*, 189, 190; 2 *Comyn on Contracts*, 113, 117, 119; *Schroeppel* v. *Corning*, 2 *Denio*, 236; *Smith* v. *Bromley*, 2 *Doug.* 670; *Howson* v. *Hancock*, 8 *Durnf. & East*, 577; *Jacques* v. *Colightly*, 1 *Wm. Bl.*, 1073; *Browning* v. *Morris*, *Cowp.* 790; *Williams* v. *Hedley*, 8 *East*, 378; *Thistlewood* v. *Cracroft*, 1 *Maule & Selw.*, 500; *Jaques* v. *Withy*, 1 *Hen. Bl.*, 65; *Mount* v. *Waite*, 7 *John.*, 434; *Smith* v. *Cuff*, 6 *Maule & Selw.*, 160; *Chit. on Contracts*, 634, 635; *Addison on Contracts*, 235, 236; *Broom's Legal Maxims*, 327; *Osborne* v. *Williams*, 18 *Ves.*, 279; *Reynell* v. *Sprye*, 13 *East's Law and Eq. R.*, 74; *Story's Eq. Jurisprudence*, § 300.)

We do not assert positively that the principle last

stated will aid a party to a contract which violates the common law, although we suppose it will. But it is unnecessary to consider that question. That the principle applies universally, where the statute violated was made for the protection of one class of persons against another, would seem, upon the authorities, to be incontrovertible. Lord Mansfield said, in the case of *Clarke* v. *Shee (Cowp.*, 197): "There are two sorts of prohibitions created by positive law in respect to contracts. 1st. To prevent weak or necessitous men from being overreached, defrauded or oppressed. There the rule *in pari delicto, potior est conditio defendentis*, does not hold; and an action will lie, because where the defendant *imposes* upon the plaintiff it is not *par delictum*. * * * * * The next sort of prohibition is founded upon general reasons of policy and public expediency. There both parties offending are equally guilty, *par est delictum, et potior est conditio defendentis*."

Where a prohibition of the first sort, looking to the classification of Lord Mansfield, is violated, the party imposed upon is relieved, because not in *pari delicto* with the other. It would be bootless to inquire whether one who is induced by weakness or imposition, or coerced by his necessities, to concur in an act which violates the law, is at all in fault. Lord Chancellor Talbot held the negative on this question (*Bosanquett* v. *Dashwood Tal. Ca. in Eq.*, 37), and he does not stand alone in that opinion. The common phrase, however, is, that the party of whose condition advantage is taken, although himself not wholly faultless, is not in equal *delictum* with the other. The distinction may not be practically of any moment, for where the statute violated was made for the protection of one class against another, the former is entitled to be relieved, as, in every view of the question, not involved in equal guilt with the latter. And, so far as respects the violators of statute law, this, as we understand it, is the length and breadth of the principle, assuming that there is no provision which, in terms, authorizes one offender to recover of another. For the correctness of this position the authorities referred to above may, as we think, be safely appealed to.

But Judge Selden has taken a different view of this question in the opinion under consideration. The facts on which this opinion was given, so far as is material to a right understanding of the question, were these: the Morris Canal and Banking Company agreed to

sell stocks of the State of Indiana to the *North American Trust and Banking Company*, for which the latter were to give their negotiable certificates of deposit, payable at future periods; and the stocks and certificates were delivered by the respective parties according to their engagements. This contract was held by the learned judge *to be illegal*, in which the court must have concurred with him, for the judgment rendered was not that a recovery could be had to the *amount agreed* by the special contract of sale, but that contract being illegal, it was adjudged the law would *imply a promise* to pay *the value* of the stocks at the time of their sale and delivery, and to that extent the seller might recover. As the general position, that an action will not lie for money or property paid or delivered on an illegal contract, was conceded, the court must have found it necessary, in order to arrive at the above conclusion, to discover some principle which would take this *advance* of stocks on the illegal contract out of the well established rule of law which has just been stated. And that principle, according to the opinion, was, that *The Morris Canal and Banking Company*, in selling the stock, was *less guilty* than the *Trust and Banking Company* was in buying them.

The precise ground on which the court adjudged the contract for the sale and delivery of the stocks to be illegal, may, perhaps, be left in some doubt; but we understand Judge Selden and the court to hold that the *Trust and Banking Company* had no legal right to issue such certificate of deposit as were agreed to be received for the stocks sold, and, therefore, the contract of sale were illegal; as it also was, because the certificates would be and were when issued, a violation of the restraining law; which, according to the opinion, imposes a penalty only on the party issuing illegal paper, and not on one who procures such paper to be issued. The statute, as was said, thus marked the *Trust and Banking Company* as the chief offender; and *The Morris Canal and Banking Company*, not being in *pari delicto*, though unable to enforce the express contract, might recover on an implied one.

In the course of his opinion, Judge Selden says: "the cases in which the courts will give relief to one of the parties, on the ground that he is not in *pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it was executed. It is essential to both classes that the contract be merely *malum prohibitum*.

If *malum in se*, the courts will in no case interfere to release either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not in *pari delicto*; or, 2. In some cases where he elects to disaffirm the contract while it remain *executory*.

The opinion then sets out what was said by Lord Mansfield, in the case of *Smith* v. *Bromley (Doug.*, 670, *note)*, to wit: "If the act is in itself *immoral*, or a violation of the *general laws of public policy*, then the party paying shall not have this action; for when both parties are equally criminal *against such general laws*, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, &c. *If such laws* are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one and the other."

Upon this Judge Selden remarks: "Two things are to be noted in this extract; that a distinction is taken between contracts *malum prohibitum* merely and such as are immoral or contrary to general principles of policy; and, also, that stress is laid upon the fact that the law contravened *in this case* was intended to *protect one party from oppression by the other*." And the learned judge then adds: "The first is a valid distinction, which runs through *all* the subsequent cases; the *last* was merely incidental to the particular case *and not essential to the principle*." The opinion then proceeds: "The first cases in which *the principle* was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other; because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. *But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.*"

After reviewing several cases, which will presently be noticed, the learned judge says: "The rule laid down in those cases, *for determining which is the more guilty party*, is directly applicable to the present case,

so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, and was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of §§ 3, 6 and 7 of the act concerning unauthorized banking. (1 R. S., 712.) It will be seen, by referring to those sections, that the *penalties* are imposed *exclusively* upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defense is based upon a violation of the restraining act, there is that *statutory designation of the guilty party* upon which most of the cases to which I have referred are made to rest. But it is obvious that the *general principle* for which I contend applies equally to that branch of the defense which rests upon the ground that the act of the Banking Company in issuing the notes was *ultra vires and against public policy.* The imposition of the penalties, for a violation of the restraining law, upon the corporation *alone*, does not *make* it the guilty party, but is simply *evidence* that the legislature *so regarded it:* and the reasons are equally strong for fixing the principal guilt upon the same party, where its acts merely violate the principles of the public policy. Although persons dealing with corporations are, for certain purposes, *presumed* to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties."

"To me, therefore, it seems plain, that whether we regard the act of the *Trust and Banking Company*, in issuing the certificates in question, as a violation of the restraining law, or as simply *ultra vires*, or as against *public policy*, the corporation is to be regarded as comparatively *the guilty party.*"

These extracts indicate the grounds on which it was held that *The Morris Canal Company* had a good right of action against the *Trust and Banking Company* upon an *implied promise* to pay for the stock sold and delivered on this illegal contract. And we understand the opinion as maintaining: 1. That the restraining law proves, by imposing a penalty on the *Trust and Banking Company* alone, that it was "comparatively the guilty party," and, therefore, *The Morris Canal and Banking Company* not being in *pari delicto*, might recover; 2. That whether the sale was simply *ultra vires*, or positively *illegal*, *The Morris Canal Company* could not enforce the express contract, yet the law would

imply a promise in its favor to pay for the stocks sold, and on this a recovery might be had.

Judge Selden seems to hold that it is "*not essential to the principle*" on which relief may be granted to a party who violates a statute, that the statute should have been made for his protection; but in this, we think, with great respect, he is mistaken. If the violated statute has in view the promotion of sound public policy, all who voluntarily break it are *particeps criminis* and equally guilty, and it is only when the statute was made to protect one class against another, that the former can set up that they are not in *pari delicto*, and on that ground claim exemption from the ordinary consequences of their own acts. We cannot say, in the words of Judge Selden, that this is "*not essential to the principle*" on which a party may be relieved, for it is, as we understand the law, the very principle itself.

We now propose to show: 1. That the restraining law makes persons, natural or artificial, who *procure* paper to be issued in violation of its provisions, equally guilty with the corporation or individual issuing such paper; 2. That where a statue is violated by several persons, natural or artificial, neither can be relieved or aided on the ground that he is not *pari delicto*, unless the statute was made for his protection. *First*, as to the Restraining Law (1 *R. S.*, 712): The 3d section of this statute is as follows: "No incorporated company, without being authorized by law, shall employ any part of its effects, or be in any way interested in any fund that shall be employed, for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt, to be loaned or put into circulation as money."

The 4th section is in these words: "Any *director or other agent or officer*, of any incorporated company, who shall violate any provision of the *last* section, shall forfeit one thousand dollars."

Here, it is plain, the penalty is imposed on directors and other agents or officers of incorporated companies only, and not on any other person who may be a party to the prohibited act; but the 7th section, under which the present question arises, is of a different character, and inflicts a penalty not only on those who violate the prohibitions in the 6th section, but also on all who "*assent* to such violation."

The 6th section declares that "No person, association of persons or body corporate, except such bodies corporate as are expressly authorized by law, shall

keep any office for the purpose of receiving deposits, or discounting notes or bills or issuing any evidences of debt, to be loaned or put in circulation as money, nor shall they issue any bills or promissory notes or other evidences of debt as private bankers, for the purpose of loaning them or putting them in circulation as money, unless thereto specially authorized by law."

The 7th section is, that "Every person and every corporation, and every member of a corporation, who shall contravene either of the provisions in the last section, or directly or indirectly, *assent* to such violation, shall forfeit one thousand dollars."

Now, without the slightest reference to these penal provisions, it must be illegal to do, or procure to be done, what is thus prohibited. It is a principle, not less of criminal than of civil law, that one who procures, by request or direction, an illegal act to be done, is himself a guilty violator of the law, precisely as much as the one who does the prohibited act. It might justly be deemed offensive, as implying gross ignorance on the part of the tribunal addressed, to cite authorities for a principle so plain and universal in its application, and none are referred to. If the penal sections were therefore expunged from the statute, the acts prohibited would be, when done, precisely as illegal as they now are; and to procure the issue of paper in violation of the provisions of the 6th section, would be exactly as illegal as actually to issue such paper. Penal sections add nothing to the illegality of what is prohibited, but only provide a mode of punishing guilty parties, some or all of them, in addition to the ordinary consequences of such acts. Where there is no express prohibition of an act, but a penalty is imposed for doing it, the penalty implies a prohibition; but if the statute contains a prohibitory as well as a penal clause, there is no occasion to look at the latter to determine that those who do, or aid in doing, what is prohibited, violate the law.

Thus, as to the restraining law, the issue of paper of a certain description being expressly prohibited by the 6th section, it must, on general principles, be illegal to procure such paper to be issued, whether the act imposes a penalty on such procurer or not. It seems to us, therefore, to be quite immaterial whether a penalty is incurred by procuring the issue of paper in violation of the restraining law or not, for the inquiry is, not whether a penalty is imposed on such

procurer, but whether it is illegal to procure such paper to be issued.

Still, we see no room to doubt that procuring the issue of such paper is a penal offence. The case falls within the 6th section of the restraining law, which, as we have seen, declares amongst other things, that "no person, association of persons, or body politic, except," &c., "shall issue any bills or promissory notes, or other evidence of debt as private bankers, for the purpose," &c. Then follows § 7, which declares that "*every person* and every *corporation*, and every *member* or a corporation, who shall *contravene* either of the provisions in the last section, or *directly* or *indirectly assent* to such violation, shall forfeit one thousand dollars."

One who does the act of issuing paper in violation of the 6th section, "*contravenes*" what is prohibited; and one who procures such paper to be issued for his own use certainly assents to such violation, and therefore incurs the penalty imposed by the 7th section. By this section, a penalty may be incurred not only by contravening the 6th section, but by assenting thereto, and the persons who may thus violate the law are not merely the corporation and its members, but "*every*" other person. What then is there in the restraining law to show that the party who issues illegal paper is more guilty than one who procures it to be issued? And in reason, why should he be?

The rule laid down in the opinion, that the imposition of a penalty on one of the parties only to an illegal act marks the offender, and shows that the other is not in *pari delicto*, if there be such a rule, can have no application to the 7th section of the restraining law, for by that the penalty is imposed alike on each party. That one who procures paper to be issued in violation of that law is in equal guilt with the corporation issuing such paper, was expressly held by Judge DENIO, in the case of *Schermerhorn* v. *The American Life Ins. and Trust Co.*, decided by this court in March, 1856.

The case of *De Groot* v. *Van Duzer* (20 *Wend.*, 390) goes even beyond this in support of the principle for which we contend. There it was held by the court of last resort, that Van Duzer could not recover on a contract made to facilitate a violation of the 6th section of the restraining law by a foreign bank, though he had not dealt directly with the bank, but with a party still more remote from the statute prohibition. The case

proves that both parties were guilty violators of the prohibition, and it cannot stand if the rule adopted by Judge SELDEN is maintained.

The rule, moreover, stands in direct opposition to the case of *Leavitt* v. *Palmer* (3 *Comst.*, 19), decided by this court. In that case, a trust was created by the *North American Trust and Banking Company*, to secure the payment of certain promissory notes issued by it in November, 1840, to the Palmers of London. The bill was filed in that case by the receiver of the company, to set aside this trust as illegal, and to compel the Palmers to account for what they had received under it. It was held by the court of appeals, that the trust was illegal and void, because made to secure notes issued in violation of the act of May 14, 1840, and the Palmers were required by the judgment to account for and pay over to the receiver what they had received under the trust. The act which made these notes, and consequently the trust to secure them, illegal (*Laws of* 1840, 306, § 4), prohibits the issue of such paper by banking associations or individual bankers, as such, and declares that "every violation of this section by any officer or member of a banking association, or by an individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both." No penalty, it will be observed, is imposed on the person who procures the illegal paper to be issued; yet the court held as to the Palmers—for whose benefit the notes were made—as well as against the bank, that the notes and trust were illegal, and required the Palmers to account for what they had received under the trust towards payment of the notes. They were not allowed to retain what had been paid to them, on the ground that the statute, by making the issue of such notes a misdemeanor on the part of the officers and members of the bank, had marked them as the principal offenders, and left the Palmers, who had procured the issue of the illegal paper for their benefit, wholly unaffected by this violation of the statute. According to the opinion of Judge Selden, the Palmers were not in *pari delicto* with the bank, but the court were of a different opinion in that case, and held the notes and trust illegal, not only as to the bank, but also as to the Palmers, and compelled them to refund what had been paid over to them under the trust.

But we proceed to our second point, stated above, which is: that where a statute is violated, no one who is a violator can be relieved or aided, on the ground

that he is not in *pari delicto*, unless the statute was made for his protection. If the rule is thus limited, as we supposed it is, it can have no application to this case: nor will the imposition of a penalty on one party alone show that he is the greater offender.

It is possible that a statute, with or without a penalty, may be framed so as to declare in terms, or effect, that one of two parties to an act, which it prohibits, is alone guilty; though instances of this nature must be rare, especially as to statutes passed for the benefit of the public in general. Such a statute must be regarded as an anomaly in legislation; for while it prohibits the doing of an act, because contrary to the public interest, it tenders absolute immunity to all who cause it to be done. Nay, it goes further. It encourages persons to cause the act to be done, by declaring them innocent, and telling them that though they may not gain by their conduct they shall in no event lose by it. Still, we admit the legislature have power to do this; and the question is, whether they have exercised it by the statutes on which we rely.

It was insisted on the argument of the case in which the opinion of Judge Selden was given, that the contract in question, in that case, was illegal on several grounds; and, amongst others, the following, to wit: 1. Because the certificates, agreed by said contract to be received for the stocks sold, would be, and were when issued, a violation of the restraining law (1 *R. S.*, 612); 2. That said certificates were, as to the *Trust and Banking Company, ultra vires*, and therefore illegal; 3. That, being *ultra vires*, the certificates were expressly prohibited by 1 *R. S.*, 600, § 3; 4. That they were also prohibited by the safety fund act of 1829. (*Laws of* 1829, 167, §§ 1, 35.)

It is obvious that these statutes were passed for public purposes and objects, if any statutes ever were, and not with a view to the protection of any particular class of persons against others; and, therefore, acts in contravention of them can on no principle be held illegal as to one party and legal as to the other.

We will now examine the cases referred to by Judge Selden, to maintain his opinion on the point under consideration; but which, as we understand them, do not sustain that opinion. Indeed, as we read these cases, they show conclusively that where two persons concur in the violation of a statute, neither can have relief as against the other, where the statute does not in terms authorize such relief; unless the statute vio-

lated was designed for the protection of the one seeking relief as against the other. We do not, of course refer to instances where a party is compelled, by positive force, to do an act which violates the law, but to those where there is a moral coercion; as in agreeing to pay usury, which the statute for this purpose regards as equivalent to coercion by absolute force.

The first of these cases is *Jaques* v. *Golightly* (2 *Wm. Bl.*, 1073), which was decided by the English court of common pleas, in 1776. The Reports of Sir William Blackstone were published from his notes of cases in 1781, after his decease. They are, in general, but meager statements of facts and reasons, and the report of this case is by no means an exception. The case was this; It was an action to recover money which the plaintiff had paid to the defendant for insuring lottery tickets; and, also, money won by the plaintiff on the contract of insurance, some of said tickets having been successful. The insurance of lottery tickets was forbidden by act of parliament. The court held that the plaintiff could not recover on the contract of insurance, as that was illegal, but that he could recover the amount paid by way of premium for making the insurance. Judge Selden understands this case to have been decided on the ground that the statute which prohibited these insurance contracts imposed a penalty on the insurer only; from which he deduces the principle that where a penalty is imposed on one party alone, the other is not in *pari delicto* with him. The report of Sir William Blackstone does not show very plainly the principle on which the case was decided; although, in giving his own opinion (for he was one of the judges), he glanced at it, in his remark that "on the part of the insured, the contract on which he has paid his money is not criminal, but merely void; and, therefore, having advanced his premium without any consideration, he is entitled to recover it back." This is well enough as far as it goes, but still it does not explain why the contract was not criminal on the part of the insured as well as the insurer; nor can that be clearly ascertained from any part of the report of the case. Fortunately, however, there is no doubt on the point, if we can rely on what was said by Lord Mansfield, in 1778, two years after the case of *Jaques* v. *Golightly* had been decided. In giving judgment in that year, in the case of *Browning* v. *Morris* (*Cowp.*, 793), Lord Mansfield said: "This brings the

present case within the determination of *Jaques* v. *Golightly*. For in that case the chief justice said: '*The statute is made to protect* the ignorant and deluded multitudes, who, in hopes of gaining prizes, and not conversant in calculations, *are drawn in by the office keepers.*'" This cannot be mistaken; it shows plainly why the advance of money on the contract was not criminal on the part of the insured; for the statute was made to protect him from being imposed upon by the insurer. The case has ever since been regarded as an authority for this principle, and for nothing else.

Judge Sheldon refers to *Jaques* v. *Withy* (1 *Hen. Bl.*, 65), decided by the English common pleas, in 1788. It was an action brought to recover back money paid for insuring lottery tickets; was argued, on the ground that the statute was made to protect the assured, and, therefore, he was not in *pari delicto* with the insurer. The court so held, and the plaintiff recovered. Judge Selden says that this, and *Jaques* v. *Golightly*, are not cases, where an "*undue advantage* was taken of the peculiar situation of the" plaintiffs. But Lord Ellenborough thought otherwise, for in *Thistlewood* v. *Cracroft* (1 *Maule & Selw.*, 500), decided in 1813, in speaking of these cases he remarked: "The statute was considered as intended to *protect* the individual, and to mark the lottery office keeper as *stigmatious*, the one being likely to be oppressed or imposed upon by the other; *and on that view of the statute those decisions turned.*"

The case of *Williams* v. *Hedley* (8 *East*, 378) is referred to by Judge Selden. The defendant, Hedley, had previously brought a *qui tam* action for usury against the plaintiff, Williams, which they agreed to compromise and settle, Williams paying, to effect that object, a large sum of money. He brought this action to recover that money back, and it was objected that he was a *particeps criminis* in *pari delicto*, with the defendant Hedley, in making the compromise, and, therefore, could not recover. But the court held that the statute which prohibited the compromise of penal actions, was confined to the informer or plaintiff therein, and did not extend to the defendant; that it was meant to restrain and punish the one who sues, who might do so in order to extort money, and not the party who might be the object of such extortion. This, Lord Ellenborough said, "appears to have been the true sense and intention of the legislature." In answer to the objection, that although the defendant in

the penal suit might not be within the terms of the statute, yet he concurred in and was a party to the act by which the statute was violated, and that the law would not aid him, Lord Ellenborough observed, that this rule applies, "if the act be in itself immoral, or a violation of the general laws of public policy; yet in the case of other laws, *which are calculated for the protection of the subject against oppression, extortion* and *deceit*, Lord Mansfield lays down, that if *such laws* be violated, and the defendant take advantage of the plaintiff's condition or situation, then the plaintiff shall recover." And in applying this principle to the case before the court, Lord Ellenborough said: "In respect to the criminal offence of compounding, the plaintiff, Williams, was the person *whose situation was taken advantage of by the other party to the composition;* the provision of law was made to *protect* parties in the condition of Williams, and he can recover."

Judge Selden says: "These are the leading English cases on the subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other." We cannot see this as his Honor does, for we understand these cases as resting "*solely*" on the ground just stated. Indeed, where two persons voluntarily concur in an act which violates a statute, why are they not in *pari delicto*, unless the statute was intended to protect one as against the other?

We agree with Judge Selden that these cases have never been overruled, and that, as we understand them, they have been expressly sanctioned and approved by American cases. *The Inhabitants of Worcester* v. *Eaton* (11 *Mass.*, 368) is such a case.

Judge Selden mentions the case of *White* v. *Franklin Bank* (22 *Pick.*, 181), and says: "It is impossible, as it seems to me, to distinguish this case in principle from that now before the court." Again, "it belongs clearly to the same class with the English cases just reviewed."

Let us see what this case was. It was an action brought on the 7th of July, 1837, to recover $2000, deposited by the plaintiff with the defendant on the 10th of February in that year, and for which the defendant gave a written agreement to repay the money on the 10th of August then next. A statute of Massachusetts prohibited banks from making any contract "for the payment of money at a future day

certain," under penalty of a forfeiture of their charter. It was objected that the plaintiff having advanced the money upon an illegal contract, could not recover it back.

There is one feature of this case which alone ought to detract from its weight as an authority. The court were evidently unable to find a precise principle on which to place their decision, and therefore adverted to various grounds. Among these are the following: 1. That the statute treated the act of deposit as perfectly legal, and only prohibited the issuing of the certificate by the bank (22 *Pick.*, 183, *Shaw, Ch. J.; id.*, 185, *Wilde, J.)* 2. That therefore its prohibitions were leveled particularly against the bank, and the act of the depositor was not prohibited (22 *Pick.*, 188). 3. That as the contract was *malum prohibitum* merely, not *malum in se*, the depositor might recover. (22 *Pick.*, 185.) Another view was adverted to, viz., that the contract remained executory, and the depositor, even if guilty, was entitled to his *locus penitentiæ* and to sue in disaffirmance. But the court finally declined to place their decision on this ground, and expressly disclaimed it. (22 *Pick.*, 189, 190.)

It is manifest, therefore, in disposing of the case, the court reposed themselves mainly, if not entirely, upon the interpretation of the statute, which they understood to mean that the act of the depositor in contracting for and taking the certificate was in no sense illegal, though the bank was prohibited from giving it. If the statute said this, or if such was its true meaning, the decision does not stand in our way. And if the court erred in the construction of the statute, the result is the same. But if the decision is understood as affirming, that where a statute is passed for public purposes and objects, persons may lawfully tempt others to violate it, simply because its penalty is imposed on the latter alone, it is directly contrary to the general rule established by numerous cases, and by this court in the case of *Leavitt* v. *Palmer*.

The case of *Atlas Bank* v. *Nahant Bank* (3 *Metc.*, 581) is precisely like the one last above, and calls for no further notice.

The case of *Lowell* v. *Boston and Lowell Railroad Company* (23 *Pick.*, 24) is also one of the cases referred to by Judge Selden. It was the duty of the plaintiff (the town of Lowell) to keep a highway in repair, so as not to be dangerous to those who might have occasion to use it. The plaintiff had caused proper barriers for

this purpose to be placed in the highway, but they were removed by the defendants, in consequence of which two persons were injured, who sued and recovered damages of the plaintiff. Upon these facts it was very properly held, that the plaintiff, not being in *pari delicto* with the defendants, might recover the damages thus sustained by the town.

The only other case referred to by Judge Selden, on this subject, is *Mount* v. *White* (7 *John.*, 434), which was precisely like the cases of *Jaques* v. *Golightly*, and *Jaques* v. *Withy*, and was decided, as they were, on the ground that the statute was intended to protect the plaintiff.

We here close our review of the opinion of the court, and we must say we are wholly unable to perceive that cases founded on statutes made for the protection of one class of persons against the fraud, oppression or chicanery of another, have any application to such a case as the one on which that opinion was given; or that they tend to prove The Morris Canal Company not to have been in *pari delicto* with the Trust and Banking Company.

Our object has been to show, and, with great respect, we think we have shown, that the opinion is erroneous in these particulars: 1. In holding that a sale of personal property is legal, although the seller has notice that the purchase is made with intent to make any illegal use of the property; and that the sale is illegal only when it is made a part of the contract that the property shall be applied to an illegal purpose; 2. In holding that the 7th section of the restraining law does not inflict a penalty on those who procure paper to be issued in violation of the 6th section, but only on the party who actually issues such paper; 3. In holding that the imposition of a penalty, on part only of those who violate a statute, makes or proves those who are subject to the penalty greater offenders than the others, and that the latter, although themselves guilty violators of the law, may have redress against the former; 4. In holding that the Morris Canal and Banking Company was not, in the illegal sale and delivery of state stocks to the North American Trust and Banking Company, in *pari delicto* with the latter.

A. Mann argued the motion for the State of Indiana.

COMSTOCK, J. This case having been decided at the last June term, the defendants' counsel now move for a

rehearing, alleging that the court, through a misapprehension of the authorities cited in the opinion of Judge Selden, has fallen into manifest error in its decision. A review of that decision is therefore urged, not only as an act of justice to the parties, but also from a very commendable regard for the law itself. In the variety and multiplicity of questions which engage the attention of this court, many of them difficult and complicated, it can hardly fail to happen that inadvertence and misapprehension will sometimes occur. When such is the case, it is plainly the duty, as, I doubt not, it will always be the pleasure, of the court to retrace its steps and correct the errors it may have committed, so long as the questions decided are open for consideration.

In the opinion of Judge Selden, which received our assent when the judgment was pronounced, the doctrine is laid down, that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were bought for an illegal purpose, **provided it was not made a part of the contract that they should be used for that purpose, and provided also, that the vendor had done nothing in aid or furtherance of the unlawful design beyond the mere sale with knowledge of the intent of the purchaser.** In the elaborate criticism of the defendant's counsel upon this doctrine, it is insisted that the authorities cited to sustain it, instead of establishing a general principle, are mere exceptions, depending on the nature of the laws violated and the circumstances under which the contracts of sale were made. It becomes proper, therefore, to analyze these authorities, at least the leading ones, with more care than was deemed necessary on the former occasion.

The leading case, in England, is that of *Holman* v. *Johnson* (*Cowp.*, 341). In that case the contract of sale was made in France, by a citizen residing there. The purchaser intended to smuggle the goods into England, in violation of the revenue laws of that

kingdom; but, as the case states, "the seller had no concern in the smuggling scheme itself, but merely sold the tea to the defendant, as he would have done to any other person in the common and ordinary course of trade." In deciding the case, Lord Mansfield referred to the circumstances of the contract being made abroad, as of some importance; but the reason why he so regarded it, has, I think, been misunderstood in some of the later cases, as well as by the counsel for the receiver in the one now under consideration. Goods smuggled into England could not be sold at all. So I infer from the remarks of Lord Mansfield. He said: "In England, tea which has not paid duty, is prohibited, and if sold there the contract *is null and void;* but if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer should be condemned to pay the price, because the original contract was good and valid." To maintain the action, it was indispensable to show that the goods could be the subject of a lawful sale between the parties; but as they had not paid duty, they could only be lawfully sold out of England. The situation of the goods and the place of the contract were therefore important, but only to establish the general legality of the transaction. That being settled, the turning point of the case was, that the plaintiff, although he knew of the purchaser's intention to smuggle the tea into England, did nothing either in the terms of the contract or otherwise in furtherance of that intent. This is quite evident from the following language of the lord chief justice: "Is there any law of England," he inquired, "transgressed by a person making a complete sale of a parcel of goods at Dunkirk and giving credit for them? The contract is *complete*, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, *but has no concern in the transaction itself.* It is not a bargain to be paid in case the vendee should succeed in landing the goods, but the interest of the vendor is

totally at an end, and his contract complete by the delivery of the goods at Dunkirk."

I am greatly mistaken if this reasoning does not rest entirely upon the fact that the contract of sale had no connection with the subsequent destination of the goods. Its force is not in the least degree impaired, if the words "at Dunkirk" are expunged from the passage quoted. To apply the argument to the facts of the present case: it was lawful, in general, for The Morris Canal and Banking Company to sell Indiana state stocks to the North American Trust and Banking Company, although unlawful for the latter to use the stocks in a particular way. With the unauthorized or illegal design, the Morris Company had nothing to do. The sale itself was complete, irrespective of that design, and the transaction between the parties closed. I have no hesitation in saying, that the case of *Holman* v. *Johnson* has not been misapprehended, and that the present one falls precisely within the doctrine there laid down.

In the case of *Biggs* v. *Lawrence*, (3 *Term R.*, 454), the plaintiffs were four partners, three of whom resided in England, and one in Guernsey. The action was for goods sold in Guernsey, to be smuggled. It was admitted that the question must be considered as though all the plaintiffs had resided in England. In determining that the action would not lie, some of the judges thought that circumstances important, as distinguishing the case from *Holman* v. *Johnson*, evidently misapprehending the reasoning of Lord Mansfield; but they all laid peculiar stress upon the manner in which the goods were packed, evincing a design, as was said, on the part of the sellers, to aid the buyer in smuggling them into England. Ashhurst, J., observed, "the plaintiffs were agents in the *very act of smuggling*." Buller, J. said, "it is clear, from the manner in which they were packed, that they were intended to be smuggled; *that was the act of the plaintiff*." The case, in short, clearly recognizes the distinction between mere knowledge, on the part of the vendor, of

the illegal intent of the purchaser, and the doing of some act to further that intent.

The subsequent cases of *Clugas* v. *Penaluna* (4 *Term*, 466), and *Waymell* v. *Reed* (5 *id.*, 599), still more clearly recognize the same distinction, and in them the distinction is not obscured by any misapprehension of the decision of Lord Mansfield. In both those cases, that decision was regarded as proceeding on the ground merely that the sale itself being a lawful contract, mere knowledge of the buyer's intention to smuggle the goods did not prevent a recovery of the price. But there is a further significance in these two cases. They necessarily repudiate the notion that the foreign residence of the seller or the place of the contract has anything to do with the question. In one of them (*Clugas* v. *Penaluna*), the vendor resided in Guernsey, and was not affected by the revenue laws of England, and on that ground it was sought to distinguish the case from *Biggs* v. *Lawrence* (*supra*). In the other (*Waymell* v. *Reed*), the vendor was for a foreigner residing at Lisle. In both the cases, it was held the plaintiff could not recover the price of the goods, because, in addition to the mere sale, with the knowledge of the intent to smuggle, they had done some act to aid in the execution of that intent. Now, if the foreign residence of the vendor, or the place of the contract, or even the character of the laws infringed, as mere revenue statutes, were the turning point in cases of this description, it is entirely plain that the actions would have been sustained; for in one the case, the inhabitant of Guernsey, although a subject of England, was not reached by its statutes against smuggling, while, in the other, the plaintiff was a resident of France; in both, the contracts of sale were lawful at the place where they were made, and in both the laws intended to be violated by the purchaser were revenue laws merely. These distinctions were therefore emphatically repudiated, while that of Lord Mansfield, in *Holman* v. *Johnson*, was distinctly recognized and admitted.

The next case in the series is that of *Hodgson* v. *Temple* (5 *Taunt.*, 181), where the goods were sold, and the plaintiff resided in London. It became, therefore, necessary to look at the question divested of the extraneous circumstances which had attended the previous cases, and the main point now in controversy was met and decided in terms as explicit as the English language affords. The court in that case ceased to advert to the distinctions between contracts made abroad and in England, and between a design to violate a revenue law and any other law, but asserted broadly the doctrine we held in the present case, that mere knowledge on the part of the vendor of goods, that the buyer intends to use them for an illegal purpose, will not defeat a recovery for the purchase money. The effort which has been made to escape the force of this decision, by putting it on some other ground, has been quite unsuccessful.

The latest of the English cases cited by Judge Selden is *Pellicatt* v. *Angel* (2 *Cromp., Mees. & Ros.*, 311). Although in this case, as in that of *Holman* v. *Johnson*, the sale of the goods was made in France by a foreigner residing there, and although this circumstance is alluded to by the chief baron, it was not the ground of the decision. Lord Abinger said: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was to be an essential part." Baron Bolland said: "I think the distinction pointed out by the chief baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one;" and Alderson, B., said: "The mere sale to a party, although he may intend to commit an illegal act, is no breach of the law." These remarks clearly had no reference to the nature of the law intended to be violated, or to the place of the contract. They are unintelligible, unless they assert the doctrine we have laid down in this case.

It will, perhaps, be still more apparent that we have

not misapprehended these authorities, if we now refer to one or two others not cited on the previous occasion. In *Bowry* v. *Bennett* (1 *Campb.*, 348), the action was brought to recover the price of certain clothes sold to the defendant, and the defence was that the defendant was a woman of the town; that this was well known to the plaintiff, and that the clothes were purchased to enable the defendant to carry on the business of prostitution. Lord Ellenborough held, at *nisi prius*, that "it must be shown not only that the plaintiff had notice, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, *so that he might appear to have done something in furtherance of it.*" It would be difficult to distinguish the principle here enunciated from that adopted by this court.

The precise question under consideration has arisen and been determined in the same way by one of the American courts, whose decisions are entitled to no inconsiderable weight. In the case of *Cheeney* v. *Duke* (10 *Gill & John.*, 11), the action was assumpsit, to recover the price of a slave sold by the plaintiff to the defendant. It appeared that the defendant purchased the slave with intent to remove him beyond the limits of the State of Maryland, contrary to the provisions of a statute of that state, and that this was known to the plaintiff. The Maryland court of appeals held this no defence. The authorities referred to were the same that we have cited, and they were understood as we understand them; not as exceptional cases, but as establishing a rule of decision.

We have then, I think, a very imposing array of authorities, in all of which the doctrine we have laid down was either expressly adjudged or explicitly recognized. Opposed to this doctrine, in England, stands the case of *Langton* v. *Hughes* (1 *Maule & Selw.*, 593), and, in this country, the case of *Territt* v. *Bartlett* (21 *Verm.*, 184). These cases may be regarded as breaking the uniformity of the rule; but to say that they

overcome it, or establish an opposite one, would be allowing them an importance to which they are not justly entitled; I do not pause to bestow on them any special criticism.

In addition to these two cases, which are admitted to bear with considerable directness upon the question, the defendant's counsel have cited *Lighfoot* v. *Tenant* (1 *Bos. & Pul.*, 551); *Cannan* v. *Bryce* (3 *Barn. & Ald.*, 179); *McKormel* v. *Robinson* (3 *Mees. & Wels.*, 434); *The Gas Light Company* v. *Turner* (5 *Bing., N. C.*, 666); and *S. C.* (6 *id.*, 314); *Peck* v. *Riggs* (3 *Denio*, 107); *Ruckman* v. *Bryan* (*id.*, 340); and *White* v. *Buss* (3 *Cushing*, 448). I mention these, because, although others were cited also, they are too remote to require any particular notice. I group these cases together because they do not differ essentially in principle. Some of them sustain the position that if the vendor of goods or the lender of money can be connected in intention with the illegal purpose to which the goods or money is to be applied, it is enough to defeat this action, although the unlawful use is not specified in the contract, and although he does not act in furtherance of the design beyond the sale or loan. But further than this they do not go. *There is certainly room for a distinction between a case where the seller or lender simply knows of the illegal design, and one where he advances the money or the goods for the express purpose of enabling the other party to effectuate such design.* For illustration, money may be lent in a gambling house, for the specific purpose of staking it on the result of a game. The law says it cannot be recovered. But suppose a broker or a banker lends money in his office in the regular course of his business, knowing his customer to be a gambler by habit, and believing that he wants the loan for gaming purposes. If the illegal design does not enter at all into the negotiation of the contract, if it forms no part of the inducement to the transaction, will the knowledge or belief of the lender (and knowledge and belief for the purposes of this question are the same) prevent

him from recovering the money when it is due? Such a doctrine, I apprehend, would be highly inconvenient in a commercial community like this. It would exact a more frequent scrutiny on the part of dealers into the habits and designs of others, than the law requires any man to make.

I deem it unnecessary to go into a more particular analysis of the cases last referred to. The leading ones were cited and commented upon by Judge Selden, and we see no reason to think that they have been misapprehended.

And upon this review of all the authorities cited, although there is not entire uniformity, we think it safe to assert that they preponderate decidedly in favor of that view of the question which we adopted in deciding this case. But if the doctrine were more doubtful upon authority than we believe it is, we are constrained to say that we approve it as founded in reason and justice when applied in cases like the present. The principle should perhaps, be stated, with some qualifications not suggested in the former opinion of the court. The case may be put of poison, or a deadly weapon purchased for the purpose of murder. The offense intended may be of such enormity, that no man having a knowledge of the design can remain neutral without being in a just sense a criminal himself. Where the design is to violate the fundamental laws of society, a positive duty of intervention may arise to prevent the perpetration of the crime. To such cases, the rule which we laid down ought not to be applied. But if the question should ever be thoroughly examined, it will, I think, be found to have been far too broadly asserted in respect to illegal contracts, that the law does not distinguish between acts criminal in their essential nature, and those which are wrong, only because they are prohibited. *This distinction cannot be made where the contract itself is prohibited, and the question is directly upon its validity.* The inquiry, then, depends not so much upon the ethics as the

logic of the law, which cannot both affirm and prohibit the same contract. But in respect to many incidental questions, the moral feeling and common sense of every man does discriminate, and so I apprehend does the law.

Let us look at the facts of this case on which the question turns. The sale of the Indiana state stocks was in itself a lawful and innocent contract. One of the parties had them for sale, and sold them in the regular course of its business. The other was competent to buy them for authorized and legitimate purposes. But it is said the seller knew the buyer's design to use them for a purpose, not in itself immoral or wrong, but unlawful only because not within its corporate powers. That purpose might have been strictly a religious or charitable one, but still unauthorized. Of this knowledge there is no direct evidence, and it has therefore been insisted that the surrounding circumstances were sufficient to put the vendor upon inquiry, amounting, constructively, at least, to notice of the facts. This may be granted; and it is also true that such a notice will determine many questions of mere title between parties affected by it and others who have a prior or more meritorious claim to the consideration of courts. But was the doctrine ever applied to a case like this? The sale itself being a lawful commercial transaction, and even the ultimate purpose of the vendee to exceed its corporate powers, involving nothing in itself immoral or wrong, where, it may well be asked, is the moral guilt of the vendor, which should be visited with a positive penalty far exceeding in pecuniary amount any known to our criminal jurisprudence? The discriminations which have been suggested may sometimes be difficult to make but courts must make them, or the law becomes an instrument of the most absurd injustice. The difficulty does not exist in the present case.

The second ground of defence to the claim under consideration was, that the contract for the sale of the state stocks provided for receiving in payment the

negotiable promissory notes of the North American Trust and Banking Company, on time, and was on that ground illegal and void. We are asked to review our conclusions on this branch of the case also, and we have done so.

If the certificates or post notes of the Trust and Banking Company were issued for "the purpose of loaning them or putting them in circulation as money," they were not authorized by the general banking law of 1838, because the issuing power under that act is confined to notes payable on demand, countersigned and registered in the controller's office, and secured in the manner provided. As a consequence of not being authorized, they were expressly forbidden by the restraining act of 1830, which applies, and is now in force as to all "persons, associations of persons, and bodies corporate not expressly authorized by law." (1 *R. S.*, 712, § 6; *Chancellor Walworth in Safford* v. *Wykoff*, 4 *Hill*, 444.) Viewed in this light, therefore, the act of issuing these notes was (first) *ultra vires*, or beyond the corporate power of the Trust and Banking company, and (second) forbidden under the penalties of the restraining law, the penalties being a forfeiture of $1000 by every person or corporation violating the prohibition, or "assenting" to such violation. In deciding this case, we assumed that the post notes were void, but held that the claimant was entitled to disaffirm the contract, and recover the value of the state stocks for the price for which the notes were given. This position we are constrained to adhere to, after an attentive reconsideration.

It may well be conceded, that a contract entered into by the agents of a corporation, which, either in substance or form, transcends its powers, creates no legal obligation, and cannot be enforced. But it is one thing to say that a void or forbidden contract cannot be enforced, and quite another to hold that both the parties are involved in moral guilt, so that neither can disaffirm it, and recover upon an implied assumpsit the money or value which he has advanced. A general

distinction of this kind has been universally recognized, although the cases do not all agree as to the conditions under which it is to be applied. It is enough that the distinction itself is well settled, for we are satisfied that it has not been misapplied in the present case.

The maxim "*in pari delicto potior est conditio defendentis*" has never been applied to the case of a person contracting with a corporation, simply beyond the powers of the latter. To this remark the cases of the *East Anglian Railway Company* v. *Eastern Counties Railroad Company* (7 *Eng. Law and Eq. R.*, 505); *McGregor* v. *Manager Deal and Dover Railroad Company* (16 *id.*, 180); and *The Mayor of Norfolk* v. *The Norfolk Railroad Company* (30 *id.*, 120) form no exception. In all these cases the action was founded upon, and affirmed the unauthorized contract, and in none of them was the maxim quoted, or the reason of policy on which it is founded so much as alluded to. Indeed, the maxim can very rarely be used in such a case without a total perversion of its original design. An instance might, no doubt, occur where the person dealing with a corporation might be shown to be an active and contriving agent in the unauthorized transaction. Then the law might leave him where it found him. It is not necessary to deny that the Morris Company might have received the post notes in such complicity with the company that issued them as to be an equal sharer in the violation of law. It might possibly be true, that the sale of the Indiana stocks was contrived for the very purpose of getting possession of the notes, in order to put them in circulation, contrary to the laws and policy of the State of New York. But such was not in fact the transaction. The Morris Company had the state stocks, which it wished to sell, and the Trust and Banking Company wished to buy them, but wanted credit for the purchase money. This was agreed to, and the notes were given as the evidence of the debt. That was the whole transaction. The sale itself, as

we have seen, being lawful, it is not doubted that a security for the price might be given in some form free from objection. In the particular form of a negotiable instrument, it is said they were illegal and void. It may be so, but the only necessary consequence is, that the creditor received a worthless security. It by no means follows that the vendor of the stocks was guilty of such moral delinquency as to involve a total forfeiture of the article sold. It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced. But does it follow that the alleged transgressor may appropriate, without compensation, the money, the goods or the services of the person with whom it deals? There are, no doubt, authorities upon the general question, which cannot be reconciled, but it is safe to say that such a rule as this has never been established.

The same considerations apply, if we regard the post notes as issued in violation of the express provisions of the restraining law. The prohibition is, upon the person, association or corporation which issues a paper, and not upon the more unfortunate recipient. The penalty, it is true, is imposed in broad language upon "every person and corporation, and every member of a corporation, violating the provision or assenting to such violation;" but this does not, upon any fair and reasonable construction, include a stranger who deals with the offending person or corporation. In the language, then, of Lord Mansfield (*Browning* v. *Morris*, *Cowp.*, 790), "the statute itself has marked the criminal." The counsel for the defendant have denied there is any distinction founded on this circumstance. It cannot be denied, however, that there are cases both in England and in this country, where the distinction has been recognized, nor that it has the sanction of very eminent names, such as Mansfield, Sir William Blackstone, Chancellor Kent, and Chief Justice Parker. It has never been in terms repudiated in any case entitled to weight as authority,

and we think it a sound and reasonable distinction where the act prohibited involves in itself no moral turpitude, and would be innocent if not forbidden. Without going over the cases at large, we see no reason to change the views upon this question which we entertained when the case was decided.

In determining the case upon these principles, we necessarily assumed that the certificates or post notes were void, either as issued by the corporation *ultra vires*, or as falling under the prohibitions of the restraining act. This was assumed without special examination, because we felt less difficulty in disposing of the case in the manner we did, than it was supposed we might encounter in affirming the validity of the notes. If we had held them valid, the result would have been a simple affirmance of the judgment of the supreme court. It is proper, and perhaps necessary, now to say, that we did not and do not now intend to pass definitely upon that question. The respondents, however, do not ask a reargument, and the appellant has no right to ask one for the purpose of having the validity of the notes established, and the judgment thus affirmed, instead of modified, as it now is.

The motion must be denied.

All the judges, except A. S. JOHNSON, J., who took no part, were in favor of denying the motion; and all the Judges, except DENIO, Ch. J., and A. S. JOHNSON, J., concurred that mere knowledge by the vendor, that the vendee at the time of the purchase of property, intends to use it for an illegal purpose, will not prevent the vendor from recovering from the vendee the value of the property.

Motion denied.

[114 N. Y. 371.]

1889.

William D. Leonard, as Receiver, Appellant, v. Abram Poole, Impleaded, etc., Respondent.

Where a number of persons and firms have conspired together, in violation of the statutes (2 R. S. 692, § 8, sub. 6 ; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise.

It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects in subordination to the others, does not render him less a principal.

Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme, simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable ; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions.

Reported below 23 J. & S. 213.

(Argued March 28, 1889 ; decided June 4, 1889.)

FOLLETT, Ch. J. When the transactions out of which this action arose were being carried on the statutes of this state provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. (2 R. S. 692, § 8, subd. 6.) The same provision is contained in the Penal Code, section 168. The scheme entered into by the parties to the contract of August 13, 1879, was an indictable misdemeanor. (2 R. S. 692, § 8 ; *People v.*

Fisher, 14 Wend. 9; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 *Id.* 434; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y., 558, 565; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173). The scheme which the parties to the contract for a time pursued, and sought to consummate, was identical with the one described in the contract, and equally criminal. That Keene, Washington Butcher's Sons and D. & N. G. Miller agreed to engage, and actually engaged, in an unlawful plot to advance the price of lard cannot be successfully denied, and the courts of this state will not entertain an action to adjust their differences. This proposition is well settled; and we do not understand that the learned counsel for the appellant gainsays it, nor does he assert that the rule would not be applicable to a case arising between those parties and out of these transactions. The learned counsel for the appellant insists that Kent & Co. were not principals, but were mere agents for the principals, and that they cannot avoid payment upon the ground that the transactions were illegal. When persons knowingly promote and participate in carrying out a criminal scheme they are all principals, and the fact that one of the parties acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal.

This rule is elementary, and does not require elaboration or the citation of authorities. Throughout the period covered by these transactions these defendants bought and sold lard and futures and options in lard, and actively engaged in the attempt to carry out the unlawful enterprise. If, at the close of their transactions, Keene and his associates had been found to be owing Kent & Co., we think it very clear that the illegality of the enterprise would have been a perfect defense to an action brought by Kent & Co. to recover the sum due. (*Bartlett v. Smith*, 13 Fed. Rep., 263; *Cobb v. Prell*, 15 *id.* 774; *Irwin v. Williar*, 110 U. S. 499). In the case last cited Mr. Justice MATTHEWS, in

speaking for a unanimous court, said: "In *Roundtree* " *v. Smith* (108 U. S. 269), it was said that brokers who " had negotiated such contracts, suing not on the con- " tracts themselves, but for services performed and " money advanced for defendant at his request, though " they might under some circumstances be so con- " nected with the immorality of the contract as to be " affected by it, they are not in the same position as a " party sued for the enforcement of the original agree- " ment. It is certainly true that a broker might " negotiate such a contract without being privy to " the illegal intent of the principal parties to it which " renders it void, and in such a case, being innocent of " any violation of law, and not suing to enforce an un- " lawful contract, has a meritorious ground for the re- " covery of compensation for services and advances. " But we are also of the opinion that when the broker " is privy to the unlawful design of the parties, and " brings them together for the very purpose of entering " into an illegal agreement, he is *particeps criminis*, " and cannot recover for services rendered or losses " incurred by himself on behalf of either in forwarding " the transaction." (110 U. S. 509.)

Several cases have been cited holding that money or property deposited with a third person, which was derived from or through an unlawful enterprise, may be recovered; and that the illegality of the transaction out of which the money or property arose cannot be successfully asserted as a defense by a mere agent or depositary. This rule is well settled, but it is not germane to this case.

Other cases are cited holding that when the parties to an illegal transaction have accounted, as between themselves, and agreed that a definite sum belongs to each, that an action may be maintained upon the accounting or new promise, and the sum, once admitted to be due, recovered. Admitting these cases to be well decided, they do not aid the appellant. These parties have had no accounting. No admission has been made that a specified sum is due to any one

of them. No promise has been made since the completion of the illegal scheme upon which a recovery is sought. On the contrary, this action is for an accounting between the parties. It is alleged in the complaint that the amount which the plaintiff is entitled to recover is unknown, and can only be ascertained by an investigation of the illegal transactions between the parties. The judgment prayed for is: "That an account may be taken of all the dealings and transactions, purchases and sales of lard made and conducted by said defendants E. A. Kent & Co. under the agreement hereinbefore mentioned," etc.

The relief sought would require the court to investigate all of the various transactions of these parties, from the beginning to the end of their unlawful enterprise and adjust the differences between them. This is precisely what the courts have always refused to do. The fraud which the trial court found was practiced by these defendants upon their associates cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

"*Leonard v. Poole* (114 N. Y. 371) is a very different case, for the persons interested in those transactions were all of them, under the statutes of this state, **engaged in a conspiracy to commit an act injurious to trade or commerce, and the contract under which they were proceeding was malum in se,** and, hence, presented a situation in which the courts would refuse relief to any of the parties to it, as was said in *Tracy v. Talmage.*"

Per PARKER, C. J., *Irwin v. Curie*, (171 N. Y., 409–415).

"The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the Courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them."

Per BROWN, J.: *Duval v. Wellman*, (124 N. Y. 156, 162).

[58 Ohio State 430; 51 N. E. 28.]

1898.

Markley v. Village of Mineral City.

Municipal corporation—acquisition of land—donation for manufacturing plant—validity of gift.

1. A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality.

2. Corporate funds paid out in the attempted purchase of land for such purpose are unlawfully expended, and a deed purporting to convey such land is without legal effect.

3. And where for the purpose stated, a village has undertaken to purchase and acquire title to land, and to convey it to a person on consideration that he will build and operate manufactories within the village, and afterwards brings its action against such person to set aside the conveyance and obtain a reconveyance of the property with possession thereof, a court of equity will not lend its aid to either party, but will leave them where they have placed themselves.

(Syllabus by the Court.)

Error to circuit court, Tuscarawas county.

Suit by the village of Mineral City against George J. Markley. A decree for defendant was reversed, and defendant brings error. Reversed.

The cause of the village of Mineral City against George J. Markley was tried in the circuit court, Tuscarawas county, on appeal from the common pleas; and it is to the judgment of the circuit court that error is prosecuted here by Markley. The purpose of the suit was to obtain a decree setting aside a deed of three acres of land, which had been made by the village to Markley; to require him to reconvey the premises to the village; and for possession of the property. In its petition the village alleged, in substance: That on the 1st day of March, 1893, it was seized of the land in question. That on that day the council attempted to pass a resolution to convey the real estate to Markley. That on that day the village mayor and the clerk executed and delivered a deed for

the premises to him, which was then delivered to the county recorder and recorded. The resolution was not properly passed. The defendant paid no consideration for the land, but it was attempted to be conveyed to him as a donation to procure him to construct and operate manufacturing plants, in accordance with an agreement to that effect of that date, a copy of which is attached to the petition. *That the defendant has violated his contract, in this: that he has not constructed and operated such plants as agreed, and has thus forfeited any rights that he otherwise might have had.* The mayor and the clerk were never legally authorized to convey the land. No ordinance was passed giving such authority, nor were any of the necessary legal steps taken to make such attempted conveyance effective. The agreement and alleged deed are illegal and void and of no effect, and plaintiff is entitled to a reconveyance. * * *

SPEAR, C. J. (after stating the facts). The pleadings and findings of fact present this question: Had the village power, by deed of purchase, to legally acquire title to and hold real estate, for the sole purpose and with the sole intent of donating the same to procure the construction and operation of manufacturing plants within its limits? Two sections of the constitution seem to bear upon the subject. One (section 6 of article 13) makes it the duty of the general assembly, in providing for the organization of municipalities, to restrict their power of contracting debts and loaning their credit, so as to prevent the abuse of such power. The other (section 6 of article 8) expressly denies to the assembly power to authorize any such corporation to become a stockholder in any joint-stock company, corporation, or association whatever, or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association. And that this interdict applies as well to the case of an individual as to the aggregations named, is without question. It is intended to prevent the union of public and private capital in any enterprise whatever. *In considering the attitude of the village in this controversy, we must look at the entire scheme that was proposed to be ac-*

complished. The first step was to pay out money of the municipality in the purchase of land. The next was a donation of the land so acquired to some one willing to contract, and that person, in turn, to construct and operate the manufacturing plants for the supposed benefit of the people. The village was not to share as a partner in the enterprise, nor to loan its credit for that purpose, nor did it do so; but it did propose, by the wrongful use of corporate funds, to make a purchase, intending thereafter to make a gift of the property so to be acquired, both of which things it undertook to do. *It cannot be doubted that the scheme, taken as a whole, was clearly violative of the spirit of the sections of the constitution cited. And, notwithstanding this, the proposition of the village is that a court of equity should aid it in recovering that which it has undertaken to acquire by a scheme forbidden by law, and has parted with it in compliance with a contract which it had no power to make.* It is to be borne in mind that we are dealing with the status and capacity, not of a natural person, but of a corporate one; a mere creature of the law; an artificial entity, which, having no natural rights or powers, exists and operates only by virtue of the law of its creation. And we suppose it to be settled that our municipalities have such capacities and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those which are expressly granted, and that doubtful claims to power are resolved against the corporation. Cooley, Const. Lim. 231, 232; *Minturn v. Larue*, 23 How. 435; *City of St. Louis v. Bell Tel. Co.* 96 Mo. 623, 10 S. W. 197; 1 Dill. Mun. Corp. Sec. 89, 457; 2 Dill. Mun. Corp. Sec. 936; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445. So that, the question resolves itself into this: Has the power been clearly granted to villages to accept title to land for the express purpose of donating it for the encouragement of local improvements? If not, is such power to be implied, as essential to carry into effect other clearly

granted powers? The right of a municipality to acquire property, is given by paragraph 34 of section 1692, Rev. St., in these words: "To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, * * * for the use of the corporation, and to sell or lease the same." Here is specific mention of the purpose for which land may be acquired. The controlling idea is that the property must be for the use of the corporation. This idea of use implies power to hold. It implies, beyond this, a *jus disponendi*,—a power to deal with the property. If such power does not exist, then its attempted acquisition would be an idle performance. The two ideas are inseparable. If the municipality is without power to hold and dispose of the property, then, by the same token, it is without power to acquire. And we are necessarily confined, in treating of the purpose of acquisition, to the express purpose, viz. "the use of the corporation"; for, applying the maxim, "*Expressio unius est exclusio alterius*," all other purposes are excluded. It would follow, therefore, that if the land be for the use of the municipality, for some legitimate corporate purpose, then power is given, by the clause quoted, to acquire it, and necessarily power to hold and dispose of it. But, if it be not for the use of the corporation (that is, for a use to which the corporation may lawfully devote it), then this clause gives no capacity to receive, or power to hold. Another paragraph of the same section gives power to accept bequests, but that is not involved here, and, so far as we are aware, there is no general power given to acquire real estate, except by the paragraph quoted. Not only, therefore, is there no clear expression of a purpose to give power to acquire and hold real estate for speculative purposes, but the provisions upon the subject, statutory and constitutional, clearly establish that no such power is intended. The chief function of a municipality being to regulate local governmental affairs, because they may be dealt with better by the people interested than by a distant cen-

trial power, we cannot assume a purpose to invest such corporation with the powers or capacities of individuals, or of private corporations, for objects not pertaining to municipal rule, since that would be to pervert the institutions from its legitimate ends, and to require of it duties which it it not adapted satisfactorily to execute, and which are not necessary to enable it to discharge the appropriate functions and duties of local administration. It follows that no such power is to be implied, as essential to carry into effect the power which is in terms given.

If we are right in these conclusions, then it results that the attempted purchase by the village from the Lechner heirs gave to the municipality no title to the land, either legal or equitable. This being the situation, how does it leave the parties? Markley is in possession. The attempted deed of the village gave him no title, but on the other hand, the village has no title to be restored. It cannot prevail except through the medium and with the aid of the illegal transaction to which it was a party, and hence it can have no standing in a court of equity, because it asks affirmative relief under circumstances showing that it is itself in the wrong. The defendant is equally *in pari delicto.* **The court will therefore refuse aid to either, but leave them where by there illegal acts they have placed themselves.** *Thomas v. Cronise*, 16 Ohio, 54; *State v. Buttles*, 3 Ohio St. 309; *Commissioners v. Andrews*, 18 Ohio St. 49; *Board of Education v. Thompson*, 33 Ohio St. 321; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

It is insisted that Markley, having taken a deed from the village, is estopped to deny the title of his grantor. But Markley does not attempt to stand on that title. He distinctly repudiates it. But, if he did, the contract which the plaintiff itself pleads, and the finding of the circuit court, disclose fully the illegal character of the transaction.

Attention is called to section 21, Rev. St., and the proposition is advanced that the attempt of the village

to convey to Markley may be treated as an illegal loan or deposit of the property of the village, which, by this section, it is authorized to recover back. The section cannot apply. We have already found that the land in question was not the property of the village. The spirit, if not the letter, of this statute, was violated by the act of the municipal officers in unlawfully paying the money of the village to the Lechner heirs, not in their futile attempt to convey what the village did not own.

The case of the village seems to rest upon the proposition that the municipality, while it is not bound by the illegal acts of the officers, nevertheless may affirm in part what they did, and thus reap whatever benefit may result from their acts. The proposition is not tenable. It weakness lies in the unfounded assumption that the illegality of the transaction consists wholly in the unauthorized acts of the agents. We have already found that the scheme could have no legal basis, because of the inherent incapacity of the municipality to enter into it. But it is insisted that to deny the relief sought by the village would be to put it in the power of village authorities to make wrongful use of corporate funds, and then refuse relief to the wronged corporation. We think not; at least, not necessarily so. If the vendors, at the time of the attempted conveyance to the village, and the receipt by them of the alleged purchase money, were aware of the purpose of the village authorities in their attempt to acquire the property, no reason is perceived why an action may not be maintained to recover of them the money thus illegally appropriated; and, failing that remedy, it is not impossible that the village officers who thus undertook to make unauthorized use of the village funds may be liable. Of course, however, we do not undertake to decide these questions. They are not involved in this controversy, nor are the proper parties before us.

Judgment of the circuit court reversed, and petition below dismissed. Reversed.

[132 Pa. St. 349; 19 Atl. 139.]

Allebach v. Hunsicker.

(Supreme Court of Pennsylvania. Feb. 17, 1890.)

Lotteries—Deed. Under Purd. Dig. Pa. p. 418, pl. 84, which makes void all deeds and transfers made in pursuance of a lottery, the grantor, in a deed valid on its face, will not be allowed to impeach it by showing that it was given in pursuance of a lottery scheme in which he participated.

Appeal from court of common pleas, Montgomery County.

Ejectment by Jacob M. Allebach against Philip M. Hunsicker. Defendant introduced in evidence a deed from plaintiff to himself. Plaintiff offered to prove that this deed was given in pursuance of a lottery scheme in which the land in dispute was put up as a prize by the plaintiff, and was won by the defendant. The court rejected the offer, and instructed the jury to find for the defendant. Plaintiff appeals. The act of March 31, 1860, Section 52, (Purd. Dig. p. 418, pl. 84), provides "every grant, bargain, sale, conveyance, or transfer of any goods or chattels, lands, tenements, or hereditaments, which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void."

Chas. Hunsicker and Henry Freedley, for appellants, *Louis M. Childs and Montgomery Evans*, for appellee.

Per Curiam. This was an attempt by the plaintiff to set up his own turpitude to defeat his own deed. If the law sanctions this, we would be ashamed to sit here and administer it. Fortunately it does not. The deed upon its face was a valid instrument. The plaintiff could only avoid it by offering to prove the illegal consideration, viz, the lottery scheme, in which he was a participant, and by means of which he was enabled to sell this and a number of other lots. This evidence the court below properly rejected. Granted

that under the act of 31st March, 1860, the deed was void, it was not so upon its face. No part of the lottery transaction appeared thereon, and the plaintiff could only avoid it by showing his own share in the illegal transaction. This, under all our authorities, he could not do. It was said in *Winton v. Freeman*, 102 Pa. St. 366 : "The books are full of cases where a "party to the fraud has sought relief in the courts "from the consequences of his unlawful act, but the "decisions have been uniformly adverse to such appli-"cations. It is not the province of the law to help a "rogue out of his toils. The rule is to leave the par-"ties where it finds them, giving no relief and no "countenance to contracts made in violation of stat-"utes;" citing *Hershey v. Weiting*, 50 Pa. St. 240; *Evans v. Dravo*, 24 Pa. St. 62.

There may be some excuse, in some instances, for men in seeking to disentangle themselves from the web of fraud which they have spun round them, but for this plaintiff there is none. He sold this property by means of this lottery scheme. He received the money, and executed a deed. He retains the money, and now seeks to recover the property back upon the allegation that the deed is void under the act of 1860. It is seldom we meet with a claim so unblushing and conscienceless as this. The learned judge below was right in rejecting his offer of evidence, and to this extent keeping him honest. *Judgment affirmed.*

[2 Pinn, (Wis.) 99 ; 52 Am. Dec. 145]

1849.

Moore v. Kendall.

1. *Jury—Charge of Judge.*—It is the duty of the jury to reconcile the discrepancies or contradictions in the testimony of witnesses, where they exist, if possible ; and it is error to instruct the jury that they ought not to attempt it.

2. *Sale on Sunday.*—Where the sale and delivery of property has been made on Sunday, though prohibited by law, *neither the vendor nor vendee can rescind the sale or recover back the property or the purchase money on that account ;* and a third party, failing to show a claim to the property superior to that of the vendor anterior to such sale and delivery, is barred by a sale thus made from questioning the title of the vendee. The vendee, in such case, may claim the protection of the well settled principle of law, "*in pari delicto potior est conditio defendentis.*"

REPLEVIN.

HUBBELL, J. If this case were to be decided on the weight of evidence as shown by the bill of exceptions, the judgment of the district court might be affirmed. But this court does not sit in the capacity of a jury. The only error assigned related to the charge of the judge.

The action was brought to recover a quantity of merchandise, which had been levied upon by the defendant in error as sheriff of Grant county, under executions in his hands, against the property of James Moore. The plaintiff in error claimed as a purchaser from James Moore. On the trial, James Moore and John Stone were called as witnesses by the plaintiff, to prove a sale and transfer of the property from James Moore to Jonathan B. Moore, the plaintiff in error. Both the fact and the time of the sale became material questions. There was some contradiction or discrepancy between the two witnesses, Jones and Moore, on these points. The sale, if made at all, appears to have been made either on the first day of November, 1847, which was Sunday, or between the first and seventh day of November.

The executions were put into the sheriff's hands on the second, and an actual levy was effected on the tenth; but an effort was made to effect a levy on the sixth, which was resisted, but which must be regarded as having fixed the sheriff's lien on the goods. The court instructed the jury as follows: 1st. "That it "would be reasonable and proper in the jury to recon- "cile slight discrepancies in the testimony of the "plaintiff's witnesses, but if there were contradictions "on material points or facts, equally within their "knowledge, that is to say, James Moore and John "Stone, the plaintiff's witnesses, it certainly was not "the duty of the jury to reconcile such contradic- "tions; it was the plaintiff's misfortune to have "brought on the stand, witnesses contradicting each "other thus, on material facts equally within the "knowledge of each; and the weight of their testi- "mony would be materially weakened, if not almost "entirely destroyed."

The errors assigned on the second branch of the charge were abandoned; and the third was as follows:

"*That if the said sale, by the plaintiff to his brother,* "*James Moore, was made on Sunday, then said sale and* "*transfer, made on that day, was absolutely void, and* "*the purchaser, Jonathan B. Moore, acquired no right* "*or title to the property in dispute.*"

To these instructions exceptions were properly taken, and the question for this court is, whether such instructions were correct.

In regard to the matter of discrepancy, I think the court erred. There was clearly a question of fact for the jury (12 Serg. & R. 283; 5 Wend. 301); and the effect of the charge was to cut off inquiry on the subject. Whether the discrepancies were material or slight, could make no difference that I can understand; and in either case, it should have been left to the jury to try and reconcile them. If, upon a full and fair attempt, they failed, still it would not follow as an inference of law that the testimony of the one was to neutralize that of the other. Conflicting witnesses

are not necessarily to be regarded as opposing powers of equal momentum, which are to be measured by mechanical rules. The court should have told the jury that, failing to reconcile their statement, "on material points, equally within the knowledge of each," it became their duty to inquire whether each of the witnesses was equally credible; whether the statements were equally consistent; whether, from their character, appearance, and relations to the parties, or from any other circumstances connected with their testimony, more reliance ought to be placed upon the one than the other. Very possibly one of them was unworthy of credit; at any rate, it has been urged on the argument by counsel for the defendant in error, that one of them was absolutely perjured—and if so, certainly his statements ought not to have been sufficient to defeat those of the other. Looking at the bill of exceptions, I am inclined to think the charge of perjury is not sustained; but that most of the discrepancy arose, not from statements of fact, but from one of them having sworn to a conclusion of law. And in this view of the case I think their statements might have been reconciled. At all events, it could not happen until the jury should find, in view of all the circumstances I have mentioned, that the weight of evidence was equally balanced, that the court could properly say to them as a matter of law, "that it was the plaintiff's misfortune to have brought to the stand witnesses contradicting each other," and that "the weight of their testimony was greatly weakened, if not almost entirely destroyed."

With respect to the other branch of the instructions, it seems to me the court below was equally in error. Admitting the sale of the goods to have been made on Sunday, it by no means follows that it was void for all purposes. There was an actual transfer of property from James Moore to his brother, the plaintiff in error; and it was not possible thereafter for James Moore or his assigns to recover it back. Between the parties, it was an executed con-

tract; and unless the defendant in error could show some claim superior to that of James Moore, the vendor, he could not disturb the possession of the vendee. On this point the authorities are conclusive. *Inhabitants of Worcester v. Eaton*, 11 Mass. 369; 13 Eng. Com. L. 351; 9 *id.* 193.

This case must not be confounded with others. The defendants in error do not claim against James Moore as an insolvent debtor, with respect to the transfer in question. They do not raise the question of a fraudulent sale. They stand upon the naked right arising from a void sale; a sale void, simply because it was made on Sunday. For the purposes of this question James Moore may be assumed to be a man of ample means and of honest purposes. The point before us is simply this: whether any man, under any circumstances, can make a valid transfer of property on Sunday. If he cannot, the instructions were right, if he can, they were wrong.

I think it would be carrying the rule of law further than the policy of the statute requires, and further than the current of decisions on this subject warrants, to deny that such a transfer, when actually completed, without fraud, should stand between the parties. After such a transfer, notwithstanding the supposed or real violation of the statute, the vendee may claim the protection of that well-settled principle of law, "*In pari delicto potior est conditio defendentis.*"

It is not without regret that I am drawn to these conclusions with respect to the instructions of the learned and able judge of the court below. With my impressions of the merits of the case, as presented in the testimony, I could wish the jury had been left free to pass upon the main questions, which seem to me to be, whether there was an actual sale of the goods before the levy; and if there was, whether such sale was fraudulent as to the creditors? I do not mean by these remarks, to prejudice the case; but inasmuch as the jury may have been improperly controlled by the charge of the judge, there must be a new trial.

Judgment reversed, with costs.

[86 Wis. 176; 56 N. W. 638.]

Cohn v. Heimbauch.

(Supreme Court of Wisconsin. Oct. 17, 1893.)

Impeachment of Witness—Sale made on Sunday—Status of Parties.

1. A witness cannot be impeached by a question whether he had not "once before" testified differently.
2. A party cannot introduce evidence as to what he said at some previous time in regard to the facts in issue.
3. One who sells and delivers property on Sunday cannot recover it on the ground that the sale was void.

Appeal from circuit court, Waukesha County; A. SCOTT SLOAN, Judge.

Action by Samuel Cohn against Daniel Heimbauch. From a judgment for defendant, plaintiff appeals. Affirmed.

ORTON, J. This is an action of trover for the conversion of a horse in April, 1884. The testimony of the defendant and his witnesses tends to prove the following facts: The plaintiff, on the last Sunday in June, 1882, sold the horse to the defendant for the sum of $125, payable on demand, and delivered the possession of the same to the defendant at the same time. *The defendant retained the possession of the horse for several months, when it escaped, or was stolen from his barn, and after much search and inquiry it was found in the possession of the plaintiff, and the* **defendant regained the possession of the horse by a writ of replevin.** The defendant offered and tendered to the plaintiff the price agreed upon, which was refused. The defendant sold the horse to a stranger, and it was taken to parts unknown to him.

The testimony of the plaintiff and his witnesses tends to prove the following facts: On and before the said last Sunday in June, 1882, the horse was and had

been kept in the pasture of the defendant, and the defendant spoke of buying it, if it suited him after trial, and they could agree upon the price. The horse was hitched with another in a wagon, and both parties, with one or two others, drove to Waterford, Racine county, to try the horse, and while there the question of price was discussed. The plaintiff asked $150, and the defendant offered only $115, and they were unable to agree ; and the defendant drove the horse back to its pasture on his premises, as he supposed. The next September the plaintiff was stopping at "Lavins," in the town of Vernon, and when he got up in the morning the horse was standing at the gate, and he took the horse, and had it pastured.

The jury found that the plaintiff sold and delivered the horse to the defendant on the last Sunday in June, 1882, and that it was of the value of $150. The Court also made the same finding, and also that at the time of the sale and delivery it was agreed that the defendant should pay to the plaintiff the sum of $125 for said horse, and *that said purchase price has not been paid*, and that there was no agreement entered into between the parties respecting the property subsequent to said sale, and, as a conclusion of law, that the contract was made in violation of law, and that the defendant was the owner, and entitled to the possession of the property ; and judgment was entered, dismissing the complaint, with costs.

Most of the errors assigned are on the admission or rejection of testimony, and the remarks of the court in connection therewith.

The exceptions, as well as the questions and answers, are very much confused, and it is very difficult to understand what they mean.

1. The plaintiff, it seems, was prosecuted for stealing the horse from the defendant, before a justice, and the defendant was sworn as a witness ; and the counsel of the plaintiff wished to show that the defendant testified on that examination differently, as to the bar-

gain being consummated on Sunday at Waterford, from his testimony on the trial. The justice had the minutes of his testimony present, and he was asked, "Did he further answer, 'when we got to Waterford?'" and "Did he say he bought the mare." The Court said, "We can't go over that trial. He talked about buying, as he testifies now. As he claims, he concluded the trial at Waterford on Sunday in question." The counsel, as it appears, was trying to impeach the defendant, or contradict his testimony, by the minutes of his testimony on that prosecution. That was neither necessary nor proper. The defendant was a party, and the plaintiff could prove by any one what he said on that examination, or anywhere or at any time, about the sale being made on Sunday, and the court properly said that "we can't go over that trial." Afterwards, the court ruled out that record, and then said, "I have examined the evidence, and there is no apparent contradiction in the answer to what he testified here." The counsel of the plaintiff still persisted, "We make the offer," and "offer to prove," etc., and the court said: "I rule out the answer. The answer ruled out." The court was patient, considerate, and clearly right.

2. One Zelotus Hill, a witness for the defendant was asked, on cross-examination, if he had not testified once before to a conversation with plaintiff, in which plaintiff denied that he had sold the mare. The court said he did not think it at all material, and excluded it. The question was clearly improper as well as immaterial. The plaintiff could not manufacture testimony for himself by proving what he said at some former time, and the witness could not be impeached in that way. He must be asked if he said so and so at a particular time and place. The question, "Did you hear the plaintiff say, in your conversation with him afterwards, that he would sue for the mare?" was objectionable for the same reasons. There are some other exceptions, but they do not appear to be material.

3. The learned counsel of the appellant make many objections to the judge's charge to the jury, which we cannot consider because no exceptions were taken to it at the time. But we have read the instructions of the court, and they do not appear to be liable to any objections whatever.

4. On the motion for a new trial, and for judgment in favor of the plaintiff, we are called upon to consider the merits of the case on the testimony. The parties are in direct conflict, in their testimony, as to whether there was a sale and delivery of the horse on the last Sunday in June, 1882. The testimony of the defendant is corroborated to some extent by the testimony of other witnesses. It is, to a considerable extent, a question of credibility, for the jury to determine, and their verdict should not, therefore, be disturbed. *Poertner v. Poertner*, 66 Wis. 644, 29 N. W. Rep. 386.

The jury, as well as the Court, found that there was a sale and delivery of the horse on Sunday, and that must be accepted as a verity in the case. The contract was completed and executed on Sunday, and therefore illegal. The defendant, as the vendee of this property, by a sale and delivery on Sunday, may claim the protection of the maxim "In pari delicto, potior est conditio defendentis." The court will neither enforce nor set aside a contract which is illegal, and not fraudulent, from being made on Sunday. *Hill v. Sherwood*, 3 Wis. 343. *Moore v. Kendall*, 2 Pin. 99, is in point with the facts. *Swartzer v. Gillett*, *Id.*, 238; *Melchoir v. McCarty*, 31 Wis. 252; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. Rep. 26; *Knox v. Clifford*, 38 Wis. 651; *Clarke v. Lumber Co.* 59 Wis. 655, 18 N. W. Rep. 492; *Worcester v. Eaton*, 11 Mass. 369.

The full statement of the principle is that when both parties enter into an illegal contract, without fraud on the part of either, the

courts will leave the contract as they find it, without a remedy to either party. Both parties being equally guilty of a violation of the law, they must abide the consequences, and not ask the Courts to give such a contract the sanction of their approval by affording a remedy to either. The court, having found that this contract was made on Sunday, rendered the proper judgment of a dismissal of the complaint, with costs.

The judgment of the circuit court is affirmed.

List of Decisions in United States Courts.

Bank of U. S. v. Owens, 2 Peters, 527.

Hanauer v. Doane, 12 Wallace, 342.

Thomas v. Richmond, 12 Wallace, 349.

Spring Co. v. Knowlton, 103 U. S. 49.

Thomas v. R. R. Co. 101 U. S., 71.

Irwin v. Williar, 110 U. S. 49.

Higgins v. McCrea, 116 U. S. 671.

Penn. R. R. v. St. L. &c. Co., 118 U. S. 290.

White v. Barber, 123 U. S. 392.

Gibbs v. Con. Gas Co., 130 U. S. 396.

Dent v. Ferguson, 132 U. S. 50.

Central T. Co. v. Pullman Co., 139 U. S. 24.

Logan Co. Bk. v. Townsend, 138 U. S. 67.

Miller v. Ammon, 145 U. S. 428.

St. L. &c. Co. v. T. H. & I. Co., 145 U. S. 398.

Pullman Co. v. Cent. T. Co., 171 U. S. 148.

McMullen v. Hoffman, 174 U. S. 639.

Connolly v. Union &c. Co., 184 U. S. 540.

E. Bement & Sons v. Nat. Harrow Co., 186 U. S. 70.

Nat Bk. &c. Co. v. Petrie, 189 U. S. 423.

W. W. Montague & Co. v. Lowry, 193 U. S. 38.

C. M. & St. P. Co. v. Wabash Co., 61 Fed. 993.

Equitable Co. v. Wetherill, 127 Fed. 947.

[2 Peters, 527.]
1829.

Bank of U. S. v. Owens.

The Branch Bank of the United States, at Lexington, Kentucky, discounted a promissory note, reserving interest thereon, at the rate of six per centum per annum ; it being agreed that the owner of the note should receive the proceeds of the discount in notes of the Bank of Kentucky, at their nominal value, although the same were at the time of no greater current value than fifty-four per cent. of the said nominal value. *Held* that the contract was usurious and void, and that the bank could not recover of any of the parties to the discounted note.

A fraud upon a statute is a violation of the statute.

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest. According to this principle, the lender in this case has taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. This is contrary to the provisions of the charter of the Bank of the United States, and against law.

Reserving interest as discount, is the same as taking the same ; since it cannot be permitted by law to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise ; for there the actual receipt is generally necessary to consummate the offence. But where the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do.

The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum ; but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the

laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal.

Mr. Justice JOHNSON delivered the opinion of the Court.

This suit is instituted for the recovery of a promissory note.

The plea is filed by the three last named defendants, who represent themselves as securities to Owens, and sets out in substance, that the note was created for the purpose of enabling Owens to obtain a loan of money from the plaintiff, in the ordinary course of discount; that it was offered for discount, and rejected, and after such rejection, it goes on to aver, that "it was unlawfully, usuriously, and corruptly agreed, by and between the said plaintiffs, by their agents employed in the management and business of the said office, and the said Owens; that they the said plaintiffs would receive and discount the said note, and that the said Owens should receive from them therefor notes of the Bank of Kentucky, or its branches, at the nominal value of said notes, and for the forbearance and loan aforesaid, that Owens should pay said note in current money of the United States, when it fell due, with interest at the rate of six per centum per annum from, &c.; the plea then avers, "that in pursuance of said corrupt and unlawful agreement," this note was passed to the plaintiffs, and Kentucky notes received in loan, "as the sole consideration thereof," at their nominal value, and further, "that at the time the said note was discounted, as aforesaid, the notes of the said Bank of Kentucky and its branches were generally depreciated, so much so, that one hundred dollars thereof, nominally, were of the value of fifty-four dollars only, or less; and current only at that depreciation for greater or smaller sums," &c.; and the defendants further aver, "that the said transaction and dealing was contrary to law,

and the fundamental articles of the said corporation; and the said note founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater interest than at the rate of six per centum per annum, upon the value of the notes loaned by them, as aforesaid."

To this plea the plaintiffs demurred, and three points are made on which the Court below certify a difference of opinion to this Court.

The 1st is, Whether the facts set forth, and the averments in said plea make out a case on which the corporation has taken more than at the rate of six per centum per annum, upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation.

The proposition here presented to the Court, has relation altogether to the violation of the ninth fundamental rule of the act of incorporation, and it brings under consideration the sufficiency both of the facts and averment contained in the plea, to make out a violation of that article.

I have, myself, entertained very serious doubts of the sufficiency of the averments in the plea; for it is not a case of a direct reservation of a higher interest than the law allows, since on the face of the note only six per cent. is reserved; but the facts are calculated to present one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction; to wit, by taking a note payable in gold or silver, for a loan of depreciated paper; a return, in fact, in specie, for an article of scarcely half the value of specie; a loan of adulterated dollars, for which a note is taken, payable, dollar for dollar, in coin of the United States.

That the law will not tolerate such transactions, has long been settled, for a fraud upon a statute is a violation of the statute.

But the difficulty with me was this, that the plea neither avers an intention to evade the statute, nor a

knowledge in the plaintiffs of the actual depreciation of Kentucky money. I am content, however, to unite with the three of my brethren, who make up the majority on this point, in holding the averments to be sufficient; because, in a considerable dearth of authorities on this subject, I find it decided in the case of *Bolton vs. Durham*, Croke's Reports, Cro. Eliz. 642, that the confession of the *quo animo*, implied in a demurrer, will affect a cause with usury, when a very similar case, in the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge. *Benningfield vs. Ashley*, Cro. Eliz., 741.

In the present instance, the loan; the unconditional return of the sum lent; the illegality, and even corruption of the bargain; are all distinctly averred, and more than once reiterated. If the transaction was corrupt, and in violation of the fundamental laws of the charter, as averred in the plea, and admitted by the demurrer; it could only have been upon the ground of an intention to evade the statute, and with a knowledge of the reduced value of the Kentucky bills.

And it is not unnatural here to remark, that the plea sets out a refusal to make a loan in the ordinary course, to wit, in gold or silver, or the plaintiffs' own notes; and a subsequent agreement to make the loan, provided payment would be received in this depreciated paper. This state of facts presents an obvious analogy to the leading case of *Lowe vs. Waller*, Douglas, 736, in which the negotiation commenced for a loan of money, but terminated in a sale of goods on the re-sale of which, the borrower, (as he was held to be,) sustained a great loss.

The Court charged the lender with that loss, as so much exacted from the necessities of the borrower.

That part of the ninth section of the fundamental rules of the bank charter, which is here drawn in question, is expressed in these words: "The bank shall not be at liberty to purchase any public debt what-

ever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts."

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume where the treaty is for a loan, and the capital is to be returned at all events; has always been adjudged to be so much profit taken upon a loan; and to be a violation of those laws which limit the lender to a specified rate of interest.

According to this principle, the lender has here taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. So that in this point the certificate of this Court must be in the affirmative.

Some doubts have been thrown out, whether, as the charter speaks only of taking, it can apply to a case in which the interest has been only reserved, not received. But on that point the majority are clearly of opinion, that reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C. 620. In those instances in which Courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do.

The second question propounded to this Court is, "Whether if the plea does make out a case of violation of a provision of the charter, the notes sued on, or the contract therein expressed, is void in law, so that no recovery can be had therein in this suit."

The question here propounded has relation exclusively to the legal effect of a violation of the provision in the charter, on the subject of interest; and does not bring in question the operation of the statute of usury of Kentucky upon the validity of this contract. To understand the gist of the question, it is necessary to

observe, that although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all the acts passed in England, and in the states on the same subjects, declare such contracts usurious and void.

The question then is, whether such contracts are void in law, upon general principles.

The answer would seem to be plain and obvious that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country, how can they then become auxiliary to the consummation of violations of law.

To enumerate here all the instances and cases in which this reasoning has been practically applied would be to incur the imputation of vain parade.

There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

That this is true of contracts violating the laws of morality is recognized in the familiar maxim "*ex turpi causa non oritur actio*", as has been exemplified in some modern cases of a house let for immoral purposes (cited and admitted in 1 B. & P. 340, and Esp. N. P. 13).

In the case of *Aubert* v. *Maze* (2 B. & P. 374) it is expressly affirmed that there is no distinction "as to vitiating the contract between *malum in se* and *malum prohibitum*. And that case is a strong one to this point since the contract there arose collaterally out of transactions prohibited by statute.

So the same doctrine was maintained in equity upon a similar contract in the case of *Watts* v. *Brooks* (3 Ves Jun. 612) in which the Court observes, "There is nothing immoral in this transaction but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The Court will not execute these contracts."

So in the case of *Webb* v. *Pritchett* (1 B. & P. 264) where the action was by a tavern keeper against a candidate, for provisions furnished to the voters at an election contrary to the Statute of William. Although the statute does not declare the contract void, the Court declared it void and in this explicit language—"This action is apparently founded on a contract to disobey the law. The defense set up proves the principle of the contract. Then how shall an action be maintained in that which is a direct violation of a public law. The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the Legislature; how then can we enforce a contract to do that very thing which is so much reprobated by the act. This court cannot give any assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law, &c."

So in the case of assurance in illegal voyages even where the underwriters have contracted with their eyes open, they are notwithstanding permitted to avail themselves of the plea of illegality *ad libitum*, as in the case of *Camden v. Anderson* (6 T. R. 723) adjudged in the King's Bench and affirmed in the Exchequer where it is declared that the defense is founded upon a principle of law which is permanent to all obligation by which the parties to a contract can bind themselves (1 B. & P. 272).

And so in another case of great hardship (*Morck v. Abel*, 3 B. & P. 35) where the insurance was upon a trading in the East Indies prohibited by an obsolete statute, the plaintiff could not even recover back his premium although admitted that the risk never commenced because the policy was void in its inception on the ground of illegality.

Nor is it to voyages illegal by statute alone, that this principle applies. A repectable writer on insurance makes these remarks. "Whenever an insurance is made on a voyage expressly prohibited by the com-

mon, statute or maritime law of the country, the policy is of no effect. The principle on which such a regulation is founded, is not peculiar to this kind of contracts, for it is nothing more than that which destroys all contracts whatsoever, (Park, 232,) that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt it, it is invalid and will not receive the assistance of a court of justice to carry it into execution.

Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to effect the general interest and policy of the country.

Thus a note given by a bankrupt upon a secret compromise with a creditor is declared void; as it produces inequality in the distribution of the bankrupt's effects, and evades the provisions and policy of the law, which proposes to put all the creditors upon an equal footing. *Wells vs. Girling*, 1 Brod. & Bing. 447.

And on the same principle a note given for a wager on the future amount of a branch of the public revenue is declared void; because it interests an individual in diminishing the production of the revenue, 2 T. R. 610. 2 B. & P. 130.

After citing these more modern decisions upon this subject, it may not be amiss to refer to some reporters, whose authority has been consecrated by the respect of ages. They will serve to show the antiquity and universality of this doctrine.

Thus in 1 Bulls. 38, it is laid down that "wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration be unlawful, the whole contract is void.

So in Hobart, 72, and Dyer, 356, "if one promises to do a thing that is unlawful, such promise is void."

And innumerable ancient cases might be cited from the best reporters, of the application of the rule to maintenance, to simony, and to promises made to public officers, engaging them to act contrary to the duties of their offices, or to individuals imposing upon them restraint inconsistent with the public interest.

For these reasons, and upon these decisions, the majority of the Court are of opinion that an affirmative answer must also be certified upon the second question in the cause.

And this renders it unnecessary to consider the third question.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the district of Kentucky, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, and was argued by counsel. On consideration whereof, it is the opinion of this Court, 1. That the facts set forth, and the averments in said plea, make out a case in which the corporation has taken more than at the rate of six per centum per annum upon a loan or discount contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation. 2. That the plea does make out such a case where the notes sued on, or the contract therein expressed to pay the plaintiffs five thousand dollars, is void in law, so that no recovery can be had thereon in this suit. And, 3. This court being of opinion in the affirmative on the first and second points, renders it unnecessary to consider the third question; all of which is ordered and adjudged to be certified to the said Circuit Court.

[103 U. S. 49.]

1880.

Spring Company v. Knowlton.

1. A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, while it remains executory, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof.

2. The trustees of A., a corporation which was organized under the act of New York of Feb. 17, 1848, for the formation of corporations for manufacturing purposes, and acts amendatory thereof, passed a resolution increasing its capital stock, which was $1,000,000, by the addition of $200,000, allowing each stockholder to take one share of the new stock for every five shares of the original stock which he held, and providing that on his paying in installments $80 on each share of $100, a certificate as for full-paid stock should be issued to him by the company, and on his failure to pay an installment of $20 per share on or before a specified date his claim to the new stock should be forfeited, and such forfeited shares divided ratably among the other stockholders who had paid that installment. A subscription agreement binding the subscribers thereto to take stock and pay $80 per share in installments as they should be called for by the company, and, on failure to pay any installment to submit to the forfeiture of all sums theretofore paid, was prepared and signed by B., who, being then a trustee of A., and its vice-president, was an active promotor of the scheme for the increase of the stock. He paid but one installment of twenty per cent. on his new stock, and the latter was, by a resolution of the company, declared to be forfeited. The capital stock of the company was afterwards reduced to its original amount, and, to refund the payments made on the new stock, withdrawn, bonds were issued. None of them were tendered to or demanded by B. On A's refusing to pay him the amount of that installment, he brought suit therefor. *Held*, that he was entitled to recover.

Error to the Circuit Court of the United States for the Northern District of New York.

Mr. Justice Woods, after stating the case, delivered the opinion of the Court.

The plaintiff in error claims that the plan adopted by it to increase its capital stock, by which certificates as for full paid stock were to be issued on the payment of eighty per cent. thereof, was against the law and public policy of the State of New York, and was, therefore, void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid.

It is conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York and therefore void. It has been so held, in effect, by the Court of Appeals of the State of New York, in the case of *Knowlton v. Congress & Empire Sewing Co.*, 57 N. Y. 518.

We are, then, to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the Circuit Court.

We think it clear that there was only a part performance of the illegal contract between the company and Knowlton, in reference to the new stock for which Sheehan subscribed, and which he agreed to transfer to Knowlton.

The company, in fact, created no new stock. It only proposed to do so. To increase the stock of the company it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two-thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the increase was voted, and countersigned by the secretary, and such certificate should be acknowledged oy the chairman and filed, as required by the first section of the act. And the

law declared that "when so filed the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the Circuit Court that any such certificate was ever made or filed. Consequently it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent. thereon. *There was no performance of the contract whatever by the company, and only a part performance by Knowlton.*

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se.* There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, *the other party not having performed the contract or any part of it,* and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition.

Their result is fairly stated in 2 Comyn on Contracts, 361, as follows:—

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto,* neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books that where the action is

in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts, vol. ii. p. 746, says:—

"All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect see 2 Addison, Contracts, sect. 1412; Chitty, Contracts, 944; 2 Story, Contracts, sect. 617; 2 Greenl. Evid., sect. 111.

The views of the text writers are sustained by a vast array of authorities, both English and American.

A few will be cited. *Taylor v. Bowers* (1 Q. B. D. 291) was an action to recover property assigned for the purpose of defrauding creditors. A verdict was rendered for the plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the Chief Justice, COCKBURN, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice MELLISH, in the Court of Appeals, said: "If the illegal transaction had been carried out, the "plaintiff himself, in my judgment, could not afterwards "have recovered the goods. But the illegal transac-

" tion was not carried out; it came wholly to an end. " To hold that the plaintiff is entitled to recover does " not carry out the illegal transaction, but the effect is to " put everybody in the same situation as they were be- " fore the illegal transaction was determined upon, and " before the parties took any steps to carry it out. " That, I apprehend, is the true distinction in point of " law. If money is paid or goods delivered for an " illegal purpose, the person who had so paid the " money or delivered the goods may recover them " back before the illegal purpose is carried out; but " if he waits till the illegal purpose is carried out, or " if he seeks to enforce the illegal transaction, in " neither can he maintain an action; the law will not " allow that to be done."

The same rule substantially is laid down in the following English cases: *Lowry v. Bourdieu*, 2 Doug. 452; *Tappenden v. Randall*, 2 Bos. & Pul. 467; *Hastelow v. Jackson*, 8 Barn. & Cress. 221; *Bone v. Ekless*, 5 H. & N. 925; *Lacaussade v. White*, 7 T. R. 531; *Cotton v. Thurland*, 5 *id.* 405; *Mount v. Stokes*, 4 *id.* 561; *Smith v. Bickmore* 4 Taunt. 474.

In *Morgan v. Groff* (4 Barb. (N. Y.) 524), it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.

To the same effect are the following cases: *Utica Insurance Co. v. Kip*, 8 Cow. (N. Y.) 20; *Merritt v. Millard*, 4 Keyes (N. Y.), 208; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell v. Boston & Lowell Railroad Corporation*, 23 *id.* 24.

In *Thomas v. City of Richmond* (12 Wall 349) this Court cites with approval the note of Mr. Frere to the case of *Smith* v. *Bromley* (2 Doug. 696), to the effect that a recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiæ;* the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the

cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blameable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a discovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not in express terms forbid a corporation from issuing certificate for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sects. 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for the plaintiff in error that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and that this court ought to consider the questions raised in this case as *res judicata*.

The reply to this suggestion is that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any Court except by the United States Circuit Court for the Northern District of New York, from which it has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

Judgment affirmed.

Mr. Justice HARLAN dissenting (on special ground).

[130 U. S. 396.]

1889.

Gibbs v. Consolidated Gas Company.

* * * * * *

Where particular contracts are inhibited by statute, and if attempted, are in positive terms declared "utterly null and void," such contracts will not be enforced.

Recovery cannot be had for services rendered, or losses incurred, in securing the execution of an illegal agreement, by a party privy to the unlawful design.

The case as stated by the court in its opinion, was as follows :

Plaintiff in error brought this action in the Circuit Court of the United States for the District of Maryland against the defendant in error, "a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff," as stated in the "bill of particulars of plaintiff's claim," "for services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas Light Co. of Balto. City, between July 1st, 1884, and November 1st, 1884, $50,000 ;" and a trial was had upon the general issue pleaded, resulting in verdict and judgment for the defendant, May 14, 1885.

* * * * * *

Mr. Chief Justice Fuller delivered the opinion of the Court :

* * * * * *

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law corporations formed merely

for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity generally of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the State as well as restrained the particular corporation.

The distinction between malum in se and malum prohibitum has long since been exploded and as "There can be no civil right "where there can be no legal remedy and "there can be no legal remedy for that "which is itself illegal" *(Bank of U. S.* v. *Owens*, 2 Pet. 527, 539) **it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced.**

The question is not one involving want of authority to contract on account of irregularity of organization or lack of an affirmative grant of power in the charter of a corporation, but a question of the absolute want

of power to do that which is inhibited by statute and if attempted is in positive terms declared "utterly null and void." "The rule of law" said PARKER *Ch. J.* in *Russell* v. *De Grand*, 15 Mass. 35-39, "is of "universal operation that none shall by the aid of the "Court of Justice obtain the fruits of an unlawful "bargain."

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done and the judgment must be affirmed.

[145 U. S. 393.]

St. Louis, Vandalia and Terre Haute R. R. Co. v. Terre Haute and Indianapolis R. R. Co.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

No. 42. Argued April 24, 27, 28, 1891.—Decided May 16, 1892.

The statute of Illinois of February 12, 1855, empowering all railroad corporations incorporated under the laws of the State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads," authorizes a railroad corporation of Illinois to make a a lease of its road to a railroad corporation of another State; but confers no power on a railroad corporation of the other State to take such a lease, if not authorized to do so by the laws of its own State.

A railroad corporation of Indiana is not empowered to take a lease of a railroad in another State by the statute of Indiana of February 23, 1853, c. 85, authorizing any railroad corporation of that State to unite its railroad with a railroad constructed in an adjoining State, and to consolidate the stock of the two companies; or to extend its road into another State; or "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper."

A lease for nine hundred and ninety-nine years by one railroad corporation of its railroad and franchise to another railroad corporation, which is *ultra vires* of one or of both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract.

This was a bill in equity, filed July 6, 1887, by the St. Louis, Vandalia and Terre Haute Railroad Com-

pany, a corporation of Illinois, against the Terre Haute and Indianapolis Railroad Company, a corporation of Indiana, to set aside and cancel a conveyance to the plaintiff's railroad and franchises to the defendant for a term of nine-hundred and ninety-nine years.

The bill contained the following allegations:

That the plaintiff was incorporated by a statute of Illinois of February 10, 1865, amended by a statute of February 8, 1867, to construct and maintain a railroad from the left bank of the Mississippi River opposite St. Louis eastward through the State of Illinois to a point on the Wabash River, convenient for extending its road to Terre Haute in the State of Indiana; and was not authorized by its charter, or by any law of Illinois, to lease its railroad, or by any other contract or conveyance to part with the entire possession, control and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight, indefinitely or for any fixed period of time.

That the defendant was incorporated by a statute of Indiana of January 26, 1847, amended by a statute of March 6, 1865, to construct and maintain a railroad from some point on the western line of the State of Indiana eastward through Terre Haute to Indianapolis; and was not authorized by its charter, or by any law of Indiana, to make or accept any lease, contract or other conveyance by which it should acquire or obtain, either indefinitely or for a fixed time, the ownership, management or control of any railroad located beyond the limits of Indiana.

That the plaintiff proceeded to construct, and on or about July 1, 1870, completed the construction and equipment or its road; that in order to obtain money for this purpose, on April 6, 1867, it executed a mortgage or deed of trust of all its railroad, property and franchises, to secure the payment of bonds amounting

to $1,900,000, and agreeing to set apart annually from its earnings the sum of $20,000, as a sinking fund for payment of the bonds; that on March 13, 1868, it executed a second mortgage to secure the payment of additional bonds to the amount of $2,600,000; that all the bonds aforesaid were sold, and outstanding and unpaid; and that no sinking fund had been created, as provided for in the first mortgage.

That on February 10, 1868, the plaintiff and the defendant executed a pretended lease, (set forth in the bill, and copies in the margin,) of the plaintiff's railroad, property and franchises to the defendant for nine hundred and ninety-nine years, the defendant retaining sixty-five per cent of the gross receipts, and the rest to be applied to the payment of interest on the mortgage bonds, and any surplus paid to the plaintiff.

That on January 12, 1869, the plaintiff's board of directors passed a resolution, undertaking to authorize its president to change the terms of said lease so that the defendant should be allowed seventy, instead of sixty-five per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all such excess shall be paid over to" the plaintiff.

That by a statute of Illinois of February 16, 1865, in force at the time of the execution and delivery of the pretended lease, it was not lawful for any railroad company of Illinois, or its directors, to consolidate its railroad with any railroad out of the State, or to lease its railroad to any railroad company out of the State, or to lease any railroad out of the State, without the written consent of all its stockholders residing within the State; and that fifty-nine of the plaintiff's stockholders residing in Illinois never consented to or ratified the lease.

That, on the completion of the plaintiff's road, the defendant took possession of and had ever since operated it, and had received, in tolls and otherwise,

more than $21,600,000; that the pretended lease was void, for want of lawful power in either party to enter into it; that the defendant by taking possession of the plaintiff's railroad and property without right, became in equity a trustee of the plaintiff, and liable to account to it for the property and for all tolls and emoluments which the defendant had, or ought to have, collected and received therefrom, and to restore the property to the plaintiff; that the defendant had refused, though requested, to turn over to the plaintiff the road and property, or the income thereof, and had thus rendered the plaintiff unable to establish a sinking fund, as required by the first mortgage; and that great and irreparable injury would be done to the plaintiff and its stockholders unless it was restored to the possession and control of the railroad, property and franchises.

That at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so; but that it had recently been advised by counsel that it had no such power, that it was its duty at once to repudiate this pretended lease and to resume the possession, control and use of its property and franchises, and that it had rendered itself liable to have its charter forfeited by the State; that the present income was more than sufficient to pay the interest on the bonds and to establish a sinking fund; and that, by reason of the failure to establish a sinking fund, proceedings might at any time be instituted to foreclose the first mortgage.

That the taking of long and complicated accounts, covering a period of nearly seventeen years and involving a great many items, was necessary for the protection and enforcement of the plaintiff's right; that the pretended lease was a cloud on the plaintiff's title; that a court of law had no jurisdiction adequate to take the account or to cancel the lease; and that the defendant was daily withdrawing large sums of money from the jurisdiction of the court to the irreparable injury of the plaintiff.

The bill, as originally framed, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property; or, if the lease should be held valid, for an account of the sums due under the lease; and for further relief.

The defendant demurred to the bill, for want of equity, for laches, for multifariousness, and because the plaintiff had an adequate remedy at law. The Circuit Court sustained the demurrer on all these grounds, as stated in its opinion reported in 33 Fed. Rep. 440. The plaintiff thereupon, by leave of court, amended the bill, by striking out the prayer for alternative relief in case the lease should be held valid. The defendant demurred to the amended bill on the same grounds as before, except multifariousness. The court, delivering no further opinion, sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant, for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both the parties.

The contract, dated February 10, 1868, recites that the plaintiff is a corporation of Illinois, and the defendant a corporation of Indiana; that their railroads connect at the line between the two States; that it is desirable that the two roads should be operated by the defendant as one road; and that the defendant has

"proposed to lease and operate" the plaintiff's road for a period of nine hundred and ninety-nine years.

"It is therefore agreed" that, upon the completion of the plaintiff's road to the state line, the defendant "shall take charge of and operate the same with its equipment" for that period, and "shall be allowed sixty-five per cent of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses," and shall appropriate the rest of such receipts to the payment of interest on the plaintiff's mortgage bonds, and pay any surplus to the plaintiff for the benefit of its stockholders. Within a year afterwards, the contract was modified by providing that the defendant should be allowed seventy (instead of sixty-five) per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all of such excess shall be paid over to the" plaintiff. It is further agreed in the contract that the defendant "shall enjoy all the rights, powers and privileges of the" plaintiff, "so far as the same may be needful to maintain and operate said railroad," and may "impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the" plaintiff "could do if operating said line."

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privileges and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the State which created it, and which, if beyond the scope of the lawful powers

of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.

By the statute of Illinois of February 12, 1855, all railroad companies incorporated under the laws of the State were empowered to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof." Illinois Private Laws of 1855, p. 304; Rev. Stat. of 1874, c. 114, Sec. 34. By the grammatical and the natural construction, the words "their roads" include roads of Illinois corporations, as well as roads of corporations of other States, and the power conferred on corporations of Illinois to make contracts "for leasing" such roads includes making, as well as taking, leases thereof. Such was the opinion expressed in the case just cited, at page 309, and we see no reason for departing from it.

The plaintiff relies on the statute of Illinois of February 16, 1865, (in force at the date of this contract, but since repealed by the Revised Statutes of 1874), by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or

lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void"; and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois." Illinois Public Laws of 1865, p. 102.

Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny. *Zabriskie v. Cleveland &c. Railroad*, 23 How., 381, 398; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S., 24, 42, 60; *Davis v. Old Colony Railroad*, 131 Mass., 258, 260; *Beecher v. Marquette & Pacific Co.*, 45 Michigan, 103; *Thomas v. Citizens' Railway*, 104 Illinois, 462.

The decision of the Supreme Court of Illinois in *Archer v. Terre Haute & Indianapolis Railroad*, 102 Illinois, 493, cited by each party at the argument, does not appear to have any important bearing upon this case. The point there decided was that the contract now in question, not being satisfactorily proved in that case to have been either assented to or ratified by the stockholders residing in Illinois, had no effect, as a lease, to convey title to the defendant, and could be sustained, if at all, only as a contract for the connection of the two railroads, and, in either aspect, did not confer on the defendant any right to maintain a bill in equity against collectors of taxes to restrain the collection of taxes assessed to the present plaintiff. Upon questions discussed in the opinion and not necessary

to the judgment, or not considered at all, the case cannot be regarded as a decision, because, as observed by Mr. Justice CURTIS, speaking for this court, "to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties." *Carroll v. Carroll*, 16 How. 275, 287.

It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff, because, as is established by the decision of this court, already cited, a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both, and the contract now in question was clearly beyond the corporate powers of the defendant.

The case in this respect is governed by the direct adjudication of this court in the case of *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited, which was much considered, both upon argument at the bar, and upon petition for a rehearing. The only differences between that case and this are that the contract in that case was for ninety-nine years, whereas in this it is for nine hundred years more; that the rent is computed in a different way, which does not alter the nature and effect of the transaction; and that in that case the two roads did not connect at the state line, but a few miles east of it, which was held to be immaterial. 118 U. S. 295–297.

The plaintiff in that case, like the defendant in this, sought to support the validity of the contract under the statute of Indiana of February 23, 1853, c. 85, of which section 1 authorized any railroad company of Indiana "to intersect, join and unite its railroad with any other railroad" constructed in an adjoining State, at any point on the state line or elsewhere to which the charters of the two companies authorized their roads to go, and to consolidate the stock of the two companies; section 2 authorized any railroad company of Indiana whose road went to the state line "to

extend its said railroad into or through any other State," under such regulations as might be prescribed by the laws thereof; and section 3 authorized any railroad company of Indiana, whose road met and connected at the state line with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper." Indiana Rev. Stats. of 1881, Secs. 3971–3973.

At the argument of that case, indeed, the third section, being the one affording the most plausible ground, was principally relied on, and was the only section of this statute discussed in the original opinion. 118 U. S. 312. But in that opinion reference was made to *Tippecanoe Commissioners v. Lafayette &c. Railroad*, in which the Supreme Court of Indiana held that this statute did not authorize one railroad corporation to lease its railroad to another with a right of perpetual renewal, and said: "To connect one road with another does not fairly mean to sell or lease it to another." 50 Indiana, 85, 110; 118 U. S. 312. And upon the petition for rehearing all three sections of the statute in question, as well as other statutes of Indiana, were cited by counsel, and examined by the court, although its conclusions were briefly stated, according to its usage in an opinion delivered on a petition for rehearing. 118 U. S. 633, 634.

It is argued for the defendant that this suit is distinguished from the former one in being brought, not, as that was, in Indiana, but in Illinois, and must therefore be controlled by the law and policy of Illinois; and it is contended that the statute of Illinois of 1855, above cited, empowered the defendant, though an Indiana corporation, to take a lease of a railroad in Illinois. But such a suit as this is governed, so far as regards the validity of the contract, not by the law of the forum, but by the law of the contract; and the statute of Illinois was manifestly intended to confer power on domestic corporations only, leaving the pow-

ers of corporations incorporated elsewhere to be determined by the laws by and under which they were incorporated, even if a State could confer on a foreign corporation powers which it did not have by the laws of its own State. *Canada Southern Railway v. Gebhard*, 109 U. S. 527, 537; *Christian Union v. Yount*, 101 U. S. 362; *Starkweather v. American Bible Society*, 72 Illinois, 50; *Santa Clara Academy v. Sullivan*, 116 Illinois, 375, 385.

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy* v. *Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co.* v. *Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co.* v. *St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co.* v. *Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway* v. *Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokage bonds, as in *Drury* v. *Hooke*, 1 Vernon, 412, and *Smith* v. *Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith* v. *Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service as in *Morris* v. *McCullock*, Ambler 433; S. C. 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the

relief was given to the public through the party. *Debenham* v. *Ox*, 1 Ves. Sen. 276; *St. John* v. *St. John*, 11 Ves. 526, 536; *Cone* v. *Russell*, 3 Dickinson (48 N. J. Eq.) 208. But Sir WILLIAM GRANT explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. *Osborne* v. *Williams*, 18 Ves. 379, 382. And *Morris* v. *McCullock*, can hardly be reconciled with his decision in *Thomson* v. *Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall., 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are in pari delicto, remains executory, its validity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. Story Eq. Jur. § 700*a*, and cases cited; *Simpson* v. *Howden*, 3 Myl. & Cr. 97; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or

by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back by law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester* v. *Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood* v. *Fisk*, 101 Mass. 363; *Bryant* v. *Peck & Whipple Co.*, 154 Mass. 460; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Jones* v. *Merionethshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position.

In either aspect of the case, the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by

the actual transfer of its railroad and franchise to the dfeendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interest, it and they were bared by laches.

Harwood v. *Railroad Co.*, 17 Wall. 78; *Graham* v. *Birkenhead &c. Railway*, 2 Hall. & Twells, 450, s. c. 2 Macn. & Gord. 146; *Ffooks* v. *Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory* v. *Pachett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain.

Spring Co. v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller, in a case often cited in this opinion, the court will not disturb the possession of the property that had passed under the contract, but will refuse to interfere as the matter stands.

Pennsylvania Railroad v. *St. Louis*; *Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

[139 U. S. 24.]

Central Transportation Company vs. Pullman's Palace Car Co.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 379. Argued January 28-29, 1890,—Decided March 2, 1891.

A statute of a state, which authorizes the judge presiding at the trial to order a judgment of nonsuit to be entered, when in his opinion the evidence introduced by the plaintiff is insufficient in matter of law to sustain a verdict, may be followed, under Rev. Stat. Sec. 914, in the Circuit Court of the United States held within that state; and a judgment of nonsuit rendered accordingly, upon a ruling in matter of law duly excepted to, may be reviewed by this court on writ of error.

A corporation, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by a special act of the Legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." The corporation forthwith entered into an indenture with a corporation of another state engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner, and covenanted not to "engage in the business of manufactur-

ing, using or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of $264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. *Held*, That this contract was unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract.

This was an action of covenant, brought September 21, 1886, by the Central Transportation Company, a corporation of Pennsylvania, against Pullman's Palace Car Company, a corporation of Illinois, to recover the sum of $198,000, due for the last three quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration.

The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation." The plaintiff filed a replication, traversing the averments of this plea. * * *

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.

The Circuit Court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the Supreme Court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." Penn. Stats. March 11, 1836, c. 34, Sec. 7; March 11, 1875, c. 8; 2 Purdon's Digest (11th ed.) 1362, 1363.

Under that statute, as expounded by Chief Justice GIBSON, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & Sergeant, 14; *Fleming v. Insurance Co.*, Brightly, 102; *Bournonville v. Goodall*, 10 Penn. St. 133.

It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *United States v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q.

B., 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83; S. C. 5 Scott, 346; 6 Dowling, 238; *Voorhees v. Coombs*, 4 Vroom, 482.

There are many cases in the books, in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice FIELD, delivering a recent opinion of this court, "rather a matter of form than of substance, except (that) in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264.

Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defence that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of Congress of June 1, 1872, c. 255, Sec. 5, (17 Stat. 197,) reenacted in Sec. 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the State within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Co. peti-*

tioner, 128 U. S. 544; *Glenn v. Sumner*, 132 U. S. 152, 156.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon.

But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires*, independently of the form in which that question was presented and disposed of.

Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered by Justice MILLER, afford satisfactory guides and ample illustrations.

The earliest case in this court, which touches the subject, is *York v. Maryland Railroad v. Winans*, decided at December term, 1854, in which a railroad corporation unsuccessfully tried to escape liability for an unlicensed use of the plaintiff's patent in cars run over its road, upon the ground that the cars were constructed, owned and used by another corporation under a contract with the defendant. Mr. Justice CAMPBELL delivering judgment said; "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate manage-

ment and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a renumeration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature." 17 How. 30, 39.

In *Pearce v. Madison & Indianapolis Railroad*, at December term, 1858, it was adjudged that two corporations, chartered by the State of Indiana to construct and manage distinct, though connecting railroads, had no power to consolidate themselves into one corporation, or to establish a connecting steamboat line on the Ohio River, and therefore were not liable to be sued upon a promissory note which they had given in payment for a steamboat. The same justice, in delivering the opinion of the court, stated the reasons for the decision as follows: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and

the public have an interest that neither the managers nor stockholders of the corporations shall transcend their authority." 21 How. 441–443.

In *Zabriskie v. Cleveland &c. Railroad*, at December term, 1859, this court, again speaking by the same justice, while affirming and acting on the principle that a corporation may be bound by the conduct and representations of its directors in "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard," took the precaution to observe: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court." 23 How. 381, 398.

In *Thomas v. Railroad Co.*, 101 U. S. 71, decided at October term, 1879, it was adjudged that a lease for twenty years by a railroad corporation of its railroad, rolling stock and franchises, in consideration of being paid one half of the gross sums collected from the operation of the road by the lessees during the term, and reserving to the lessor a right to terminate the lease and retake possession of the road at any time, paying to the lessees the value of the unexpired term, was void; and that the corporation upon terminating the lease and resuming possession when the lessees had been in possession five years, and the accounts of the parties for those years having been adjusted and paid, was not liable to an action by the lessees to recover the value of the unexpired term; and Mr. Justice MILLER, in the course of delivering judgment, said:

"The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at

any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce, merchandise, freight or passengers, and to enforce the fulfilment of such contracts.' This is no more than saying 'you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods, received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease or transfer to others the entire road, and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies." 101 U. S. 80. "The authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals." 101 U. S. 81.

"The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as such granted as what is expressed, it remains, that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." 101 U. S. 82.

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very

clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." 101 U. S. 83.

It was also held in that case that the lease was not made valid by a subsequent act of the legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad;" the Court saying: "It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." 101 U. S. 85.

In *Branch v. Jesup*, Mr. Justice BRADLEY delivering judgment said: "Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them." And a lease from one railroad

corporation to another was upheld in that case, only because the lessor had by its charter express authority not only to purchase, hold and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company, which, it was observed, "contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply." 106 U. S. 468, 478, 479.

In *Pennsylvania Railroad v. St. Louis &c. Railroad*, the same principles were reaffirmed; and the court, again speaking by Mr. Justice MILLER, after referring to some of the previous decisions on the subject in this and other courts, stated, "as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchise and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In that case it was held that a lease for ninety-nine years of a railroad in Illinois and Indiana from a railroad corporation of Illinois to a railroad corporation of Indiana, whose road connected with the road leased, was within the authority conferred on the lessor by

the statute of Illinois, which empowered all railroad corporations of that State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof;" yet was unlawful and void, because beyond the authority conferred upon the lessee by the statute of Indiana, empowering any railroad corporation of that State, whose road connected with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper;" the court saying that it could not "see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk." 118 U. S. 290, 309, 312, 630.

In another case, decided about the same time, the same justice, in delivering an opinion by which a corporation was held to be liable for a tort done by its agents in the course of its business and of their employment, although in excess of its powers, observed: "The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Salt Lake City v. Hollister*, 118 U. S. 256, 263.

In *Willamette Co. v. Bank of British Columbia*, 119 U. S. 191, cited for the plaintiff, a corporation char-

tered "for the purpose of creating and improving water power and privileges," and authorized to bring water from a river, was also expressly authorized by its charter to "use, rent or sell" "the exclusive right to the hydraulic power and privileges created by the water" so taken, and for that reason only was held by this court, speaking by the same justice, to have the power to mortgage such right, power and privileges.

In *Green Bay & Minnesota Railroad v. Union Steamboat Co.*, 107 U. S. 98, and in *Pittsburgh &c. Railway v. Keokuk & Hamilton Bridge*, 131 U. S. 371, 384, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steamboat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power.

In *Oregon Railway v. Oregonian Railway*, 130 U. S., 1, it was held that a general law of Oregon, authorizing companies to organize themselves by written articles of association filed with the Secretary of State for "any lawful enterprise, business, pursuit or occupation" specified in the articles, including "making or constructing any railroad," and "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad corporation to be incorporated, either for leasing its railroad to another corporation, or for taking leases from other corporations of their roads, although these objects were included in its articles of association; and therefore that, without further and express authority from the legitsature, a lease of ninety-six years from one railroad corporation of its whole road and franchises to another such corporation was utterly

void, and would not sustain an action by the lessor against the lessee to recover the rent stipulated in the lease.

It was also held in that case, in accordance with the decision in *Thomas v. Railroad Co.*, that no authority to make such a lease could be implied from a special act passed by the Oregon legislature before the lease, granting to the plaintiff corporation rights, privileges and easements, for wharves, stations and tracks, in certain public grounds and streets; with a proviso that said corporation "or its assigns" should have no power to sell, convey or assign the rights so granted to any person or corporation, save only with and as part of its railway; and the reasons for so holding appear in the following extracts from the opinion of the court, delivered by Mr. Justice MILLER:

"One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified." 130 U. S. 30.

"The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of terminal facilities, as they are called, with the right to wharves, depots and access to the river for the use of the road, should

never be separated by sale, assignment or otherwise from the road itself, and that into whosesoever hands the road went should also go the rights, powers and privileges conveyed by the grant." 130 U. S. 32.

It was further held that a provision of the general laws of Oregon, authorizing any corporation, by a vote of a majority of its stockholders, to dissolve itself, and thereupon to settle its business, dispose of its property and divide its capital stock, did not confer upon it any authority, while continuing in existence, to dispose of by conveyance or lease its road and its corporate powers and franchises. 130 U. S., 34, 35.

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds; the obligations of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchises to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee: and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544–548; *Dubuque & Pacific Railroad v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Railway v. Oregonian Railway*, 130 U. S. 26, 27.

In the case at bar, the plaintiff was originally incorporated for twenty years from December 26, 1862, with a capital stock of $200,000, by articles of association, called a certificate or charter, under general laws of Pennsylvania. It is not without significance, that those laws required its stock, property and affairs to be managed by a board of directors, a majority of whom should be stockholders therein, and citizens of the State; and forbade it to use any part of its capital stock in the purchase of stock of any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in the charter, was "the transportation of passengers

in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting those cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property."

The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil Co.*, 66 Penn. St. 375; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars con-

structed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pichard v. Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

The evideat purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute.

The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring, its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only

goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.

By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent rights under which other cars might be constructed, and all other personal property, moneys, credits and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent rights must have expired, the indenture is still to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty, for which it had been chartered, of transporting passengers and making and letting cars to transport them in; but it undertakes to transfer, for ninety-nine years, nearly coextensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation, the stipulated rent or compensation, and of making dividends out of the moneys so received.

Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts,

and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable.

A covenant by the assignor of letters patent for an invention, that he will not himself make, use or sell the patented article, is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole. Rev. Stat. Secs. 4884, 4898; *Gayler v. Wilder*, 10 How. 477, 494; *More Co. v. Morse*, 103 Mass., 73. But this plaintiff's transfer and covenant, as we have seen, cover much more than patent rights, and are to continue in force long after the patent rights assigned must have expired.

Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used. *Fowle v.*

Park, 131 U. S. 88, 97; *Vickery v. Welch*, 19 Pick. 523, 527; *Peabody v. Norfolk*, 98 Mass. 452, 460.

A contract of a carrier, whether an individual or a corporation, not to carry passengers or goods over a particular route, may be reasonable and valid. *Peirce v. Fuller*, 8 Mass. 223; *Palmer v. Stebbins*, 3 Pick. 188; *Leslie v. Lorillard*, 110 N. Y., 519. But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for ninety-nine years, is clearly unreasonable and void. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Baltimore Gas Co.* 130 U. S. 396, 408-410.

This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as compactly and forcibly stated by Mr. Justice MORTON in the leading case of *Alger v. Thacher:* "They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market." 19 Pick. 51, 54.

But this objection, as applied to the facts of this case, so closely connects itself with the objection more distinctly pleaded, and already discussed at length, that it requires no further separate consideration.

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant, because, in order to bind either party, it must be within the corporate powers of both. *Thomas v. Railroad Co.*, *Pennsylvania Railroad v. St. Louis &c. Railroad*, and *Oregon Railway v. Oregonian Railway*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy yet, that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defence to this action to recover the compensation agreed on for that period.

But this argument, though sustained by decisions in some of the states finds no support in the judgments of this court.

The passages cited by the plaintiff from *Railway Co. v. McCarthy*, 96 U. S. 258, 267, and *San Antonio v. Mehaffy*, 96 U. S. 312, 315, are no more than a passing remark that "the doctrine of *ultra vires* when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong," and a repetition in substance, of the same remark, adding "if such a result can be avoided".

In *Thomas v. Railroad Co.*, already cited, Mr. Justice MILLER, while admitting in general terms that "in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred", and that "the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it", yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract of the earliest moment and the performance of that duty, though delayed for several years was a rightful act when done, and could give the other party

no right of action; and that to hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." 101 U. S. 86.

In an earlier part of the same opinion and again in *Oregon Railway v. Oregonian Railway*, he referred with approval to the decision of the House of Lords in *Asbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, by which, as he observed, "the broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." 101 U. S. 83; 130 U. S. 22.

In **Union Trust Co. v. Illinois Midland Co.** 117 U. S. 434, *after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly.* **It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line; and this court, as declared in its opinion delivered by Mr. Justice Blatchford, rested this conclusion "on the principle that nonaction on the part of the bondholders and their trustee which allowed the court and the receivers to go on during the entire litigation contracting debts in respect to the**

whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests, as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amount to such acquiesence as should operate as an ESTOPPEL." (117 U. S. 467-469). The court, in that case, in no way maintained any suit on the contract supposed to be unlawful but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection it had been acted upon as valid throughout a long course of judicial proceedings.

The distinction is clearly brought out in **Pennsylvania Railroad v. St. Louis, &c., Railroad,** above cited, in which it was argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession and control by the defendants of the plaintiff's road and franchise that they could not now be permitted to repudiate or abandon it; and that **the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract.** In answering that objection, Mr. Justice MILLER speaking for the court, said: **"Undoubtedly there are such decisions in courts of high authority and there is such a principle, very sound in its application to appropriate cases.** But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and

that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor as on a *quantum meruit*, for the use of its road, was not decided, because not presented. 118 U. S. 316–18.

In *Salt Lake City v. Hollister*, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." 118 U. S. 263.

The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice MILLER in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received.

Thus, in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its powers to issue, it was decided that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract, Mr. Justice STRONG, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not

authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all.

So in *Louisiana v. Wood*, 102 U. S. 294, 299, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its recept of the money, Chief Justice WAITE saying: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending and consequently no express contrict to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersbury v. Brown*, 106 U. S. 487, 503, where individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed, in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and demand an account of the city; and Mr. Justice BLATCHFORD, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Brien's [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal

contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a cantract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

The case of *Chapman* v. *Douglas County*, in which the opinion was delivered by Mr. Justice MATTHEWS, is to the same effect. 107 U. S. 348, 355 & *seq.*

In Pittsburgh &c. Railway v. *Keokuk & Hamilton Bridge*, it was stated, as the result of the previous cases in this court, that " a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows :

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a coporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting

with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been properly performed, and under which prop-

erty has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

Judgment affirmed.

Mr. Justice BROWN, not having been a member of the court when this case was argued, took no part in its decision.

[171 U. S. 138.]

Pullman's Palace Car Company v. Central Transportation Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FROM THE EASTERN DISTRICT OF PENNSYLVANIA; AND ALSO CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 141. Argued March 24, 25, 1898.—Decided May 31, 1898.

By taking an appeal to the Circuit Court of Appeals the Pullman Company did not, under the peculiar circumstances of this case, waive its right to appeal to this court, and the case being now before this court either on appeal or by the writ of *certiorari*, it has jurisdiction.

In order to authorize a denial of a plaintiff's motion to discontinue a suit in equity, there must be some plain legal prejudice to the defendant, other than the mere prospect of future litigation, rendered possible by the discontinuance.

Unless there be an obvious violation of a fundamental rule of a court of equity, or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

The decision of the Circuit Court in denying the motion of the Pullman Company to discontinue its suit was right, as was also its decision permitting the Central Company to file a cross bill.

In no way, and through no channels, directly or indirectly, will courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract; but the right of recovery must rest on a disaffirmance of the contract, and is permitted only because of the desire of courts to do justice, as far as possible to the party who has made payment or delivered property under a void agreement, which in justice he ought to recover, and no recovery will be permitted which will weaken said rule founded upon the principles of public policy.

Acting upon those settled principles the court decides:

(1) That the Central Company is entitled to recover from the Pullman Company the value of the property transferred by it to that company when the lease took effect, with interest, as that property has substantially disappeared, and cannot now be returned;

(2) That the value of that property is not to be ascertained from the market value of the shares of the Central Company's stock at that time, but by the value of the property transferred;

(3) That the value of the contracts with railroad companies transferred by the Central Company form no part of the sum which it is entitled to recover;

(4) That the same principle applies to the patents transferred which had all expired;

(5) That it is not entitled to recover anything for the breaking up of its business by reason of the contracts being adjudged illegal.

The record in this case shows that in 1870 the Central Transportation Company, hereafter called the Central Company, was a corporation which had been in 1862 incorporated under the general manufacturing laws of the State of Pennsylvania. It was engaged in the business of operating railway sleeping cars and of hiring them to railroad companies under written contracts by which the cars were to be used by the railroad companies for the purpose of furnishing sleeping conveniences to travellers. The corporation at this time had contracts with a number of different railroad companies in the East, principally, but not exclusively, with what is known as the Pennsylvania Railroad system, and it had been engaged in its business with those companies for some time prior to 1870. In the year last named the Pullman's Palace Car Company, hereafter called the Pullman Company, was a corporation which had been incorporated under the laws of the State of Illinois. It was doing the same general kind of business in the West that the Central Company was doing in the East. For reasons not material to detail, the two companies entered into an agreement of lease, which was executed February 17, 1870.

By its terms the Central Company leased to the

Pullman Company its entire plant and personal property together with its contracts which it had with railroad companies for the use of its sleeping cars on their road, and also the patents belonging to it. The lease was to run for ninety-nine years, which was the duration of the charter of the Central Company.

It was also agreed that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

In consideration of these various obligations, the Pullman Company agreed to pay annually the sum of $264,000 during the entire term of ninety-nine years, in quarterly payments, the first quarter's payment to be made on the 1st of April, 1870.

From the time of the execution of the contract its terms were carried out, and no particular trouble occurred between the companies for about fifteen years. During this time and up to the 27th day of January, 1885, the Pullman Company paid to the Central Company, as rent under the contract, the sum of $3,960,000, without any computation of interest. About or just prior to January, 1885, differences arose between the companies. The Pullman Company claimed the right to terminate the contract under the eighth clause thereof, or else to pay a much smaller rent. The merits of the controversy are not material.

The two companies not agreeing, and the Pullman Company refusing to pay the rent stipulated for in the lease, the Central Company brought successive actions to recover the instalments of rent accruing. In one of them the Pullman Company pleaded the illegality of the lease, as being *ultra vires* the charter of the Central Company. The plea prevailed in the trial court, and upon the writ of error the judgment upholding this defence was, in March, 1891, sustained in this court. *Central Transportation Company v. Pullman's Car Company*, 139 U. S. 24.

After the bringing of several actions for instalments of rent by the Central Company and before the ques-

tion of *ultra vires* had been argued in this court, the Pullman Company on the 25th day of January, 1887, commenced this suit by the filing of its bill against the Central Company in the Circuit Court of the United States for the Eastern District of Pennsylvania. The bill asked for an injunction to restrain the bringing of more suits for rent. It gave a general history of the transactions between the companies from the execution of the contract between them in February, 1870, down to the time of the filing of the bill, and it alleged the election of the Pullman Company to terminate the lease under the provisions of the eighth clause thereof, and the willingness of the company to pay what should be found by the court to be equitable and right to the Central Company on account of the property which had been transferred by that company to it, and to this end it prayed the aid of the court. * * * *

After considerable proof had been taken upon the issues involved in this suit and after the decision of the other case in this court, in March, 1891, holding the lease illegal and void, the complainant herein, on the 25th of April, 1891, applied to the court for leave to dismiss its bill at its own cost. This application was opposed by the defendant, who, on the same day moved for leave to file a cross-bill, in which it said it would avail itself of the tenders of relief made by the complainant in its bill, and that it would pray such relief in its cross-bill as might be pertinent to the case made by the bill. In December, 1891, complainant's motion for leave to dismiss its bill was denied, and the defendant's motion for leave to file a cross-bill was granted. Thereupon the cross-bill was filed, in which the Central Company acknowledging, under the decision of this court, that the lease in question was void, claimed to avail itself of the tenders made in complainant's bill upon the subject of the return of its property and compensation for that which it was impossible to return, and claimed, among other things, that the Pullman Company should account for all the profits which it had derived since the making of the lease by the use

of the property transferred to it under the agreement, and that the amount found due should be paid to the Central Company, and that the Pullman Company should be adjudged to be a trustee for the Central Company of all the contracts for transportation whether original, new or renewals, held by the Pullman Company with railroad companies with which there were contracts of transportation with the Central Company at the time of the making of the lease in February, 1870, and that the Pullman Company should be adjudged to pay the Central Company all such sums as should be due to it by the Pullman Company as such trustee, and that defendant should in the future from time to time account for the sums which should be due by reason of future operations under those contracts. It also prayed for a discovery and an accounting by the Pullman Company of its use and disposition of the property turned over to it by the Central Company.

To this cross-bill the Pullman Company filed three demurrers. * * * *

The demurrers were overruled with leave to present the questions on final hearing, and the Pullman Company then answered the cross-bill. * * * *

The Pullman Company denied that it owed any duty to the cross-complainant, which was enforceable at law or equity, to return to the Central Company the property assigned under the lease or to account for any profits derived under and by reason of any property delivered to it under the agreement.

Testimony was taken under these pleadings, and the case came before the Circuit Court for final hearing, and that court held that the cross-complainant made out a case for an accounting by the cross-defendant for the value of the property when received, together with its earnings since, less the amount paid as rent. The court, therefore, referred it to a master for the purpose of ascertaining the facts, with directions to report within the time named in the order of reference. Under this order testimony was taken and the master

reported in favor of the Central Company, and the exceptions filed having been overruled, judgment was entered in favor of the Central Company for the sum of $4,235,044, together with costs. From this judgment the Pullman Company appealed directly to this court. * * *

Mr. Edward S. Isham and *Mr. Joseph H. Choate* for appellant. *Mr. A. H. Wintersteen* and *Mr. Robert T. Lincoln* were on their brief.

Mr. Frank P. Pritchard and *Mr. John G. Johnson* for appellee.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the court.

The motion to dismiss the appeal in this case is now before the court.

Counsel for the Pullman Company took the appeal directly from the Circuit Court to this court on the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central Company in its cross-bill was, under the circumstances, a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross-defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the Circuit Court of Appeals, and we think that by this action he did not waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by writ of *certiorari*, and we therefore proceed to determine it it upon the merits.

The Pullman Company, complainant in the original suit, insists that it had the right to discontinue that

suit at its own cost before any decree was obtained therein, and the refusal of the court below to grant an order of discontinuance upon its application is the first ground of objection to the decree herein.

The general proposition is true that a complainant in an equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *Detroit v. Detroit City Railroad Company*, in an opinion by the Circuit Judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in *Chicago & Alton Railroad v. Union Rolling Mill Co.*, 109 U. S. 702.

From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens v. The Railroads*, 4 Fed. Rep. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

Upon an examination of the facts relating to the motion, we think the Circuit Court was right, in the exercise of its discretion, in denying the same. The original bill was framed really on two theories: One, that by reason of an election made under the eighth clause in the lease, the Pullman Company had terminated the lease, and it was therefore bound under its provisions to return the property which it had re-

ceived from the Central Company. It stated in its bill the impossibility of returning a large portion of the property which it had received ; it announced its willingness to make substantial performance of its contract contained in the lease, and it asked the court to aid it therein by decreeing exactly what it should do for the purpose of carrying out equitably and fairly its obligations incident to its termination of the lease, under the clause above mentioned. The other theory rested upon what was a substantial allegation of the invalidity of the lease as having been made without authority of law, and therefore in violation of the corporate duties of the Central Company, and on that account not enforceable against the Pullman Company beyond the obligation of the latter company to make return of just compensation for the property demised. Upon that theory the bill asked, not that the court should set aside or cancel the lease, but that it should aid the parties by decreeing just what relief should be given by the complainant to the lessor in the execution of its duty to make some compensation for the property it received and which it stated its willingness to make, and to that end, than an accounting might be had and the amount ascertained that should be paid to the Central Company in discharge of the obligations of the complainant in that behalf. Thus the Pullman Company came into a court of equity and in substance alleged that the lease had been terminated by it under the eighth clause, and it also alleged that the lease was void as *ultra vires*, and in either event it tendered such relief as the court might think was proper and fair under the circumstances.

A large amount of proof had been taken under the issues made in this original bill and the answer thereto, and before the case was concluded the decision of this court was made in which the lease was declared to be void. The only obligation left under the original bill of complainant after the decision of this court was the obligation to return such portion of

the property received by it as the court should determine to be right, or to make some compensation to the Central Company for the same. And this obligation it had offered in the original bill to carry out.

The Pullman Company had also obtained an injunction in the original suit, restraining the Central Company from commencing further legal proceedings to recover rent under the lease, and after obtaining this injunction and taking the testimony relating to the subject-matter of the original bill, the complainant should not be permitted under these circumstances to dismiss that bill and thus withdraw the whole case from the jurisdiction of the court, and thereby blot out its tenders of relief contained in its original bill grounded, among others, upon the allegation that the lease was void, and asking the aid of the court to decree the precise terms upon which its obligations to the Central Company might be fulfilled.

The denial of the motion was made in connection with the application of the Central Company to file a cross-bill in which it would seek to avail itself of the tenders made by the Pullman Company in the original bill. Such an application for leave to file a cross-bill seeking affirmative relief while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for the exercise of the discretion of the court in refusing to grant the application for leave to discontinue. We think there was no error committed by the court below in refusing the leave asked for.

The further objection is made by the counsel for the Pullman Company that it was error to allow the cross-bill to be filed in this case. Counsel for the Pullman Company assert that the cause of action for a return of the property is a purely legal one of which a court of equity has no jurisdiction, and that it can acquire none simply by the filing of a cross-bill. Whatever may be the original character of the liability of the Pullman Company to return or make compensation for the property, we are of opinion that under the facts

above set forth it cannot object to the filing of the cross-bill, or to the determination of the amount of its liability by a court of equity. It had itself voluntarily appealed to the jurisdiction of such a court for the purpose of obtaining its aid in decreeing the terms upon which its obligations to the Central Company might be fulfilled and the lease terminated, either under the eighth clause in the lease or because of its invalidity as being *ultra vires*. Having thus appealed to equity for its aid and the lease having been conclusively determined to have been void, we think it was within the fair discretion of the court to retain jurisdiction of the cause and of the original complainant, and to permit the filing of a cross-bill in which the cross-complainant might seek affirmative relief, and at the same time avail itself of the tenders made by the complainant in its original bill.

The facts which were set up in the cross-bill closely affected one of the theories upon which the original bill was filed, viz., the invalidity of the lease. They were relevant to the matters in issue in the original suit, and in seeking affirmative relief the cross-complainant is but amplifying and making clearer the foundations for the intervention of equity which had been appealed to by the Pullman Company, and the continued intervention of which would greatly speed a final termination of all matters for litigation between the parties. The court below did not err in permitting the cross-bill to be filed.

This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24. The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable

restraint of trade, and therefore contrary to public policy. In making the lease the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defence to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the States, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different States have allowed a recovery in such cases, among the latest of which is the case of *Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24, where Chief Judge ANDREWS of the Court of Appeals examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.),

"the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm the unlawful contract."

And the opinion of the Court ended with the statement that

"Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new, but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowper, 341, decided in 1775, that "the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon

the subject. (*Coppell v. Hall*, 7 Wall. 542; *Spring Company v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67; *St. Louis &c. Railroad Company v. Terre Haute &c. Railroad Company*, 145 U. S. 393, at 408, 409; *Manchester & Lawrence Railroad Company v. Concord Railroad Company*, 66 N. H. 100; *White v. Franklin Bank*, 22 Pick, 181; *Utica Insurance Company v. Cadwell*, 3 Wend. 296; *Atcheson v. Mallon*, 43 N. Y. 147; *Leonard v. Poole*, 114 N. Y. 371; *Snell v. Dwight*, 120 Mass. 9; *Davis v. Old Colony Railroad*, 131 Mass. 258; *Holt v. Green*, 73 Penn. St. 198; *Johnson v. Hulins*, 103 Penn. St. 498; *Thomson v. Thompon*, 7 Ves. 470; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *Brooks v. Martin*, 2 Wall. 70.

They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.

We may now examine the record herein and learn the grounds for the recovery which has been permitted, and determine therefrom whether the judgment in favor of the Central Company should be in all things affirmed, or if not, then how far the liability of the cross-defendant extends, and, if possible, what should be the amount of the judgment against it.

In referring the case to the master for the purpose of taking the account between the parties the learned District Judge stated the principle upon which the liability of the cross-defendant rested. He said:

"The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value the annual rental may be considered, but it does not afford a conclusive nor an entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business and its earnings at the time they passed into plaintiff's hands and subsequently. It is not their value to the plaintiff we want, but to the defendant; in effect, what is lost by parting with them. The value of both property and earnings may have been worth more to the plaintiff with the business united but this cannot be considered."

Acting under these directions of the court, the master in his opinion said:

"Passing to the consideration of the main question raised in the present reference, viz., what the Central Transportation Company lost by the transfer of its property to the Pullman Company, the measure of damages as determined by the court requires the master to ascertain.

"(1.) What was the value to the Central Transportation Company in 1870 of the property transferred?

"(2.) What was earned by the Pullman Company between January 1, 1870, and January 1, 1885, from the use of the property transferred?

"(3.) The difference between the amount so received by the Pullman Company and the rental paid by it to the Central Transportation Company for the above period.

"(4.) The total amount to be paid by the Pullman

Company, as of January 1, 1885, deduced as above, together with interest thereon from January 1, 1885, to date or final decree."

The master proceeded to determine the value in 1870 of the property then transferred. In ascertaining it he said:

"The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value."

He accordingly reported the value of the property when received at $58 a share, (the par value being $50 per share or a total par value of $2,200,000,) making the total market value of the shares $2,552,000, which sum he reported as the value of the property transferred.

When the report came before the court, exceptions having been taken, among other things, to the findings of the value of the property when delivered, the court said:

"It is the value of the property at the time it should have been returned that the Pullman Company should be charged with. Inasmuch as this value would be difficult of ascertainment by the transportation company except by reference to the value in 1870, it was considered proper to direct the inquiry to the latter date. Presumably the value increased; the evidence fully justifies the presumption. If it decreased, the Pullman Company could and should have shown it. The master's valuation in 1870 is therefore to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement, treating the value of the use and the rents paid prior to that date as balancing each other. A decree may be prepared accordingly, dismissing the exceptions and confirming the report."

Judgment based upon the value of the property at $2,552,000 on the 1st of January, 1885, with interest

from that time was therefore entered and it amounted, as stated, to the sum of $4,235,044.

We are of opinion that the court erred in the manner of ascertaining the value of the property transferred by the Central Company. The market value of its stock was not a proper measure of the value of the property and such error resulted in largely increasing the supposed value of the property which the cross-defendant was under liability to account for.

The capital stock of this corporation had been increased from an original amount of $200,000 in 1862 to $2,200,000 in 1870. During this time it had been doing an increasing and a profitable business, and it was supposed that such business might increase in the future. The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross-defendant. Whatever that something may be it is not that kind of property which was delivered or that can be returned or compensation made in lieu of its return. It is not property at all within the meaning of the word as understood in such a case as this. The value of the franchise for one thing enters into the computation of market value, This was, of course, not assigned to the Pullman Company, nor were the shares of the capital stock of the Central Company, all of which remained in the hands of its original owners. The probable prospective capacity for earnings also enters largely into market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views. A liability to return or make compensation for property received

cannot be properly extended so as to include other considerations than those of the actual value of that property.

In this particular case a consideration entering into the market value of the shares must have been the probability or possibility of renewals of the contracts owned by the company for the use of its cars upon the railroads of the companies with which it had such contracts and the possibility of extending its business in the future under contracts with other railroads. These considerations, while they effect more or less the value in the market of the shares of a corporation, do not constitute the value of the property which a party impliedly promises to pay for upon the agreement being determined void under which the property was received. The faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity of the company to make future earnings, may be well or ill founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock. The capacity to make any future earnings in this case by the lessee arose out of the transfer of the property to it and grew out of the lease itself, and that capacity would therefore be partly founded upon the illegal contract and could not otherwise exist.

As the market value of the shares of this stock was made up to some extent, at least, of certain factors which the lessee cannot, under the rules of law, be held responsible for in this case, it follows that such value cannot furnish a safe guide in measuring the responsibility of the lessee in an utterly void lease. The court therefore erred in taking the market value of the shares of this stock as a proper or just measure of the value of the property transferred.

We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock. The property transferred consisted *(a)* of cars, bedding, etc.: *(b)* contracts which the Central Company owned with railroad companies for the use of its cars on their roads; *(c)* patents covering the construction and use of sleeping cars owned by the Central Company and by it transferred under the lease to the Pullman Company; and *(d)* $17,000 in cash. It seems to us these values must be taken separately, because, for reasons hereafter suggested, the value of the contracts and patents does not enter into the problem.

As to the value of the cars. We agree with the court below that it is now impossible to decree their return, for the reasons stated. They have substantially disappeared. The property has become incorporated with the business and property of the Pullman Company. Compensation therefore must be made. The master found that the value of the cars as vehicles, together with their equipment, at the time of the transfer, was $710,846.50. This is probably a pretty high figure judging from the whole evidence in the case upon that subject, yet still we are inclined to think that the master was justified in arriving at that sum. We take this value for the reason that the Pullman Company agreed in the lease to keep the cars in good order and repair, and renewed and reconstructed as often as might be needful during the whole term of the lease. During the fifteen years elapsing from 1870, up to January, 1885, no violation of the terms of the lease by either party is complained of, and we think the whole transaction between the parties during those fifteen years must be treated as closed, so that no examination should be made in regard to anything that happened within that time. We must assume the provisions of the lease were fully carried out by both parties, particularly as no complaints were made of non-performance. We therefore assume that the cars were kept in good order, and when necessary were reconstructed

and renewed up to January, 1885. The value of that time may be taken to be as great as the master found it to be for 1870. It is very probable the assumption is not in accordance with the fact, and that the property had greatly depreciated. But as we refuse to look into the transactions between the parties during that period, we will hold the value in 1885 to have been the same as in 1870, on the presumption that the Pullman Company fulfilled its obligations between those dates. What rule of compensation should be deduced from such finding will be alluded to hereafter.

We next come to consider the various contracts. They were entered into with different railroad companies for certain definite periods, and their time of expiration was stated in the contracts themselves. They were valuable only as they were used by the lessee, and its right to use them sprang from and was determined by the lease itself. They were assigned to the lessee for the purpose of enabling it to avail itself of the rights therein created and to use the cars with the consent of the railroads to which the contracts applied. Whether any use was made of these contracts or not they became daily less available as they daily neared their termination. The use made of them did not impair their value. The passage of time did that. The rental that was paid by the lessee included compensation for use, and to that extent the transaction was closed and the compensation paid up to the time when the contracts themselves had expired, which was prior to the time when the lease was declared void and payment of rent ceased. There is no principle with which we are familiar that will permit the value of those contracts when assigned to the Pullman Company to enter into and form a part of the value of the property for which the company is to make compensation, when from the nature of the thing itself, its value necessarily, and from the simple passage of time, decreased daily, and upon the arrival of the date named for the expiration of the contract it ceased to have any value.

We think the contracts were not extended by the legislative extension of the charter of the Central Company by the act of 1870. Some of these contracts were to last during the corporate life of the Central Company. At the time they were made the charter of the company would expire in twenty years from December 30, 1862, or on December 30, 1882. We do not think the contracts meant that they were to cover any further time to which the legislature might thereafter extend the charter of the company. Some language to that effect would have been contained in the contracts if such had been the meaning of the parties. All the contracts had therefore expired by the end of 1882.

Now upon what principle can it be urged that the lessee should compensate the lessor for the value of these contracts when delivered to it when it had paid for the use, and the property was of such a nature that it became valueless by mere limitation of time? In 1885 they had gone out of existence and, of course, had no value. The basis for a recovery of property or compensation for its value, in cases of illegal agreements, rests upon the implied contract to return it or pay for it, because there is no right in the party in possession to retain it. If at the time when otherwise it would or ought to be returned it has ceased to exist by virtue of the termination of its legal existence, how can it be returned? How can a promise to return or make compensation therefor be implied in the case of a contract having but a limited time to run and the value of which diminishes daily until the contract itself and its value are wholly extinguished by expiration of time, and where the use of this intangible right during its existence was fully paid for by the party to whom it was assigned? There is no implication of a promise to make any further compensation for such a species of property than is made by paying for its use while it remained in legal existence. When that time expired the value was gone, and while it lived it had been paid for.

We have been able to find no case where any principle was laid down which would authorize or justify a recovery of the value of property at the time of delivery, which, before its return became proper, had passed out of existence by limitation of time, and the use of which was paid for during its lifetime.

What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretense of a claim in regard to them by virtue of and through the illegal contract. A resort to the illegal instrument cannot be permitted for the purpose of sustaining any recovery.

The same may be said of the patents which the Central Company also undertook to transfer, as they had all expired before January, 1885. They simply protected the use of the cars which had been constructed under them, and they diminished in value as each day brought them nearer to their expiration, and when that time arrived they were absolutely valueless. During all that time they were included in the consideration for the payment of rent made by the Pullman Company under the terms of the lease. The contracts and the patents must be eliminated from the value of the property.

Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

There is no question of trustee in the case. *Root v. Railway Company*, 105 U. S. 189, 215.

The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that

term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

As to the claim of the lessor that its business has been broken up, its contracts with railroads terminated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract

itself or upon alleged damages arising out of its non-fulfillment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

We conclude that the cross-defendant is not liable for the contracts and patents transferred nor for the possible damage the Central Company may have sustained, as above stated. It is liable for the value of the cars, furniture, etc., transferred. It is a liberal estimate of the value of this property to say that it amounted in 1885 to as much as it did in 1870, yet we are disposed to deal in as liberal a manner with the cross-complainant as we fairly may, while not violating any settled principle of law, in order to give to it such measure of relief as the circumstances of the case seem to justify. We therefore take the value of the property in the cars, etc. in 1885 at the sum of $710,846.50 to that, we think, should be added the $17,000 cash received from the Central Company, making a total of $727,846.50 and interest from January 1, 1885, for which the cross-defendant is liable, together with costs.

Although the Central Company may have been injured by the result of this lease, yet, that is a misfortune which has overtaken it by reason of the rule of law which declares void a lease of such a nature, and while the company may not have incurred any moral guilt it has nevertheless violated the law by making an illegal contract and one which was against public policy and it must take such consequences as result therefrom.

The judgment appealed from must be

Reversed and the case remitted to the Circuit Court for the Eastern District of Pennsylvania, with directions to enter a judgment for the Central Transportation Company in accordance with this opinion.

Mr. Justice HARLAN dissented.

Mr. Justice WHITE dissented on the ground that the judgment appealed from was for the correct amount and should not be reduced.

[174 U. S. 639.]

McMullen v. Hoffman.

No. 271. Argued April 27, 28, 1899. Decided May 22, 1899.

The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe line, Hoffman of Portland and McMullen of San Francisco, entered into a contract in writing as follows: "This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom. And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike." Both put in bids for the work which forms the subject of dispute in this case. Hoffman's bid was for $465,722. McMullen's was $514,664. There were several other bids, but Hoffman's was the lowest of all. The contract was awarded to him. He did the work and received the pay. This action was brought by McMullen to recover his portion of the profit, according to the contract. *Held*, that this contract was illegal, not only as tending to lessen competition, but also because the parties had committed a fraud in combining their in-

terest and concealing the same, and in submitting the different bids as if they were *bona fide*, and that the court will not lend its assistance in any way towards carrying out the terms of an illegal contract, nor will it or any court enforce any alleged rights directly springing from such a contract.

While distinguishing *Brooks v. Martin*, 2 Wall. 70, from this case, the court holds that, taking that case into due consideration, it will not extend its authority at all beyond the facts therein stated.

This action was originally brought by the complainant McMullen against one Lee Hoffman, and he having died before the trial, the action was revived against the defendant Julia E. Hoffman, as the executrix of his will. When the defendant is hereinafter spoken of, the original defendant is intended.

The complainant filed his bill against the defendant, seeking an accounting of profits that he alleged had been made by the defendant upon a certain contract for the construction of what is termed the Bull Run pipe line, and which contract was entered into between the city of Portland, in the State of Oregon, and the defendant on or about March 10, 1893. The complainant bases his right to share in the profits of that contract by virtue of another contract in writing between himself and the defendant herein, executed March 6, 1893. * * *

An appeal from the decree of the Circuit Court was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and that court held that the contract between the parties was illegal, and that no action could be maintained thereon by either, and the decree in favor of the complainant was therefore reversed. 48 U. S. App. 596. Complainant then applied to this court for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals, which was granted May 9, 1898. 170 U. S. 705.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the Court.

The foregoing statement shows that there is a difference of opinion in the courts below as to the law applicable to the case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract and upon the right of the complainant to obtain redress for his alleged wrongs.

It was on account of the general importance of the question and the many lettings for public works by the Government and by municipal corporations which are affected by the law relative to the bidding, that this court thought it a proper case to issue the writ of *certiorari* herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and so far as possible to remove the doubts which seemingly have arisen in this branch of the law.

Looking in the record before us, we find that the pleadings and proofs taken herein show that for some time prior to the 6th of March, 1893, the city of Portland intended to add to its water supply by bringing to the city the water from a creek or river called Bull Run, some thirty miles distant, and for that purpose it had issued through its water committee proposals for bids to build the works, which proposals were divided into several different classes as already stated.

The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they

both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and all bids were to be put in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly $50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a *bona fide* bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, viz., that relating to the partnership, was reduced to writing, and is set out in the foregoing statement.

Upon these facts the question arising is whether a contract between the parties themselves such as is above set forth is illegal? In order to answer the question we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, al-

though the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a *bona fide* bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. The fact that there were other bids even higher than that of the San Francisco Bridge Company, for the manufacture and laying of the pipes, does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in the fact of an active competition and the *bona fide* character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been.

The natural tendency and inherent character of the agreement are also unaffected by any evidence produced on the part of the complainant, that the chairman of the water committee had, when examined nearly three years after the occurrence, no recollection as to the bid of the bridge company or that it had any particular effect upon his mind, and that he said that the contract was awarded to the lowest bidder simply

because he was the lowest bidder, and without reference to the bid of the bridge company.

The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made between the parties; and that tendency or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made. The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of a *bona fide* character, the more the committee would be impressed with the idea that there was active competition for the work to be done.

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural.

In *Richardson v. Crandall*, 48 N. Y. 348, 362, the court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate," citing *Atcheson v. Mallon*, 43 N. Y. 147.

Although these remarks were made when the court was dealing with the case of a bond taken *colore officii*, yet the principle applies equally to a case like the one at bar, and indeed it is seen that such was the view of the judge delivering the opinion, since he cited *Atcheson v. Mallon*, which in its nature is a case very similar to the one now before us.

The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.

In *Tool Company v. Norris*, 2 Wall. 45, 56, the Court said, in speaking as to illegal agreements:

"It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution."

And in *Rex v. De Berenger*, 3 M. & S. 67, 72, cited in *Scott v. Brown*, (1892) 2 Q. B. D. 724, 730, Lord ELLENBOROUGH, C. J., said:

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them.

In the case at bar the illegal character of the agreement is founded not alone upon the fact that it tends to lessen competition, but also upon the fact of the commission of a fraud by the parties in combining

their interests and concealing the same, and in submitting different bids as if they were *bona fide*, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. The tendency of such agreements is bad, although in some particular case it might be difficult to show that it actually accomplished a fraud, while its intention to do so would be plain enough. Therefore, when it is urged that these parties had no intention of bidding for this work alone, and that unless they had combined their bids neither would have bid at all, and hence the agreement between them tended to strengthen instead of to suppress competition, this answer to the illegality of the transaction is insufficient. The evidence, however, does not show that if these parties had not agreed upon a combination neither would have bid alone. It shows the complainant came to Portland to see the defendant and to conclude their arrangements to go into the combination, but we are by no means of the opinion that the evidence shows that if they had not combined they would not have bid at all. Complainant's company had bid alone at a prior letting, some time before, and had then been the lowest bidder for the contract, which the city did not award because of a lack of means of payment for the work consequent upon a veto by the governor of the bill providing for the issuing of bonds to make such payment. And it seems that the defendant himself was well able to carry on the contract alone.

If it be granted that the fact was proved that neither party would have bid separately, and that by virtue of the combination a bid was made which otherwise would not have been offered, the significance of the other facts in the case is not thereby altered. Those other facts are the concealment of the interest which the parties had in each other's bids, and the

making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement.

The reason given for the making of these fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light.

Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the

dangers arising out of a concealed combination and from fictitious bids.

To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is but to carry into effect the public policy upon which the rule itself is founded. People who have been guilty of the conduct exhibited in this record cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because the bids show they were the lowest bidders. The bids might have been lower yet if there had been competition where there was in fact combination. The parties must accept the consequences resulting from entering into the agreement proved in this case, all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves.

In *Hyer v. Richmond Traction Company*, 168 U. S. 471, in speaking as to the character of the agreement in that case, Mr. Justice BREWER remarked that the vice of a combination "lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse, but in fact friendly, source."

In that case the demurrer admitted the allegation of the complaint that the combination of the two interests asking for the concession from the common council was known and announced to that body before its decision was made. The case simply shows the part which concealment takes in a combination, being in fact one of the great dangers springing therefrom.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, Judge FOLGER, in delivering the opinion of the court said:

"But a joint proposal, the result of honest cooperation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and where no concealment is practised and the fact is known, there may be no ground whatever for judging it to be in any manner improper.

But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interests. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

The evidence shows that this written partnership agreement was only a part of the entire agreement existing between the parties. That agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. The agreement (of which that for a partnership

was but a portion) was that they should combine their interests; that they should put in bids known to each; that they should conceal the fact of their combination; that they should put in fictitious bids without expectation or purpose of having them taken; that if the contract were procured they should perform the work as partners and share expenses and divide profits. *No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties can be made.* The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol.

Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.

There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all

law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman.* It is stated that Lord KENYON once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th ed. 94, note *n;* 9 Law Quarterly Review (London) pp. 105–197.)

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

The following are only a few of the numerous cases upon the subject in England and in this country: *Holman v. Johnson,* (1775) 1 Cowper, 341; *Booth v. Hodgson,* (1795) 6 T. R. 405; *Thomson v. Thomson,* (1802) 7 Ves. 468; *Shiffner v. Gordon,* (1810) 12 East, 296; *Sykes v. Beadon,* (1879) L. R. 11 Ch. Div. 170; *Scott v. Brown,* (1892) 2 Q. B. D. 724; *Belding v. Pitkin,* (1804) 2 Caines, 147*a*; *Atcheson v. Mallon,* (1870) 43 N. Y. 147; *Leonard v. Poole,* (1889) 114 N. Y. 371; *Wheeler v. Russell,* (1821) 17 Mass. 258, 281; *Snell v. Dwight,* (1876) 120 Mass. 9; *Marshall v. Baltimore &*

Ohio Railroad Co., (1853) 16 How. 314, 334; *McBlair v. Gibbes*, (1854) 17 How., 232; *Coppell v. Hall*, (1868) 7 Wall. 542; *Trist v. Child*, (1874) 21 Wall. 441, 448; *Woodstock Iron Company v. Richmond & Danville Extension Co.*, (1888) 129 U. S. 643; 1 Lindley on Partnership, 5th ed. 93, note, giving the result of the American cases.

The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.

If the partnership agreement that is contained in the writing set forth is in truth but part of an entire agreement, which contains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him *without resorting to the contract*, the court will permit a recovery in such case. The cases cited as illustrating the excepting are, among others, *Tenant v. Elliott*, (1797) 1 Bos. & Pul. 2; *Farmer v. Russell*, (1798) 1 Bos. & Pul. 295; *Sharp v. Taylor*, (1849) 2 Phil. Ch. 801, 817; *Armstrong v. Toler*, (1826) 11 Wheat. 258, 269; *McBlair v. Gibbes*, *supra*, 17 How. 232, 235; *Brooks v. Martin*, (1863) 2 Wall. 70; *Planters' Bank v. Union Bank* (1872) 16 Wall. 483; *Armstrong v. American Exchange National Bank of Chicago*, (1889) 133 U. S. 433, 466.

Upon the point as to the ability of the

plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. *Booth v. Hodgson*, 6 T. R. 405, 408; *Thomson v. Thomson*, 7 Ves. 468; *Embrey v. Jemison*, 131 U. S. 336, 348.

In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord KENYON, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff "That if the whole case were disclosed to the court there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

Mr. Justice ASHURST, in the same case, said: "The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover."

Mr. Justice GROSE said: "We cannot decide on a part of the case; and taking the whole together, an assumpsit cannot be raised from one part of the case when the other parts of it negative an assumpsit." The defendant therefore had judgment.

In **Thomson v. Thomson**, *supra*, the plaintiff was not permitted to recover, because he had no claim to the

money except through the medium of an illegal agreement. The Master of the Rolls (Sir WILLIAM GRANT) said: "If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. *But in this instance it is paid to the party; for there can be no difference as to the payment to his agent.* Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it. I must therefore dismiss the bill."

And in **Embrey v. Jemison,** *supra*, although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice HARLAN, in delivering the opinion of the court, said that the plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as

tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law," citing *Coppell v. Hall*, 7 Wall., 542, 558.

In the latter case Mr. Justice SWAYNE, delivering the opinion of the court, said:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance which it was not necessary for plaintiff to prove.

The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action being founded on some new consideration, or upon a contract collateral to the original illegal one.

In **Tenant v. Elliott,** *supra*, it was held that where two persons had entered into an illegal contract in regard to insurance, and a loss having occurred, the insurer paid the money to a third person to be paid to plaintiff, the third person could not himself retain the money because it arose out of an illegal contract. EYRE, Chief Justice, asked, "Whether he who had received the money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him?"

In such case clearly the defendant had nothing whatever to do with the illegality of the original contract. He received the money to be paid to another, and when he received it for that purpose he promised, either expressly or by implication arising from the facts, that he would deliver the money to the plaintiff, and when he refused to do it the plaintiff could recover upon this express or implied contract, without resorting in any manner to the original contract between himself and another, which in its nature was illegal, but with which the defendant was in nowise concerned.

Farmer v. Russell, *supra,* is to the same effect. The defendant received the money from a third person to deliver to the plaintiff, and it was held that he was bound to pay it to the plaintiff, although the original consideration upon which the money was to be paid the plaintiff by the third person was illegal. EYRE, Chief Justice, said:

"It seems to me that the plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus,* from which an *assumpsit* in law arises, and on that an action on the case may be maintained. * * * The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void the difficulty with me is, that the contract with the carrier cannot be connected with the contract between the plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract; for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz., that he was lending his assistance to an infamous traffic. In that case, the rule *Melior est con-*

ditio possidentis will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a Court of law."

The verdict in this case had been for the defendant. There was a question in the case whether the defendant was privy to the contract between the plaintiff and the man at Portsmouth. The goods transported were counterfeit pennies or half-pence, and *it was the opinion of Eyre, Chief Justice, that if the defendant had been privy to the original illegal agreement so that the whole thing was but one transaction, the plaintiff could not have recovered.* Mr. Justice ROOKE was of opinion that it was not important whether the defendant were privy or not; that if the contract were illegal, the plaintiff could not recover from the defendant in any event. The other two judges were of opinion that the money having been delivered to the defendant for the purpose of being paid to the plaintiff, the defendant was bound to make such payment without reference to the illegality in the original transaction.

The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defence in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defence of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise

to pay the plaintiff, would have no possible defence to an action by the plaintiff to compel such payment. Such action is in no sense founded upon an illegal contract. That matter was closed when the party owing the money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character.

The next case cited by complainant as an authority for the maintenance of this action is **Sharp v. Taylor,** *supra.* It was stated by the Chancellor in that case that where one of two partners had possessed himself of the property of the firm, he could not be allowed to retain it by merely showing that in realizing it some provision of some act of Parliament had been violated or neglected or that some provision of a foreign statute relating to the registry of vessels had not been complied with.

Lord Chancellor COTTENHAM, in the course of his opinion, said:

"The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a Parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the Court is asked to do, as between the parties. Do the authori-

ties negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir WILLIAM GRANT in *Thomson v. Thomson*. But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell v. Innis*. The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one; assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defense to Sharp's claim. Upon these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right."

These observations show that the judgment did not go upon the illegality arising from a mere violation or neglect of a provision of an act of Parliament relating to vessels, and the agreement was not classed among those contracts which are of such an illegal nature that courts refuse to enforce them. Some of the observations of the Chancellor, made by way of illustration regarding the rule itself, have been since doubted by the English courts, as in the case of *Sykes v. Beadon*, *supra*, where JESSEL, Master of the Rolls, in holding that an illegal contract could not be enforced by one party to it as against the other, directly or indirectly, said that there were several dicta of Lord COTTENHAM'S in *Sharp v. Taylor*, which he thought were not good law, and the Master of the Rolls remarked:

"It is no part of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

Continuing, the Master of the Rolls observed:

"Then Lord COTTENHAM goes on, in *Sharp v. Taylor*, to say: 'Do the authorities negative this view of the

case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir WILLIAM GRANT in *Thomson v. Thomson*.' Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to an illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp v. Taylor* in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it directly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it."

Sharp v. Taylor should not be carried at all beyond the facts of the case as set out in the report.

In **McBlair v. Gibbes**, *supra*, the question was in relation to the validity of an assignment by an assignor of his interest in an illegal contract. The payment of the money arising therefrom had been, subsequent to the assignment, provided for by the party owing it, and the dispute arose between the representatives of the assignor and those of the assignee as to which were entitled to the share originally due to the assignor. It was claimed on the part of the representatives of the assignor that the original contract being illegal, the sale and assignment of an interest therein from him to the assignee was also illegal, and consequently that such interest, equitable or legal, passed to the assignor's executors. Mr. Justice NELSON, however, in delivering the opinion of the court, said:

" But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The

assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver (the assignee) was not a party to these transactions, nor in any way connected with them. It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfillment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfillment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."

What is meant by a collateral contract or a cause of action arising therefrom, which does not require reference to the principal illegal contract or transaction, is still further illustrated in **Armstrong v. Toler,** 11 Wheat. 258. In the course of his opinion Mr. Chief Justice MARSHALL assumed the facts to be that the plaintiff, during a war between this country and Great Britain, contrived a plan for importing goods on his own account from the country of the enemy, and goods were also sent to B by the same vessel. The plaintiff, at the request of B, became surety for the payment of the duties which accrued on the goods of B and was compelled to pay them, and the question was whether he could maintain an action on the promise of B to re-

turn this money, and the court held that such an action could be sustained. The court said:

"*The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted.*"

And again: "The question whether the plaintiff had any interest in the goods of the defendant, or was the contrivor of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, *provided he was not interested in the goods, and had no previous concern in their importation.*"

And at page 274: "In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage, or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction."

The case of **Armstrong v. American Exchange Bank,** *supra,* is similar to the cases of *Tenant v. Elliott* and *Farmer v. Russell,* and was decided upon the same principle.

Counsel for the complainant also refer to a case where a plaintiff had let his horse to the defendant on Sunday, and the defendant had injured the horse by his recklessness and negligence, and recovery against him was had for the damages occasioned by such neg-

ligence, notwithstanding the illegality of the contract of hiring, because in violation of the law relating to the Sabbath day. *Hall v. Corcoran*, 107 Mass., 251.

In that case the court held the cause of action was not founded upon the contract, but the defendant was held liable by reason of his improper and neglectful conduct in regard to the horse in his possession, and which conduct was a violation of the legal duty he owed to the owner of such horse, irrespective of contract. The case was a clear instance of a proper recovery based upon collateral facts, and not founded upon any original illegal contract.

The same principle was held in *Welch v. Wesson*, 6 Gray, 505, as the damage done plaintiff by the wilful act of defendant in running into him with his sleigh had nothing to do with the race they were engaged in.

To the same effect is *Woodman v. Hubbard*, 5 Foster, (N. H.) 67. The act of damage to the horse upon which the liability rested was not connected with or part of the illegal Sunday hiring.

We think it clear that these cases cited as authority for a recovery in this case upon the ground of completion of the illegal contract or of a new contract upon a good consideration, do not touch the case before us, with the possible exception of *Sharp v. Taylor*, *supra*, and that case ought not to be extended.

In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was illegal. The partnership part of the agreement cannot be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he cannot separate his cause of action from the illegal part, and claim a recovery upon the written portion providing for and evidencing the partnership.

We come now to a consideration of the two cases upon which the counsel for the complainant sepecially rely for the maintenance of this action. They are **Brooks v. Martin,** 2 Wall. 70, and **Planters'**

Bank v. Union Bank, 16 Wall. 483. Of the two cases, *Brooks v. Martin* is the more like this one, although the cases are by no means precisely similar. The partnership in that case was stated by the court, in its opinion, to have been really engaged, probably with the full knowledge of all its members, in dealing in soldiers' claims long before any scrip or land warrants were issued by the Government and contrary to the ninth section of the act of February 11, 1847, providing for the granting of land warrants to be issued to the soldiers.

The main object of the ninth section of the act was, as the court stated, to protect the soldiers against improper contracts of the precise character of those shown in the record. It was further said that the traffic for which this partnership was formed was illegal, and that if a soldier who had sold his claim to these partners had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it or give them any relief against it ; or if one of the partners, after the signing of the articles, had said to the other, " I refuse to proceed with this partnership because the purposes of it are illegal," the other partner would have been entirely without remedy. And if, on the other hand, one of the partners had said " I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance, according to your contract." the other partner might have refused to comply with such demand, and no court would have given either of the partners any remedy for such refusal.

The court further stated that upon the facts existing, all the claims purchased by the partner having been turned into land warrants and the warrants having been sold or located, and where the purchase of the claim had been made prior to the date of the warrant, assignments having been subsequently made by the soldiers, and the portion of the lands located having

been sold partly for cash and partly on mortgage, and the assets of the partnership consisting then almost wholly of cash securities or of lands—all these facts appearing, the partner in whose possession the profits of the partnership were could be compelled to account by the other partner, and that the fact that such partner had given a release procured from him by fraud was no bar to his action for such an accounting.

The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands; and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The wrong originally done or intended to the soldier had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts, and could not be affected by any action which the court might take. The cases of *Sharp. v. Taylor*, *Tenant v. Elliott*, *Farmer v. Russell*, *Thomson v. Thomson* and *McBlair v. Gibbes* were cited as authority for the proposition.

We have already adverted to each of them, and we admit it is quite difficult to see how, with the exception of *Sharp v. Taylor*, the principle upon which they were decided could be applied to the case then before the court.

There is a difference between the case before us and that of **Brooks v. Martin**, because in the latter the fact existed that the transactions, in regard to which the case of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be

difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. **We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated.** We think it should not control the decision of the case now before us.

In **Planters' Bank v. Union Bank,** *supra,* Confederate bonds had been sent by one party to the other for sale, and the bonds had been sold by such party as agent of the plaintiff and their price paid to such agent of the party selling, and the court held that an action would to recover the proceeds of that sale thus paid to the plaintiff's agent, although no suit could have been maintained by plaintiff against the purchaser for the purchase price of the bonds, because their sale was an illegal transaction. But when the purchase price of the bonds was paid, it certainly did not rest with the person who received the money upon an express or implied promise to pay it over to set up the illegality of the original transaction. When the bank received the funds, there was raised an implied promise to pay them to their owner, and a recovery could be sustained upon the same ground taken in *Tenant v. Elliott* and the other cases above mentioned.

It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

We must, therefore, come back to the proposition that to permit a recovery in this case is in substance

to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public consideration and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them.

The judgment of the Circuit Court of Appeals was right, and must be Affirmed.

[127 Fed. Rep. 947.]

Equitable Life Assur. Soc., to Use of Reilly v. Wetherill.

(Circuit Court of Appeals, Third Circuit. February 11, 1904.)

No. 32.

1. INSURANCE—REBATES—EXECUTED ILLEGAL CONTRACT—MONEY PAID—PARTIES IN PARI DELICTO.

Where certain life insurance agents made a contract to pay the first premium on a policy for insured, in order to induce him to take the insurance, which agreement was expressly prohibited by Acts Pa. May 7, 1889, (Laws 1889, p. 116), and thereafter such agents paid the premium to the insurance company in the ordinary course of business, the contract thereby became executed, and, the parties being *in pari delicto* the Court would not aid a recovery thereof from the insured.

2. SAME—SUBROGATION.

Where certain insurance agents made and executed a contract to pay the first premium on an insurance policy issued to defendant, and the policy was thereafter issued by the insurer with an acknowledgment of payment of such premium endorsed thereon, in the absence of evidence that the agents were secondarily liable to insurer for such premium an action against insured to recover the same could not be maintained by insurer for the benefit of the agents' receiver on the ground that, as the agents had paid the debt of the insured to insurer, they were subrogated to insurer's right to recover the premium, and were entitled to sue in its name therefor.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John Ewen, *for plaintiff in error.*

John G. Johnson, *for defendant in error.*

Before ACHESON, DALLAS and GRAY, Circuit Judges

GRAY, Circuit Judge. With this action against Richard Wetherill, another similar action was brought in

the court below against one Robert Wetherill. As the facts in each case are the same, by agreement, the two actions were tried together, and but one writ of error has been taken.

The actions were brought by one William F. Reilly, in the name of the Equitable Life Assurance Society for the use of the said Reilly, as receiver, to recover the first premium on two policies of life insurance, for $100,000 each, issued to the said defendants. The testimony adduced on the part of the plaintiff disclosed the following state of facts: The firm of Reilly & Sherman was, at the time these policies were issued, general agent for the Equitable Life Assurance Society, the firm at that time being composed of William F. Reilly, George B. Sherman and Edward A. Reilly. The firm has since gone out of business, and William F. Reilly, the equitable plaintiff, has been appointed receiver thereof and has succeeded to all its rights. In June, 1898, this defendant made application, through Reilly & Sherman, for an insurance policy of $100,000. The negotiations were conducted by Edward A. Reilly, and the policy was thereafter forwarded, through the firm of Reilly & Sherman, with a receipt for the first premium of $4,457 indorsed upon it, and was thus delivered to the defendant. This first premium was not paid by the defendant, who, having been called as a witness by the plaintiff, and after testifying to that fact, further testified that he (Reilly) agreed to pay the first year's premium, through the firm of Reilly & Sherman:

"Q. And did he tell you he had done so later? A He told me so later; yes, sir. Q. And the policy was delivered to you in the shape that it is? A. Yes. Q. You paid subsequent premiums on that policy, did you not? A. Two years, yes. Q. And later you delivered the policy to them and took up a paid-up policy in return? A. Yes. Q. Has the Equitable ever, during any of that time, claimed any of that premium from you? A. No. The receipt is on that policy. Q. Have they ever claimed it? A. No. There is evidence here that the Equitable received the payment. There is a letter here from them."

Another witness, Alfred W. Main, called by the plaintiff, testified that he was insurance and associate auditor of the Equitable Life Assurance Society, and as such, was in charge of the accounts of the agents; and that in the year 1898, between January and August, Reilly & Sherman were agents of the said society; that he had knowledge of the issuance of the policies to the Wetherills. "Q. As a matter of fact, did the firm of Reilly & Sherman ever pay the premiums on these two policies to the Equitable, in cash? A. They did." In explanation of this, the witness stated that, in rendering their monthly account, Reilly & Sherman charged themselves with this first premium, among other charges, and settled for the balance due upon that basis. This was admitted by William F. Reilly in his testimony. There is no evidence that the Equitable Life Assurance Society had knowledge of or consented to the bringing of the suit. Reilly & Sherman, in their testimony, said that they had no knowledge of the agreement testified to by Wetherill:

Upon this state of the testimony adduced by the plaintiff, the court below granted a nonsuit, saying:

"The rule in Pennsylvania undoubtedly is that when there is a suit brought by the legal plaintiff to the use of any person who is the equitable plaintiff, the equitable plaintiff must recover upon the legal title, because that is what he brings into court and is that which he represents. It is very clear to me that there is no legal claim of the Equitable Company against either of these defendants, and for that reason I will have to enter a nonsuit in each case."

The only error assigned is as to the entry of the nonsuit. The plaintiff in error's contentions are:

"(1) That the alleged agreement made with Edward A. Reilly was illegal, and not having been authorized by the members of the firm of Reilly & Sherman, was not binding upon that firm.

"(2) That the firm of Reilly & Sherman, having paid the debt of the defendant to the Equitable Life Assurance Company, became subrogated to the rights of the Equitable Life Assurance Company, both be-

cause Reilly & Sherman were also liable at the time of the payment to the Equitable Life Assurance Company, and also because the payment was made in order to protect their interest in the premium."

In support of the first contention, the first section of the act of Assembly of Pennsylvania, of May 7, 1889 (Laws 1889, p. 116), is cited. This section, after prohibiting the making of any distinction or discrimination by insurance companies in favor of individuals, as to the amount or payment of premiums or rates charged, etc., proceeds as follows:

"Nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow or offer to pay or allow nor shall any insurant receive directly or indirectly, as inducements to insurance, any rebate of premium payable on the policy."

The second section of the act provided that "any life insurance company, its agent or agents, or any person violating section one of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine," etc.

It is claimed by the plaintiff in error, that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal and void.

It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed. Wetherill was induced to take out the policy and assume responsibility for subsequent premiums, by the undertaking of Reilly & Sherman to pay the first year's premium, which was payable in advance, as a condition precedent to the issuance of the policy. It appears by the testimony adduced by the use plaintiff, that this advance premium was paid by Reilly & Sherman to the Equitable Society, and that its policy was thereupon issued and

delivered, through Reilly & Sherman, to Wetherill. The contract, therefore, was entirely executed. The company had received the premium due to it, and had, as was testified to by plaintiff's own witnesses, no claim against Wetherill. "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid." *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347; Pollock on Contracts, star p. 332; Leake on Contracts, 774.

The second contention proceeds upon the assumption that Reilly & Sherman had paid the debt of the defendant to the Equitable Life Assurance Society, and therefore became so subrogated to the rights of that society, as to enable it to prosecute in its name a suit against Wetherill, for the premium paid. The case as made by the plaintiff, however, negatives this proposition. The firm of Reilly & Sherman is not in position of one who being secondarily liable for a debt, and being obliged to pay the same, claims to have acquired, by way of subrogation, the rights of the creditor against the primary debtor. There is nothing in the case to show that Reilly & Sherman were secondarily liable to the assurance society for this premium. The premium was paid by them in the course of business, and in the ordinary settlement of their accounts with the society. The policy was issued by the society, with an acknowledgment of the first premium upon it. There never was any debt due from Wetherill to the assurance society. The payment made by Reilly & Sherman, of the first premium, while it might, perhaps, lay the ground for an *indebitatus assumpsit* in their own name against Wetherill, could not authorize the suit by the Equitable Society itself for an indebtedness that never existed.

For the reasons given, we think the nonsuit was properly granted, and the judgment below is therefore affirmed

Pollock: Principles of Contract.

[4 ed.: star pp. 253, 322–327, 329, 338.]

(A). When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita* (*i. e.* things which if not forbidden by positive law would not be immoral) and *mala in se* (*i. e.* things which are so forbidden as being immoral. * * * *

4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party *if he discovers that intention at any time before the contract is executed.* * * *

An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose *is entitled (if not bound) to rescind the contract;* nor is he bound to give his reason at the time of refusing to perform it. He may justify the refusal afterwards by showing the unlawful purpose, though he originally gave no reason at all, or even a different reason.

But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, **it is conceived, for an unlawful purpose known to both parties, is valid both at law and in equity, and cannot afterwards be set aside. And an innocent party who discovers the unlawful intention of the other after possession has been delivered under the contract is not entitled to treat the transaction as void and resume possession.** * * *

An agreement may be made void by its connection with an unlawful purpose, though subsequent to the execution of it.

To have that effect, however, the connection must be something more than a mere conjunction of circumstances into which the unlawful transaction enters, so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States, and spreading over a considerable time. They are the more worth special notice as they are unlike anything in our own books. In *Armstrong v. Toler* (11 Wheaton, 258, 269), the point, as put by the Court in a slightly simplified form, was this : "A during a war contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact a commuted payment in lieu of confiscation of the goods themselves] which accrue on the goods of B., and is compelled to pay them ; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation." *But it would be otherwise if the goods had been imported on a joint adventure by A. and B.* In *Blair v. Gibbes* (17 How. 232) an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger vs. Cooke* (18 Wall. 421) the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin on hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors

on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the Federal government, it was open to the government alone to take any objection to it. * * *

6. *a.* "When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement."

The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful. This or other subsequent conduct of the parties in the matter of the agreement may be evidence, but evidence only, that a violation of the laws was part of their original intention, and whether it was so is a pure question of fact. The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction. * * *

7. Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?);

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief;

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

Pomeroy: Equity Jurisprudence.

[2 Ed.: Vol. 2, pp. 1349-1359.]

SEC. 939. *Other Illegal Contracts.*—I have already, in the former volume, stated and illustrated the general rules which determine when relief will or will not be given in cases of ordinary illegal contracts. Without repeating what was there said, I purpose to explain the meaning and effect of the three maxims which limit the exercise of the equitable jurisdiction, and to ascertain and formulate, if possible, such conclusions as shall be sustained both by principle and by authority. These maxims are, *Ex turpi causa non oritur actio; In pari delicto melior est conditio possidentis;* or *In pari delicto melior est conditio defendentis.* What is meant by the "condition" of the possessor, or the defendant, which is so much "better"—or, as the maxim sometimes reads, "stronger" *(potior)*—that it will not be disturbed? Plainly, it is not the condition merely of an executory contract having been made and subsisting between the parties; the maxim does not refer to the condition of the executory contract which has been entered into remaining unaltered and unmolested; otherwise the setting up the illegality as a defense would be prohibited, for it would directly violate the maxim. The defense is always allowed, and this necessarily disturbs the condition of the contract. The "condition" referred to in the maxim is clearly the condition of the parties with respect to their property rights created by or resulting from the contract. If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and it involves no requirement that the contract, as a mere *executory instrument*, should remain unmolested; it deals solely with the rights flowing, or which would flow, from the

agreement. The form, therefore, which correctly expresses the thought is *Melior est conditio possidentis;* "*defendentis*" is appropriate only when regarded as equivalent to *possidentis.* The foregoing analysis is not a mere verbal discussion. Upon the true signification given to "condition," in the maxim, depends to a great extent the doctrine concerning affirmative equitable relief against illegal contracts.

SEC. 940. *In Pari Delictio—General Rules.* The proposition is universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto,* no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine. As applications of this principle, the following rules may be regarded as settled, where the parties are *in pari delicto:* If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer. As long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it; the illegality constitutes an absolute defense. As an application of the same doctrine merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and canceled, and by granting the ancillary remedies of injunction, discovery and the like. Whenever the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction

will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect. It has already been shown that the maxim, rightly interpreted, does not require the condition of the parties, *with respect to the subsisting executory contract*, to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights.

SEC. 941. *In Pari Delicto—Limitation on the General Rules.* To the foregoing rules there is an important limitation. Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy,—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidental and collateral motives of public policy require relief.

SEC. 942. *Not in Pari Delicto.*—Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality,—in some degree affected with the unlawful taint,—but are not *in pari delicto*,—

that is, both have not, with the same knowledge, willingness and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy,—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due, by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, *if considered by themselves alone*, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it has been voluntarily entered into. 2. The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others.

Story : Equity Jurisprudence.

[13 ed. : vol. 1, pp. 300-303.]

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to ; and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose ; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the Court will refuse it. * * *

298. And here it may be well to take notice of a distinction, often but not universally acted on in courts of equity, as to the nature and extent of the relief which will be granted to **persons who are parties to agreements or other transactions against public policy, and therefore are to be deemed participes criminis.** In general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita or mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not at present interpose to grant any relief ; acting upon the known maxim, " *In pari delicto potior est conditio defendentis, et possidentis.*" But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party. And in these cases relief will be granted, not only by setting aside the agreement or other transaction, but also in

many cases by ordering a repayment of any money paid under it. Lord THURLOW indeed seems to have thought that in all cases where money had been paid for an illegal purpose it might be recovered back, observing that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before. But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, '*In pari delicto potior est conditio defendentis.*' The ground of reasoning upon which his Lordship proceeded is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern doctrine is established. **Relief is not granted where both parties are truly** *in pari delicto* **unless in cases where public policy would thereby be promoted.**

Story: Sales of Personal Property.

[4th ed.: p. 607.]

The vendee having obtained possession of property sold under a contract void because made on Sunday, as of his own property, by the assent of the vendor, the title passes to him and he has a right to maintain that possession against both the vendor and his creditors. [Citing *Smith v. Bean*, 15 N. H. 577; *Simpson v. Nicholls*, 3 Mees & W. 240, 241; *Green v. Godfrey*, 44 Maine, 25.]

Addison : Contracts.

[1883 ; 8th ed. : vol. 2, pp. *1171–*1172.]

If indentures of apprenticeship are void by reason of the amount of the premium paid with the apprentice not being truly or correctly stated pursuant to the requirements of the Stamp Acts, the money actually given with the apprentice cannot be recovered back on the ground of a failure of consideration, as both parties are *in pari delicto.*

When, however, the parties are not *in pari delicto*, the more innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other under the illegal contract, although the unlawful act may have been fully accomplished. And it has been held that a debtor paying money to one creditor as the price of procuring a fraud on his other creditors before the creditors enter into a composition, can recover back the money, the parties not being *in pari delicto. (Atkinson v. Denby*, 30 L. J. Ex. 361 ; 31 *ib.* 362 ; 7 H. & N. 934 ; *In re Lenzberg's Policy*, 7 Ch. D. 650.)

"If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. But if the contract is unlawful both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus given his money is justly deprived of what he has expended, and cannot recover it back." (Les Lois Civ. liv. 1, tit. 18, sect. 14, 5.)

§ 169. *Sale—Possession—Rights—Creditors.*—Where the possession of property is acquired or obtained by contract of sale on Sunday, though the contract be illegal, the possession is by permission and he may retain it as against his vendor or anyone claiming under him, and against the creditors of his vendor, not that he has any legal title which the law will protect, but because his vendor cannot be heard to set up a claim to it, and it is the inability of the vendor which protects the possession of the vendee, and is, to him, in effect, the same as a sufficient title. Then, if he cannot recover it, his creditors cannot subject it to the payment of his debts, and it is not subject, in the hands of the vendee, to attachment or execution against the vendor.

[36 Misc. (N. Y.) 583.]

1901.

Hackett v. Northern Pacific Ry. Co.

(Supreme Court, New York Special Term, December, 1901.)

Corporation—Issue of preferred stock—Option for its retirement at par—Rights of a holder—Exercise of the option—Not an organic change—Injunction refused where there is a remedy in damages.

Where a foreign railway corporation is authorized by law to issue, upon a vote of a majority of its stockholders, preferred stock, without any conditions or restrictions, the corporation may upon due issue thereof for value attach thereto such conditions as it chooses, these conditions when assented to by holders become the contract between it and them and their acquiescence follows their acquisition of the stock.

A condition of the issue, that the corporation may, on any 1st day of January prior to 1917, retire the whole or any part of the preferred stock at par, is valid; and where the act of incorporation also provides that the preferred may be made convertible into common stock at the option of the corporation, it may lawfully carry out a plan to retire the preferred stock at par, issue common stock instead, and give present holders of the common stock the privilege of acquiring all the additional common stock.

Holders of the preferred have no other rights than to have the option exercised legally and receive par for their stock and, therefore, will not be permitted to enjoin such a plan upon the ground that it will reduce the capital of the corporation, for, assuming the contention to be true, the reduction will come after they have ceased to have any interest in the corporation.

Where its charter provides that all its affairs shall be managed by a board of directors and they are invested with all the powers of the corporation "except as hereinafter provided", a resolution of the board, re-

tiring all the preferred stock at par on Jan. 1, 1902, is a valid exercise by the corporation of the option.

The exercise of such an option does not effect an organic change in the composition or business of the corporation.

Assuming that the holders of the preferred have a right to exchange it for the new common stock and that the right has been wrongfully denied them, their remedy is in damages, the corporation being solvent, and they are not entitled to an injunction.

Motion for injunction *pendente lite*.

SCOTT, J.:—This is an application by holders of preferred stock of the defendant corporation, for an injunction *pendente lite* restraining the consummation of a plan whereby it is proposed to retire the preferred stock of the company at par, and to issue in place thereof common stock to an equal amount, giving to the present holders of the common stock the privilege of acquiring the additional common stock to be issued in substitution for the preferred stock.

The defendant corporation, as at present known and constituted came into being in 1896, as the result of the reorganization of another corporation known as the Northern Pacific Railroad Company. This defendant was incorporated by the legislature of Wisconsin in the year 1870 under the name of the Superior and St. Croix Railroad Company with an authorized capital stock of five million dollars, which might be increased to ten million dollars. This Act was amended from time to time until finally in 1895, by chapter 244 of the laws of that year, very radical amendments were made, which permitted and doubtless were intended to permit the acquisition of the property and franchises belonging to the Northern Pacific Railroad Company then about to be reorganized.

The powers of the corporation were largely increased. With reference to the capital stock it was provided that it might be increased from time to time, by a vote

of a majority of the stockholders, to such an amount as might by them be deemed necessary. It was further provided that the company might, by a like vote of its stockholders classify its stock into common and preferred, and divide its preferred stock into different classes and make any or all of its preferred stock cumulative or non-cumulative as to dividends. It was further provided that said company might "make such "preferred stock convertible into common stock, upon "such terms and conditions as may be fixed by the "board of directors."

On July 1st, 1896, the name of the corporation was changed to that now borne by it, and on the same day certain resolutions were adopted by the unanimous vote of its then stockholders. One of these resolutions provided for an increase of the capital stock to one hundred and fifty five million dollars, to be divided into eighty millions of common stock, and seventy five millions of preferred stock. Among the provisions inserted in this resolution was the following:

"Resolved that such preferred stock shall be issued "upon the condition that at its option the company "may retire the same in whole or in part, at par, "from time to time, on any first day of January prior "to 1917."

The second resolution, adopted on the same day recited that the property and franchises of the Northern Pacific Railroad Company were about to be sold under foreclosure; that the firm of J. P. Morgan & Co. as reorganization managers of said company, under a certain plan and agreement for reorganization, had acquired large proportionate parts of the several issues of the securities of said company which they proposed either to use themselves in the purchase of the property and assets of said company, or to turn over to the Northern Pacific Railway Company, in exchange for its capital stock and bonds, so that said last named company might purchase said property and franchises. The Directors of this defendant were therefore author-

ized to enter into an agreement with the reorganization managers for the acquisition of securities of the Northern Pacific Railroad Company to be used in the purchase of its properties and franchises, issuing in return to said reorganization managers securities, in stock and bonds of this defendant.

The directors of the defendant on July 13th 1896 made such an agreement as had been then authorized with the reorganization managers, whereby the defendant corporation agreed to issue and deliver to said managers, in exchange for securities of the Northern Pacific Railroad Company, bonds of the defendant, and certificates for seventy five million dollars of preferred stock and eighty million dollars of common stock. This agreement referred to, and by reference incorporated into itself the plan or agreement for the reorganization of the Northern Pacific Railroad Company, under and upon the faith of which the holders of the securities of the said company had deposited those securities with the reorganization managers.

In this plan or agreement, it was expressly stated, referring to whatever company might acquire the properties and franchises of the said Northern Pacific Railroad Company, and speaking of the preferred stock to be issued by said purchaser company.

> " the right will be reserved by the new company
> " to retire this stock in whole or in part, at par,
> " from time to time, upon any first day of Janu-
> " ary during the next twenty years."

The certificates of stock which were issued under the foregoing resolutions and agreement, both for the common and preferred stock, as well as every certificate of stock of either class which has been issued since have contained the following clause:

> " The company shall have the right at its
> " option, and in such manner as it shall deter-
> " mine, to retire the preferred stock in whole or

" in part, at par, from time to time upon any first " day of January prior to 1917."

The defendant corporation was expressly authorized by its charter to issue preferred stock, and no restriction, or limitation was put upon it, as to the terms and conditions upon which such stock was to be issued, except that the company might at its option make it convertible into common stock. The company was therefore left free to attach such conditions and restrictions upon the issue of such stock as it saw fit, and the conditions and restrictions thus attached, when agreed to by the holders of such stock, became a valid and enforceable contract between the company and such holders, whose acquiescence followed upon their acquisition of the stock (*Scott* vs. *B. & O. R. Co.* 49 Atl. Rep. 327).

The contract between this defendant and its preferred stockholders is definite and precise. It had its birth at the very moment that the issue of preferred stock was authorized by a vote of the stockholders, and from that moment became a part of every share of preferred stock issued, as a vital condition of its issuance; its terms have been incorporated into every certificate of stock issued by the company, including those held by the plaintiffs, who thus acquired their stock with full knowledge and notice of the basic condition upon which the stock had been authorized; it was founded upon the equitable consideration that the holders of securities of the predecessor company had surrendered their securities to their agents, the reorganization managers upon the faith of the statement in the plan or agreement of reorganization, that the new company would attach such a condition to the preferred stock which they issued to the reorganization managers in exchange for such securities of the predecessor company.

I see no reason to doubt that the condition then attached to the preferred stock was one which the company had the right to attach. Preferred

stock, in its very nature, is stock which is held under a different contract and subject to different conditions, from those under which common stock is held. It is of course competent for the Legislature to prescribe what these conditions shall be and to forbid all others. It may however leave the determination of that question to the company itself, and it does so leave it when it fails to specify and limit the conditions. The Legislature of Wisconsin placed no limitation upon the terms which this company might attach to its issue of preferred stock, and therefore left it to determine those terms for itself.

It is claimed however that although it was lawful for the company and the preferred stockholders to agree that the stock might be retired at par, still that the company cannot enforce that contract, and retire the stock because to do so would involve a reduction of the capital, by an amount equal to the outstanding preferred stock. This contention is founded upon a nice distinction between the meaning of the word "retire" and that of the word "acquire." If the condition upon which the preferred stock was issued had been that the company might at its option "acquire" the preferred stock, this particular objection to the proposed action of the defendant would clearly be without any foundation, for it cannot be doubted the company has the legal right to purchase its own stock. It is argued however that to "retire" stock, necessarily means that it is to be extinguished, and that if seventy five millions of preferred stock should be extinguished the capital of the company would be, to that extent, reduced. It is not apparent how the plaintiffs are interested in the question whether or not the capital stock of the company is reduced, or if reduced whether or not such reduction is lawful. Such reduction if it takes place at all, will take place after their interest in the company has come to an end by the retirement of their stock.

An examination of the resolution adopted by the defendant's directors will show that the capital stock of the company will not in fact be reduced or increased. It will still remain, as originally fixed at one hundred and fifty five millions, the sole difference being that all of the capital stock will be common stock.

The burden of the plaintiffs' complaint is that they will not be permitted to exchange their preferred stock for common. They do not point out why they are entitled to such an exchange. Certainly no contract to that end was ever made with them. Their agreement was that their stock might, at the company's option, be retired at par. This condition which now appears to be a burdensome one, was doubtless inserted as an offset to their preferential right to receive dividends if the net earnings of the company should not provide dividends for both classes of stock. Having assented to this condition, they cannot avoid its enforcement merely because they apprehend that as a result of such enforcement the company may do some unauthorized act, unless they can also show that such unauthorized act will injure them in some way other than by retiring their stock. The company has the right to retire the stock at its option. All that the plaintiffs are entitled to insist upon is first; that the option shall be exercised in a legal way, and secondly; that they shall receive par for their stock. With what happens afterward they have no concern.

It is a mistaken view to take of the functions of a Court of equity that it will interfere by a writ of injunction to prevent an abstract wrong, or one not affecting any person who invokes its aid. Even if it appeared, which I do not intend to be understood as intimating, that the directors of this defendant contemplated doing something after the plaintiffs' stock had been retired which would be unauthorized by law or beyond the powers of the corporation, still the Court would not be called upon to act by way of injunction, unless appealed to by some person who would suffer

loss or injury from the threatened act, or, in some cases, by the State. It does not appear that these plaintiffs will, or can so suffer, for when such unauthorized acts, if they be such, are performed the plaintiffs' interest in the corporation will have come to an end by the retirement of their stock.

It remains to consider whether the company has lawfully exercised the option to retire the stock. The attempt to do so was by a resolution of the Board of Directors, whereby it was resolved that the defendant corporation

" has determined and hereby does determine to re-
" tire the preferred stock of the Northern Pacific Rail-
" way Company, in whole, at par, upon the first day of
" January, 1902."

The charter (Sec. 8, Chap. 244 Laws of Wisconsin, 1895) provides that " all of the affairs of said com-
" pany shall be managed by a board of directors, who
" shall be stockholders, and who are hereby invested
" with all the powers of the corporation except as
" hereinafter provided." It is of course true that this authority does not empower the directors to make organic or fundamental changes in the composition or business of the corporation. (*Railway Company* vs. *Allerton*, 18 Wall. 223). The exercise of the option to retire the preferred shares cannot in any proper sense be considered as affecting such a fundamental change. The retirement of the preferred stock at some time was contemplated by the stockholders, and was provided for when the issue of the stock was authorized. All that was left was the determination as to when the option should be exercised and the retirement take place. This was a matter peculiarly within the scope of the Directors powers, and even if the assent of the stockholders were necessary that assent might be given at any time and in any manner which would serve to show that they approved of the exercise of the option (*Payson* vs. *Stover*, 19 Fed. Cas. 27). It is asserted by

the answer that more than a majority of the stockholders of both classes have signified their acquiescence.

Many other questions have been raised and ably argued in the briefs of counsel. That they are not discussed at length in this opinion is not to be taken as an indication that they have not been examined and considered; but only that their discussion at length does not appear to be necessary.

I am satisfied that the plaintiffs as holders of preferred stock have not and never have had the right to insist that their stock should be transformed into common stock, or that they should be permitted to subscribe for the common stock proposed to be issued in place of the present preferred stock. That on the other hand the company has the positive right at its option to retire the preferred stock at par, and that the directors of the company are authorized to exercise that option in behalf of the company. That the plaintiffs have no concern with what may be done with the stock of the company after their preferred shares have been retired, or in consequence of such retirement, nor are they in a position to question the manner in which the company proposes to raise the money to retire their shares, so long as they are assured of the par value thereof.

Even if the defendant's right to retire the plaintiffs' stock was less clear than I deem it to be I should still hesitate to permit the temporary injunction to stand. The plaintiffs though holding preferred stock to a considerable amount, really hold but a small percentage of this class of stock and of course a much smaller percentage of the total capital stock of the company. Their claim is, that they are entitled to an opportunity to subscribe for the convertible certificates representing common stock to be issued in place of the preferred stock. Upon what that claim is based is not made very apparent, but assuming that it is well founded, no reason is suggested why they cannot be fully

and amply compensated in an action for damages for the denial of their assumed right. The amount of common stock to which they would be entitled, and its value would be readily ascertainable, and no suggestion is made that the defendant is not solvent and well able to respond in damages. I see nothing in the case to warrant a departure from the rule that an injunction will not issue to prevent a threatened invasion of a plaintiff's rights where his remedy by an action for damages is available and adequate, and the damages, if any, are easily ascertainable.

It follows that the motion to continue the temporary injunction must be denied, and the said temporary injunction vacated with $10 costs.

No. 512.

THE UNITED STATES

vs.

NORTHERN SECURITIES CO. AND OTHERS.

OPINIONS AND DECREE.

CIRCUIT COURT.

	Pages.
Opinion on Final Hearing	[illegible]
Final Decree	[illegible]
Opinion dismissing petition of Harriman and others, for intervention after affirmance of decree	[illegible]

SUPREME COURT.

	Pages.
Opinion of Mr. Justice Harlan	[illegible]
" Mr. Justice Brewer	[illegible]
Dissenting opinion of Mr. Justice White	[illegible]
" " Mr. Justice Holmes	[illegible]

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

NO. 277.—OCTOBER TERM, 1903.

NORTHERN SECURITIES COMPANY ET AL., Appellants, vs. THE UNITED STATES.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14th, 1904.]

Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the Statute of July 2d 1890, commonly known as the Anti-Trust Act, and entitled "An act to protect trade and commerce against unlawful restraint and monopolies." 26 *Stat.* 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a con-

sideration of the scope and meaning of most of its provisions, the act is here given in full:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with any foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying

that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopoliz-

ing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent, through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *The Great Northern Railway Company*, 161 *U. S.* 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. *Gen. Laws, Minn.*, 1874, *c.* 29; *ch.* 1881.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital

stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent. per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13th 1901 defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interest of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, " by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the

public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13th 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company were formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold,

purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certifi-

cates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent., the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership.* Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and be-

came stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two

roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 *Fed. Rep.* 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or conspiracy? How far may Congress go in regulating the affairs or conduct of State corporations engaged as carriers in commerce among the States or of State corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If State corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust act

was *United States* v. *E. C. Knight Co.*, 156 *U. S.* 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 *U. S.* 290. That was followed by *United States* v. *Joint Traffic Association*, 171 *U. S.* 505, 569, 571, *Hopkins* v. *United States*, 171 *U. S.* 578, *Anderson* v. *United States*, 171 *U. S.* 604, *Addystone Pipe & Steel Co.* v. *United States*, 175 *U. S.* 211, and *Montague* v. *Lowry*, 193 U. S. *ante*. To these may be added *Pearsall* v. *Great Northern Railway*, 161 *U. S.* 646, which, although not arising under the Anti-Trust act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addystone Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe,

whereby competition among them was avoided, was covered by the Anti-Trust act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a

State corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign States. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance to its provisions, are the Supreme Law of the Land, "anything in the constitution or laws of any State to the contrary notwithstanding"—supreme over the States, over the courts, and even over the People of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 *Wheat.* 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a State corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which

Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a State railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in State railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other State corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of State corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited

by the Constitution. It does contend that no State corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or the organization of a State corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 *U. S.* 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 *U. S.* 545; *Lottery Case*, 188 *U. S.* 321, 355, *and authorities there cited.* Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice MARSHALL for the court in *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those

objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 *Wheat.* 419; *Sinnot* v. *Davenport*, 22 *How.* 227, 238; *Henderson* v. *The Mayor*, 92 *U. S.* 259; *Railroad* v. *Husen*, 95 *U. S.* 465, 472; *Mobile* v. *Kimball*, 102 *U. S.* 691; *M., K. & Texas Ry. Co.* v. *Haber*, 169 *U. S.* 613, 626; *The Lottery Case*, 188 *U. S.* 321, 348. In *Cohens* v. *Virginia*, 6 *Wheat.* 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCullock* v. *Maryland*, 4 *Wheat.* 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 *U. S.* 564, 582, this court, every member of it concurring, said: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations for-

bidden by the Anti-Trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretence that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the

stockholders of two or more State railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations?

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." (*pp.* 569, 571.) That such a rule was applied to interstate commerce should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in State courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 *Penn. St.* 173, 186, the Supreme Court of Pennsylvania dealt with a

combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi Rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . *There is a potency in numbers when combined*, which the law cannot overlook, where injury is the consequence." The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 *N. Y.* 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in *Cen-*

tral Ohio Salt Co. v. *Guthrie*, 35 *O. St.* 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 *Ill.* 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the right of competition, were all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection." Again, in *People* v. *Chicago Gas Trust Co.*, 130 *Ill.* 269, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson* v. *Buhl*, 77 *Mich.* 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 *Cal.* 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 *La. Ann.* 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic

commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 *Wheat.* 194—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it.

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe, (as in *Addystone Pipe & Steel Co.* v. *United States*,) or in tiles, grates and mantels, (as in *Montague* v. *Lowry*,) surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that

Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under State charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the People of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign States by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination described in the bill? All will agree that if the Anti-Trust act be constitutional, and if the combination in question is in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People"; and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway Companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such re-

straint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are State corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is neces-

sarily subject to the Supreme Law of the Land. And yet the suggestion is made that to restrain a State corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of the *Baltimore & Ohio R. R. Co.* v. *Maryland*, 21 *Wall.* 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the State, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists with a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a State enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Government as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 210; *Sinnot* v. *Davenport*, 22 *How.* 227, 243; *In re Debs*, 158 *U. S.* 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 *U. S.* 613, 626-7. In *Texas* v. *White*, 7 *Wall.* 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 *Wall.* 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much

within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Ry.* v. *Kentucky*, 161 *U. S.* 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which even intimates that a State or a State corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and

international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a State corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and in-

tegrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 *U. S.* 196, 220, is the only supreme power in our system of Government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense,

the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case ; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to the legislative department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare.

But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign nations. In *Brown* v. *Maryland*, 12 *Wheat.* 419, 446, it was said : " Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association case*, " are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate " public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 *U. S.* 641, 657 ; *Chicago &c. R. R. Co.* v. *Pullman Car Co.*, 139 *U. S.* 79, 90 ; *Interstate Commerce Commission* v. *Brimson*, 154 *U. S.* 447, 475 ; *United States* v. *Freight Association*, 166 *U. S.* 290, 332 ; *Smyth* v. *Ames*, 169 *U. S.* 466, 544 ; *Lake Shore &c.* v. *Ohio*, 173 *U. S.* 285, 301. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be State corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock ; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one

of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association)* "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employees, be and they are hereby enjoined from acquiring, or attempting

to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies, which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this

effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted by the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain

commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 *T. R.* 96, 101, Mr. Justice BULLER said: "It is not true that the

courts in the exposition of penal statutes are to narrow the construction." In *United States* v. *Wiltberger*, 5 *Wheat.* 76, 95, Chief Justice MARSHALL, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States* v. *Morris*, 14 *Pet.* 464, 475, this court, speaking by Chief Justice TANEY, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 *Wheat.* 95." So, in *The Schooner Industry*, 1 *Gall.* 114, 117, Mr. Justice STORY said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn*, 3 *Sumner*, 209, 211, 212. In *People* v. *Bartow*, 6 *Cowen*, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. It is well settled

that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction." So, in *Commonwealth* v. *Martin*, 17 *Mass.* 359, 362, the highest court of Massachusetts said: "If a statute, creating or increasing the penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demands. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice Brewer concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States* v. *Freight Association*, (166 U. S. 290,) followed by the cases of *United States* v. *Joint Traffic Association*, (171 U. S. 505,) *Addystone Pipe & Steel Company* v. *United States*, (175 U. S. 211,) and *Montague & Company* v. *Lowry*, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reason given for the judgments cannot be sustained. Instead of holding that the Anti-Trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of that act. The act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct

restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, (161 U. S. 646,) in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchase a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as well as four hundred,

and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of

their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce--one in conflict with State law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice White, with whom concur Mr. Chief Justice Fuller, Mr. Justice Peckham, and Mr. Justice Holmes, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway Companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in

Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust act. (26 Stat. 209.) The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations;" and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations." The court below sustained the contentions of the government. It, there-

fore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars was paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars was expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can

have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice MARSHALL in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the States and with foreign nations " is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, " all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such com-

merce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in State corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a State corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a State corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and

parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and State governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by State authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its powers over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such State charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of State railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every State law forbidding such consolidations, for, if the ownership of stock in State corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it

would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow that if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to State action taken before the adoption of the Anti-Trust act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from State control. (*Mobile County* v. *Kimball*, 102 U. S. 691; *Robins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.)

It is said, moreover, that the decision of this case does

not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control or the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion, resulting from the alleged distinction to admit it would do violence to both the letter and spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, that individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." (*Paul* v. *Virginia*, 8 Wall. 168, 183.)

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous

principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under State authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust act the power to put its provisions in motion is, as

to many particulars, confided to the highest law officer of the government, and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by State legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in State corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of State legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both State and National, from the beginning and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust act in 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, (24 Stat. 379,) it sedulously confined the provisions of that act to the carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concern-

ing the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. (27 Stat. 531.) It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of State laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under State authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems. One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been

a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust act in 1890. Who can deny that from that date to this consolidation and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by State laws, to a vast extent, and that during all this time, despite the energy of the government in invoking the Anti-Trust law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lend themselves even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system.

The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to en-

dow them with such powers as were deemed appropriate or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, (8 Wall. 168,) the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183) :

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, (21 Wall. 456,) the question was this : The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of

all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, (118 U. S. 557.) But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, (102 U. S. 691,) was approvingly quoted. That definition was as follows (p. 574):

"Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by the separate States is not therefore permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *when applied to legislation upon subjects which are merely auxiliary to commerce.*"

In *Ashley* v. *Ryan*, (153 U. S. 436,) this was the question: The property of various railroad corporations operating in the

State of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, (156 U. S. 1), the facts and the relief based on them were thus stated by Mr. Chief Justice FULLER, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar

Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890."

After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the State sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice MARSHALL of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in State corporations, because the products of such manufacture might subsequently become the subjects of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *The Great Northern Railway Company*, (161 U. S. 646,) the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice BROWN, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the State law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a State corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, (161 U. S. 677,) the power of the State to pass a law forbidding the consolidation of competing State railroad corporations doing in part an interstate commerce business was again considered, and a State statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of State railroad corporations, because they did in part an interstate commerce business, was within the

paramount authority of Congress, that authority was exclusive and the State regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice BROWN, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

* * * * * *

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce, and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

The subject was considered at circuit in *In re Greene*, (52 Fed. Rep. 105.) The case was this: A person was indicted in one State for creating a monopoly in violation of the Anti-Trust act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the Pearsall and Louisville and Nashville cases, be-

cause it was decided by Mr. Justice JACKSON, then a Circuit Judge, who subsequently, became a member of this court. The opinion manifests that the case was considered by Judge JACKSON with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ Judge JACKSON said (p. 112) :

" Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, ' consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' (*County of Mobile* v. *Kimball*, 102 U. S. 691–702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826.) In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * * *

" That neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities

or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, (166 U. S. 290,) was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many stipulations relating to the carrying of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provided as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties thereto, and if they disagree it shall be arbitrated in the manner provided in article VII."

The government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge, to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti-Trust act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-

Trust statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case, *United States* v. *Joint Traffic Association*, (171 U. S. 505.) In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust law. If this were held not to be true, a reconsideration of the questions decided in the Freight Association case was invoked. The court reviewed and reiterated the rulings made in the Freight Association case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, (171 U. S. 578,) involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged

exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice PECKHAM, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust act. (26 Stat. 209.)

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust act was decided. (*Anderson* v. *United States*, 171 U. S. 604.) The difference between that case and the Hopkins case was thus stated by Mr. Justice PECKHAM, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the Hopkins case were only commission merchants who sold the cattle upon commission as a compensation for their services.

"Counsel for the government assert that any agreement or combination among buyers of cattle coming from other States,

of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was in violation of any of the provisions of the Anti-Trust act.

The Anderson case was followed by *Addyston Pipe & Steel Co.* v. *United States*, (175 U. S. 211.) The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust act. Coming to consider the subject, the court, through Mr. Justice PECKHAM, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the Knight and Hopkins cases, the Knight case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240) :

" The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce.

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" We think the case now before us involves contracts of the nature last before mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by defendants. . . . *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods ? " (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *Montague* v. *Lowry*, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under State law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the Knight, in the Pearsall, in the Louisville and Nashville case and in the Hopkins case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their context they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the Knight case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the Knight case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And this would be the result in the Pearsall case, since in that case it was decided that the States had the power to

forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the Louisville and Nashville case, immediately following the Pearsall, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the Pearsall case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the Louisville and Nashville case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the Freight Association and Joint Traffic cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust act. Now in the Hopkins case, decided subsequent to the Freight Association and Joint Traffic cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. It would follow then, if the sentences quoted from the opinions in the Freight Association and Joint Traffic cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the Hopkins case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the Hopkins case, the court, in expressing its opinion through the same Justice, proceeded in the Addyston Pipe case, which related only to interstate commerce, to overrule the Hopkins case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured, that is, the difference which arises from the

power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, (17 Wall. 560;) *Welton* v. *Missouri*, (91 U. S. 275;) *Pensacola Telephone Co.* v. *Western Union Telegraph Co.*, (96 U. S. 1;) *Gloucester Ferry Co.* v. *Pennsylvania*, (114 U. S. 196.) To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and

ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under State law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and State courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by State laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of State legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subject.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate

commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without contradiction in terms, that the power exercised is a regulation, because a direct burden to commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge JACKSON in the Greene case. Take the Knight case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might

thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the Addyston Pipe case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the Knight case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the

power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the State and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers founded our government upon an enduring

basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the government is, to my mind, illustrated by the summing up of the case for the government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity

and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroying the lines which separate State and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest.

If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an

opinion of Mr. Justice HOLMES, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust act, as is shown in the opinion of Mr. Justice HOLMES, I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice PECKHAM and Mr. Justice HOLMES concur in this dissent.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice Holmes, with whom concurred the Chief Justice, Mr. Justice White, and Mr. Justice Peckham, dissenting:

I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin

with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, (26 Stat. 209,) it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether

it included railroads until the point was decided by this Court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainant to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the government, which I do believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient

doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two —Contracts in restraint af trade and combinations or conspiracies in restraint of trade, and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized

or attempted to monopolize some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 that it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *W. W. Montague & Co.* v. *Lowry*, — U. S. ——. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States* v. *Joint Traffic Association*, 171

U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association's case.

If the statute applies to this case it must be because the parties, or some of them have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that

valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the State now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the Act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an objection under the act, the Great Northern and the Northern Pacific

already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of the new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that

there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this Court, is the question of liability under the present statute. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the

meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the Trans-Missouri Freight Association's case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a State line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretence. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

[120 *Federal Reporter, p.* 721.]

UNITED STATES *vs.* NORTHERN SECURITIES CO. ET AL.

(Circuit Court, D. Minnesota, Third Division. April 9, 1903.)

No. 789.

1. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSTRUCTION OF ANTI-TRUST LAW.

The generality of the language used in the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form.

2. SAME—APPLICATION OF ACT TO INTERSTATE CARRIERS.

The anti-trust act (Act of July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which directly and substantially restricts the right of such carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable.

3. SAME—CORPORATION TO ACQUIRE STOCK OF COMPETING RAILROADS—LEGALITY.

The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided *pro rata* among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce and is in violation of the anti-trust act (Act July 2,

1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates.

4. CORPORATIONS—POWERS—NEW JERSEY STATUTES.
The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.

5. SAME—INTERSTATE COMMERCE.
A State cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.

6. CONSTITUTIONAL LAW—RIGHT OF PRIVATE CONTRACT—LIMITATION BY INTERSTATE COMMERCE CLAUSE.
The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce.

7. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT TO ENJOIN.
The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, cannot be urged to defeat a suit by the United States to restrain the exercise of the power so illegally acquired by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

8. SAME—DEFENSES—QUESTIONS OF PUBLIC POLICY.
Where the effect of a combination is to directly prevent competition between two parallel and naturally

competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), and the court, in a suit to enjoin it as such, cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress.

In Equity.

Before CALDWELL, SANBORN, THAYER, and TANDEVANTER, Circuit Judges.

THAYER, Circuit Judge. This is a bill, exhibited by the United States, to restrain the violation of an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly termed the "Sherman Anti-Trust Act." The case was heard before a Circuit Court composed of the four Circuit Judges of the Eighth Circuit, pursuant to the provisions of a recent act of Congress, approved February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the Circuit where the suit is brought, when the Attorney General files with the clerk of the court wherein the case is pending, a certificate that it is one of "general public importance." Such a certificate has been filed, and in accordance with the mandate of the statute the case "has been given precedence over others and in every way expedited."

From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact:

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the State of Minnesota; thence across the continent to Puget Sound. These roads are, and in public estimation have ever been regarded as, parallel and competing lines. For some

years, at least, after they were built, they competed with each other actively for transcontinental and interstate traffic.

In the spring of the year 1901 they united in purchasing about 98 per cent. of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and became joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run 20 years, and bear 4 per cent. interest per annum. The amount of the stock so acquired was of the par value of about $107,000,000, and, as it was purchased at the rate of $200 per share, the bonded indebtedness of the two companies was thus increased to the extent of $200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern Companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.

In accordance with this plan the defendant the Northern Securities Company (hereafter termed the "Securities Company") was organized under the laws of the State of New Jersey on November 13, 1901, with a capital stock of $400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Com-

pany was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity.

Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share, and using its own stock at par to make the purchase.

The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company.

The scheme which was then devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done willfully and deliberately, we must conclude that those who conceived

and executed the plan aforesaid intended, among other things, to accomplish these objects.

The general question of law arising upon this state of facts is whether such a combination of interests as that above described falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations." Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

What is commonly termed a "trust" was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate trade or commerce—that is, if it directly occasioned or effected such restraint—should likewise be deemed illegal.

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial; that the words "in restraint of trade or commerce" do not mean in unreasonable or partial restraint of trade or commerce, but any direct restraint thereof; that an agreement between competing railroads, which requires them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one State to another, and which, by that means, restricts temporarily the right of any one of such carriers

to name such rates for the carriage of such freight or passengers over its road as it pleases, is a contract in direct restraint of commerce within the meaning of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such a contract or combination being that it confers the power to establish unreasonable rates, and directly restrains commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage; and, finally, that Congress has the power, under the grant of authority contained in the Federal Constitution, to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the general law of competition. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Taking the foregoing propositions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and prorate or divide them among all the shareholders of the two companies who had transferred their stock—the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men the power to suppress competition be-

tween two competing interstate carriers, whose lines are practically parallel.

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in Pearsall *v.* Great Northern Railway, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. Pennsylvania R. Co. *v.* Commonwealth (Pa.) 7 Atl. 368, 371; Farmers' Loan & Trust Co. *v.* New York & Northern Railway Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; People *ex rel. v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite Pullman Car Co. *v.* Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word "controlled," as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

What has been done through the organization of the Securities Company accomplishes the object which Congress has

denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter.

It is manifest, therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law. The reason which led to the acquisition of that charter would seem to have been that while, as individuals, the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony, and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and, by placing the same stock in the name of such artificial being, accomplish the same purpose. The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law, as administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

So far as the New Jersey charter is concerned, the question, broadly stated, which the court has to determine, is whether a charter granted by a State can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control. Presumptively, at least, no charter granted by a state is intended by the State to have that effect or to be used for such a purpose; and in the present instance it is clear that the State of New Jersey did not intend to grant a charter under cover of which an object denounced by Congress as unlawful, namely, a combination conferring the power to restrain

interstate commerce might be formed and maintained because the enabling act under which the Securities Company was organized expressly declares that three or more persons may avail themselves of the provisions of the act and "become a corporation for any lawful purpose." Laws N. J. 1899, p. 473. This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however extensive and comprehensive these powers may seem to be, the State of New Jersey has said, "You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any State wherein you see fit to exercise your powers."

But aside from this view of the subject, if the State of New Jersey had undertaken to invest the incorporators of the Securities Company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals, then we have no doubt that such a grant would have been void under the provisions of the anti-trust act, or at least that the charter could not be permitted to stand in the way of the enforcement of that act.

The power of Congress over interstate commerce is supreme, far-reaching, and acknowledges no limitations other than such as are prescribed in the Constitution itself. Gibbons *v.* Ogden, 9 Wheat. 1, 197, 6 L. Ed. 23; County of Mobile *v.* Kimball, 102 U. S. 691, 696, 697, 26 L. Ed. 238; Champion *v.* Ames (decided Feb. 23, 1903) 23 Sup. Ct. 321, 47 L. Ed. ——. No legislation on the part of a State can curtail or interfere with its exercise; and, in view of repeated decisions, no one can deny that it is a legitimate exercise of the power in question for Congress to say that neither natural nor artificial persons shall combine or conspire in any form whatever to place restraints on interstate trade or commerce. United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States *v.* Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259;

Addystone Pipe & Steel Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

It is urged, however, that such a combination of adverse interests as was formed, and has been heretofore described, was lawful and not prohibited by the anti-trust act, because such restraint upon interstate trade or commerce, if any, as it imposes, is indirect, collateral, and remote, and hence that the combination is not one of that character which the Congress of the United States can lawfully forbid. The following cases are relied upon to sustain the contention: United States *v.* E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Hopkins *v.* United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson *v.* United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the manner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage.

The cases cited above, and on which reliance is placed to sustain the view that the restraint imposed is merely indirect, remote, incidental, or collateral, are not relevant, for, as was fully explained in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 238, 240, 243, 20 Sup. Ct. 96, 44 L. Ed. 136, one of these cases (United States *v.* E. C. Knight Company) dealt only with a combination within a State to obtain a practical

monopoly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to commerce among the States or with foreign nations; that the fact that an article was manufactured for export to another State did not make it an article of interstate commerce before transportation had been begun, or necessarily subject it to Federal control; and that the effect of the combination then under consideration on interstate commerce was at most only incidental and collateral. But while commenting on its previous decision in United States *v.* E. C. Knight Co., the court took occasion to say, in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 136, that, when a contract is made for the sale and delivery of an article in another State, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and that combinations to control and monopolize such transactions would be in restraint of interstate commerce.

In the other cases (Hopkins *v.* United States and Anderson *v.* United States) it was held that the business of the members of the Kansas City Live Stock Exchange, which was under consideration by the court, was not interstate commerce and that the act did not affect them, and that, even if they were so affected, the particular agreement which was involved did not operate as a restraint of interstate commerce.

We fail to find in either of these cases any suggestion that a combination such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. No combination, as it would seem, could more immediately affect it.

Again, it is urged tentatively that, if the existing combination which the government seeks to have dissolved is held to be one in violation of the anti-trust act and unlawful, then the act unduly restricts the right of the individual to make contracts, buy and sell property, and is invalid for that reason. With reference to this contention it might be suggested (as it has been by the government) that, as the situs of the stock which the Securities Company has bought is in the States of

Wisconsin and Minnesota, which respectively chartered the Northern Pacific and Great Northern Companies, and as the stock owes its being to the laws of those States, and as each State has forbidden the consolidation of competing and parallel lines of railroad therein, and has likewise prohibited any consolidation of the "stock and franchises" of such roads, the contention last mentioned is entitled to little consideration in the case at bar.

But waiving and ignoring this suggestion, the argument advanced in behalf of the defendants is met and answered, so far as this court is concerned, by the decision in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 228, 229, 20 Sup. Ct. 96, 102, 44 L. Ed. 136, where it is said, *inter alia:*

"Under this grant of power to Congress (the power to regulate commerce between the several States and with foreign nations), that body in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. * * * We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts, limits the power of Congress and prevents it from legislating on the subject of contracts of the class mentioned. * * * It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. * * * But it has never been, and in our opinion ought not to be held, that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, among other things of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision of the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those

private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States. We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or that it was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."

These observations, as a matter of course, preclude further controversy over the power of Congress to limit to some extent the right to make contracts when enacting laws for the regulation of commerce between the States.

Learned counsel for the defendants further contend as follows: That the anti-trust act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad, although such a combination operates to stifle competition; that no relief can be granted to the government in this instance, because the combination or conspiracy of which it complains has accomplished its purpose, to wit, the organization of the Securities Company and the lodgment of the majority of the stock of the two railroads in its hands before the bill was filed; and, finally, that the combination proven was one "formed in aid of commerce and not to restrain it;" in other words, that it was one formed to enlarge the volume of interstate traffic and thus benefit the public.

The court cannot assent to either of these propositions.

The first, we think, is clearly untenable for the reason already stated and fully disclosed in the decisions heretofore cited.

Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such

construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce, that antedated its organization as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it.

Relative to the third contention, which has been pressed with great zeal and ability, this may be said: It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial and necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.

We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them involve questions which are not within the province of any court to decide, involving, as they do, questions of public policy which Congress must determine. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce; that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination, and we have little hesitation in answering this question in the affirmative, then the anti-trust act, as it has been heretofore interpreted by the court of last resort, has been violated, and the government is entitled to a decree.

A decree in favor of the United States will accordingly be entered to the following effect: Adjudging that the stock of the Northern Pacific and Great Northern Companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants in restraint of trade and commerce among the several States, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies; also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision, or influence over the acts of said companies or either of them by virtue of its holding such stock; enjoining the Northern Pacific and Great Northern Companies, respectively, their officers, directors and agents from permitting such stock to be voted by the Northern Securities Company, or any of its agents or attorneys on its behalf, at any corporate election for directors or officers of either of said companies; and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said company, or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

UNITED STATES OF AMERICA v. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.	C. Equity No. 789.

DECREE.

This cause came on to be heard at this Term and was argued by counsel (Hon. Philander C. Knox, the Attorney-General; Mr. D. T. Watson, special counsel; Mr. James M. Beck and Mr. W. A. Day, Assistant Attorneys-General, and Mr. John M. Freeman appearing for the United States, and Mr. George B. Young, Mr. John W. Griggs, Mr. M. D. Grover, Mr. C. W. Bunn, Mr. Francis Lynde Stetson, and Mr. David Willcox appearing for the defendants); and thereupon upon consideration of the evidence and the arguments,

It was ordered, adjudged and decreed as follows, to wit: That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are

hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor.

HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

A true record.
Attest:

HENRY D. LANG,
Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

THIRD DIVISION.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. Maxwell Evarts and Mr. John D. Baldwin, (Mr. John F. Dillon was with them on the brief) for the petitioners.

Mr. Elihu Root, Mr. John G. Johnson, Mr. Frank B. Kellogg and Mr. C. A. Severance for the Northern Securities Company.

Hon. P. C. Knox, Attorney-General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge, stated the conclusions of the Court.

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of The United States *vs.* The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed recently by the Supreme Court of the United States.

The petitioners state as the ground of their application that Harriman and Pierce, as Trustees for the Oregon Short

Line Railroad Company, are the registered owners of $82,491,-871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company, that the plan so proposed contemplates that the stockholders of the Securities Company shall surrender ninety-nine per cent, of the stock of that Company which they respectfully hold, each stockholder receiving in exchange $39.27 in stock of the Northern Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern Pacific stock; and, as they verily believe, that the proposed plan of distribution if carried out will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who co-operated in the forming of the Securities Company and would continue the common management of the two competing railway companies and render the decree of this Court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case, after the entry of a final decree, are very unusual.

They are never granted as a matter of course, and owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise.

The principal ground as it seems on which the petitioners Harriman and Pierce base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be

filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given (*Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609), but we fail to perceive that further orders are necessary in the case in hand to insure the due execution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two Railway Companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that Company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that

had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said Railway Companies which the Northern Securities Company had acquired in exchange for its own stock and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two Railway Companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last men-

tioned but will lead to a very wide distribution of the stock of the two Companies, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits or excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. The United States is the complainant in this case. It is the conservator of the public welfare and has the right to speak for the public. According to well established rules the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has the right to exercise. The petitioners can intervene only for the protection of their own individual interests and for that purpose only in the event that they can obtain adequate protection in no other way. The United States, speaking by its Attorney General, says that it "neither admits nor denies the allegations of the petition but objects to the proposed intervention. This case was heard before this Court on bill, answer and testimony and a final decree was entered enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States the decree of this Court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable disposition of the stock of the two Railway Companies if they can do so, which will not be in violation of law, feeling confi-

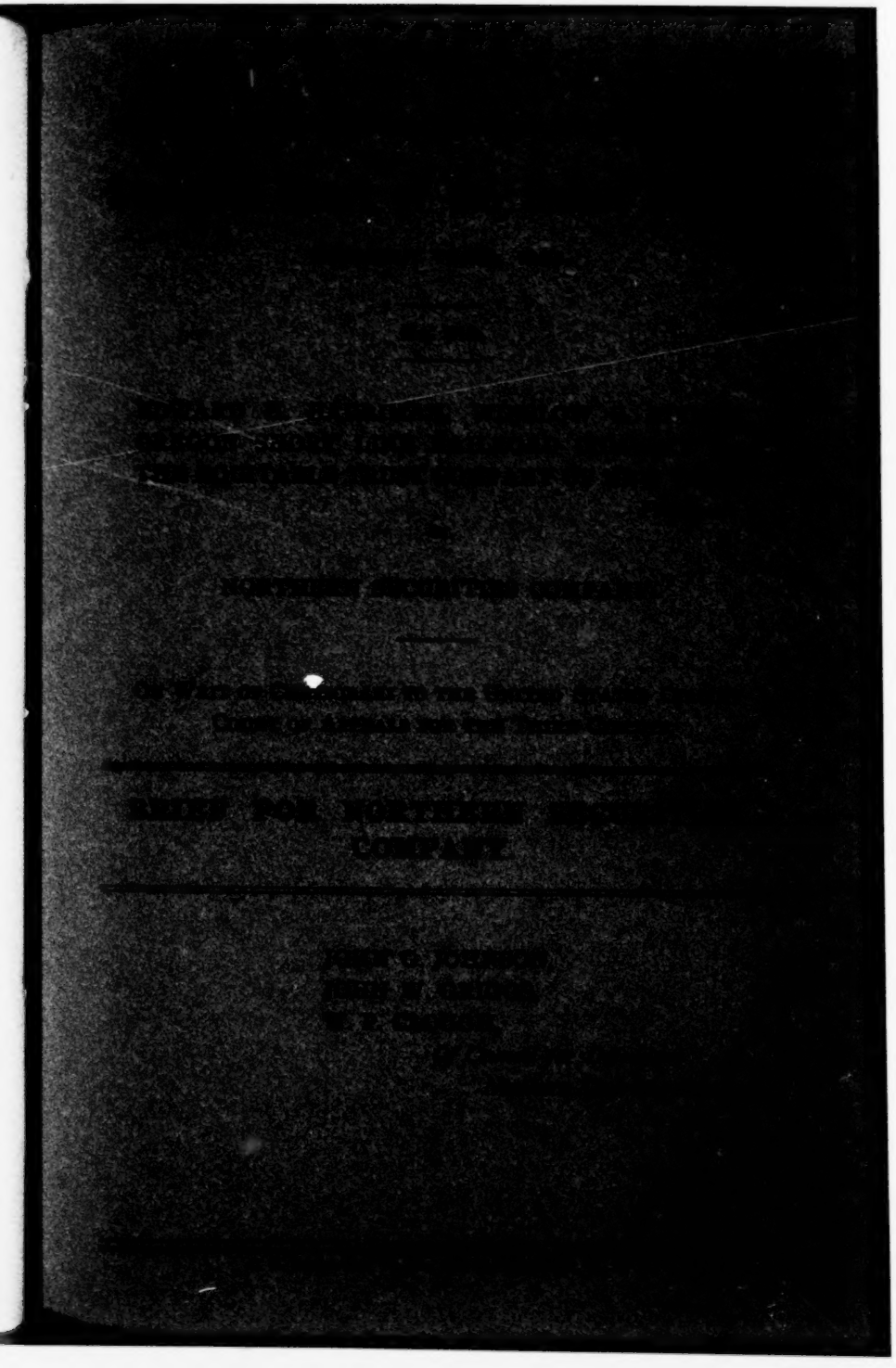
dent of its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies and preferring to challenge the validity of a .y such combination by an independent bill rather than by further proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government's bill in this case, that it has never been released from such custody, although a final decree has been entered, and that on this ground the petitioners, who assert a right to have particular shares of stock of the Northern Pacific Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that so long as property remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In Matters of Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to that court for relief, and as a general rule cannot obtain relief elsewhere. This Court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it and the Railway Companies from paying dividends thereon to the Securities Company. Nor was the bill, which was filed by the Government, one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the Court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated. Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action and if it so happens that the decree of this Court in favor of

the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that Company in the two Railway Companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any Court having general common law and equity powers, is competent to enforce.

Leave to intervene is denied.



Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

vs.

NORTHERN SECURITIES COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Appeal to the Circuit Court of Appeals was from an Interlocutory Decree of the Circuit Court for the District of New Jersey, filed August 18, 1904, ordering :

" That a writ of special injunction do issue out of and under the seal of this court, directed to the Northern Securities Company, restraining it, its Directors, officers, agents, and employes, until the final determination of the suit, or until further order of this court, from in any manner transferring, assigning, distributing, or otherwise disposing of, or parting with three hundred and seventy thousand, two hundred and thirty (370,230.) shares of the common stock of the Northern Pacific Railway Company, alleged in the Bill to have been received by the Northern Securities Company from the complainants, Edward H. Harriman and Winslow S. Pierce,

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NOTE.—References herein to " OPINIONS " are to the pamphlet " Opinions and Decree " in the suit of U. S. vs. Northern Securities Co., *et al.*, of which copies were filed for respondent in the application for *certiorari*.

on or about the 18th day of November, 1901, or any part thereof; *and from transferring, assigning, distributing or otherwise disposing of or parting with three hundred and forty-seven thousand and ninety (347,090) shares of the common stock of the Northern Pacific Railway Company, received by the Northern Securities Company from the Northern Pacific Railway Company, on or about the 27th day of December, 1901;* and from transferring, assigning, distributing, or otherwise disposing of or parting with the certificates representing said stock, or any of them or any part thereof." (R. 344–345).

I.

On appeal from an interlocutory decree granting a special injunction in a suit for establishing title to property, if the record fully and fairly discloses the case on the point of title, the Appellate Court not only may, but rightfully should, determine the question of the injunction upon the merits of plaintiff's claim. The action of the Circuit Court of Appeals in this case was controlled by that rule, and proceeded upon it.

The authorities agree that under some showings the granting or refusing of a special injunction is, in a measure, discretionary.

But the right to grant an injunction is always dominated by the nature of the case disclosed by the motion papers. It is elementary law that a plaintiff cannot have a special injunction where, on the face of the motion papers, it appears he will not succeed in finally establishing the claim he asserts.

High on Inj. 3rd Ed., Vol. 1, § 7.

Under such a state of the record, the injunction must be denied. In the discretion of the court, the bill may also be dismissed.

Stated in general terms, the authorities also agree that, on appeal from an order granting a special injunction, the appellate court will usually limit its action to determining whether the "*judicial*" discretion of the court below has been properly exercised. But discretion could neither be "judicial" nor properly exercised, which should tie up property of great value to await the distant outcome of a suit, when the motion papers show that plaintiff's case must fail on final hearing.

If, nevertheless, the injunction be granted on such a showing, and be appealed from, not only is it the duty of the appellate court to vacate the injunction, but it may properly include in its mandate to the lower court a direction to dismiss the bill. The appellate court is charged with doing what the court below should have done in the first instance. These propositions are now fully established in the federal appellate courts.

Knoxville vs. Africa, 47 U. S. App. 74, 77. Fed. Rep. 501, C. C. A., Sixth Circuit.

This was a controversy growing out of a grant of right to occupy streets in Knoxville with surface railways.

Referring to Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co., 43 U. S. C. C. A., 47, the court said :—

"We there said touching appeals from preliminary injunctions, that where a preliminary injunction is allowed on a *prima facie* showing, and without determination of the merits, this court will, on an appeal, consider only the question whether, on the *prima facie case* made, there has been an abuse of discretion. Such preliminary injunctions are ordinarily intended to operate *pendente lite*, or until a hearing on the merits can be had. They are granted upon a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge. In the same opinion we also said, in regard to the same class of appeals, that quite another question would arise, if, on appeal from such an order, this court upon the record should conclude, not only that no case was exhibited for preliminary injunction, but also that the bill could not be entertained for any purpose. In such a situation, shall it refuse to determine the case on the merits, and refuse to direct the lower court to dismiss the bill? *Must it confine itself to a mere expression of opinion, that the dis-*

cretion of the court has been erroneously exercised, and permit a fruitless suit to be prosecuted to a final decree, ultimately to end in dismissal? Clearly, the court ought not to sit idly, and merely advise the counsel and the lower court, but should, if it has jurisdiction, and if it has before it a sufficient record to enable it to do justice, pronounce a judgment upon the merits, and direct the inferior court to do what it originally ought to have done.

The appeal now under consideration presents one or more questions of law going to the root of the complainant's right of way upon the street in controversy. These questions arise upon the face of the ordinance of 1876, and involve not only its validity, but its meaning, and the duration of the right thereby granted. They were considered by the court below, and an elaborate opinion filed, construing and determining the validity, scope and duration of the street rights attempted to be conferred. The same questions are presented fully in the records of this court. Why shall we refuse to consider or decide them? What good is to be accomplished by confining ourselves to the shell of the case, and refusing to decide a question of law, because it is one of grave character, and goes to the foundation of a litigation? The practice of refusing to determine grave questions of law upon a mere motion to dissolve an injunction, or upon an application for a preliminary injunction, is discussed by Chancellor Cooper in *Owen vs. Briers*, 2 Tenn. Ch. 295, 297. The rule of practice there considered is only for the government of *nisi prius* courts, and not one of universal obligation. The practice, upon such motions, as very clearly stated by Chancellor Cooper in the case cited was, 'upon motion to dissolve an injunction, it is neither necessary nor proper for the court to undertake to decide the case upon its merits, for there is no mode, under our system, of correcting his errors, if he should make any, in the conclusion arrived at. No appeal can be made from such ruling, and, in the meantime, irreparable injury may be done. If the court can see that there is a substantial question to be decided, it should preserve the property until such question can be regularly disposed of.' * * *

"Upon the other hand, such an injunction ought not to be granted unless the plaintiff's right seems very clear, and the injunction will not operate with more hardship upon the defendant than its disallowance upon the plaintiff.

Shinkle vs. Louisville & N. R. Co., 62 Fed. Rep. 690, 692.

It is manifest that these rules of practice have no operation upon an appeal to this court, where the legal questions are presented by the record in such a manner that justice can be done the litigants, and fruitless delay and a second appeal avoided. Though this court will not feel itself compelled to consider and

decide such appeals upon the merits, yet it will do so when the circumstances seem to require it, and the record is sufficient. This practice has the high sanction of the Circuit Court of Appeals for the Fourth Circuit, in the case of *Green vs. Mills*, 25 U. S. App., 383, where the opinion was by Chief Justice FULLER.

The order granting the injunction was dismissed, and the case remanded with order to dismiss the bill.

This case was fully approved on this point by this court in *Mast vs. Storer*, 177 U. S., 485, 494-5."

By its appeal from the ruling of the Circuit Court, the Securities Company necessarily undertook to satisfy the appellate court, that the state of the showing here is like that in *Knoxville vs. Africa;* that the motion papers exhibit Plaintiffs' case in full; that every essential transaction and fact composing it is now on the record, in all amplitude; and, consequently, that the duty of the appellate court was merely to apply to the established facts the principles of law governing the ultimate rights of the parties; in other words, to dispose of the application for an injunction on the merits of the case. In the Circuit Court, the Securities Company opposed an injunction solely on the ground that. Plaintiffs were shown to have no case. Questions of procedure were not mooted.

Although, in the state of the Record, the Circuit Court of Appeals would have been justified in ordering dismissal of the Bill, it was not bound to do so; and counsel for Defendant do not suggest the omission to so order as an error.

Manifestly, the principle underlying *Knoxville vs. Africa*, and the point on which it turned in the Circuit Court of Appeals, and on which it was approved by this court, was not that the want of equity appeared upon the face of one particular sort of document instead of another, or that the bill was ordered to be dismissed as well as the injunction to be vacated; but rather that when the record on an appeal from an injunction

order discloses absence of a cause of action in the plaintiff, the appellate court will dispose of the matter on a consideration of the merits, and not uselessly prolong the defendants' distress by allowing the injunction to stand until the case can be brought up on appeal from a final decree. That this is the basic rule of that case, unmistakably appears from the italicized passages of the opinion, quoted, Ante, p. 3-4.

If the record shows a want of equity in plaintiff, how could the particular part or parts, in which the disclosure is made, be of consequence ?

In this Record, certainty of Plaintiffs' inability to finally succeed, pervades the whole.

Defendant's counsel submit that the Bill itself fails to state a case ; but, in view of the remainder of the Record ; especially in view of the extracts from corporate minutes, and the numerous sworn admissions of the managing Plaintiff, which it contains, any importance that otherwise might be claimed for the Bill for the purpose of this hearing disappears.

Even where a bill states a case ; and is positively verified by one having knowledge ; a plaintiff does not thereby acquire right to an injunction, if the bill be disproved by his own testimony, or by documents admitted or presumed to be true or by both, as here.

Otherwise special injunctions would be the rewards of mere good art in pleading.

The mode prescribed by Act of Congress reviewing injunction orders is Appeal.

In equity proceedure, in the federal courts, and as used in Congressional Acts, this term has long borne a well defined and generally understood meaning. Inherent in and inseparable from that meaning is the idea that the entire matter appealed from comes before the appellate court for consideration *de novo*, and for disposition accordingly. An appeal brings up more than the mere question whether or not errors of law appear on the face of the record. Writs of error in common law

actions are limited to that; but appeals in equity matters vest the appellate court with every power to decide and direct, possessed by the court of first instance. This must be equally true for matters of discretion as for those of strict right; so that while upon appeals, appellate courts may, in certain matters, not feel like disturbing the exercise of discretion by a lower court, such attitude does not result from any lack of power. The appeal from this injunction order authorized the Circuit Court of Appeals to consider *de novo*, and on every ground, the question whether Defendant here should be enjoined. This included all questions involving exercise of discretion.

Hence for argument's sake conceding that, within limits, the granting or withholding of this injunction was discretionary with the Circuit Court, upon the appeal the matter became subject to the superior exercise of discretion by the Circuit Court of Appeals.

When the latter court had decided that the demands of justice and equity here could be met only by considering the question of injunction from the standpoint of the ultimate rights of the parties, any discretion of the Circuit Court had been entirely eliminated, and had ceased thereafter to be a factor.

Exercise by the Circuit Court of Appeals of its own discretion in a sense contrary to the exercise of that of the Circuit Court, was within its clear competence, and could not be assigned as error.

II.

If, up to the time of argument of the appeal in the Circuit Court of Appeals, Plaintiffs had been entitled to a stay of the pro rata plan of distribution, until opportunity could be given for fair argument and advisement upon the law points involved in their claim, such right was exhausted by their opportunity to be heard in the Circuit Court of Appeals.

The opinion of the learned judge granting the special injunction discloses much misapprehension and misunderstanding of the facts appearing upon the papers.

It can be gathered from his opinion, that, in granting the application, he was moved by *three* considerations, viz. :—

1. Supposed material and important questions of fact to be settled;

2. Assumed material and important questions of law to be decided;

3. The statutory right of appeal from an order granting an injunction, but the absence of such right from an order refusing one.

The opinion filed with the order allowing the injunction contains the following passages, which may fairly be regarded as the kernel of the whole :

"The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. * * * Regard should be had to nature of the controversy, the object for which the injunction is sought, and the comparative hardship or inconvenience to the respective parties involved in the awarding of denial of the injunction."

(R. 332-333)

" An appeal does not lie from any interlocutory decree of this court, denying a preliminary injunction. While this consideration is entitled to no weight where, on an application for an injunction, it clearly appears that the complainant cannot prevail in the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought."

(R. 344)

The second and third of the above-enumerated grounds were non-existent in the Circuit Court of Appeals.

Plaintiffs were heard there with like effect as if the appeal had been their own. They had the benefit of a full consideration of their case, and a judgment of their rights, by the court to which alone an appeal therein could be taken from a final decree of the Circuit Court.

The opportunity of obtaining the opinion of the Circuit Court of Appeals, which was strongly pressed for by Plaintiffs, in the Circuit Court, both orally and on all their printed briefs, and preserved for them by the order of the latter court, has been accorded them.

No authority recognizes difficult or doubtful questions of law as alone forming sufficient ground for tying up property for a lengthy period. Every exigency arising from the existence of law questions, however difficult or doubtful, is fully and fairly covered by the preservation of the *status quo* merely long enough to allow fair preparation for argument, and reasonable advisement afterwards by the court. Such questions might be, although no case has been found where they actually have been, regarded sufficient reason for an *ex parte* injunction running until parties could obtain a fair hearing, and the court could reasonably consider the case; but no longer. Any and every right of preparation to which Plaintiffs could be entitled, under the utmost stretch of favor, was certainly exhausted in the Circuit Court.

On April 20, 1904, an *ex parte* injunction, in the form of a stay order, was issued.

(R. p. 154)

This order remained in force until superseded by the order appealed from.

The motion came on for argument on May 20, and the hearing occupied three days. Lengthy original and reply briefs were submitted on both sides. Plaintiffs amended their bill twice; the case now rests on the Second Amended bill. The oral argument terminated on May 23. The case was held under advisement until July 20, when the decision and opinion of the Circuit Court were filed.

Any and all right which Plaintiffs originally might have had, of opportunity for preparation, argument, and decision of the law questions in the case had by that time been exhausted, and no further delay on the ground of the existence of such questions could rightfully be imposed on the Securities Company. Nevertheless, it was imposed; and the opportunity for preparation was again extended from July 20 to the date of argument in the Circuit Court of Appeals. Plaintiffs cannot urge the existence of difficult law questions as a ground for still further retaining the injunction.

III.

In the Circuit Court of Appeals, therefore, the whole case for an injunction, pendente lite, was thrown back upon the first ground of the Circuit Court, viz., "grave and difficult" questions of fact, for ultimate determination.

If no such questions remained, but all essential facts in the controversy could, with reasonable clearness, be ascertained

from the present record, it became the duty of the appellate court to ascertain them; and, having done this, unhesitatingly to apply the law to the facts, and determine the question of granting or refusing the injunction in view of the ultimate rights of the parties.

The documents in this record necessary to be considered in ascertaining the facts of the case are of the following classes:

The Bill of Complaint in this suit.

The pleadings and decree in the suit of *The United States vs. Northern Securities Company and Others*, in the Circuit and Supreme Courts of the United States.

The *ex parte* affidavits of sundry individuals, including those verifying the Bill of Complaint, taken in the present suit.

Deposition of Mr. E. H. Harriman, taken before the Interstate Commerce Commission, at Chicago, in January, 1902.

Deposition of same taken in the suit of *The State of Minnesota vs. Northern Securities Company, and Others*, in December, 1902.

Extracts from the official minutes of proceedings of the Board of Directors of the Northern Pacific Railway Company, and of the Executive Committee and Board of Directors of the Northern Securities Company.

The above-mentioned depositions were both read in evidence by the Government, in the suit, *United States vs. Northern Securities Co.*, and appear in the printed Record of this Court therein, on pages 190-241.

On the question of injunction the papers must be examined in light of the following principles:—

Statements of the Bill are not to be considered true, except in so far as they are supported by documents themselves imparting verity, or by the oath of some one having personal

knowledge of the matters stated ; it not appearing here that any such person is sick, absent, or unwilling to make affidavit.

An *ex parte* affidavit, being commonly the language of the draftsman, rather than that of the affiant, must yield to a regular deposition of the same witness, taken orally on question and answer, and with opportunity of cross-examination and re-examination, on points wherein affidavit and deposition differ.

Minutes of corporate proceedings made contemporaneously with the event recorded, and therefore free from the infirmity of human memory, are evidence of the highest quality as to the facts stated by them. The corporate minutes appearing in these motion papers have the additional element of credit, that they were all made while Mr. Harriman was a member of the board or committee making them. In the usual course of business, the minutes of each meeting were read at the following one and submitted for approval or correction ; so that if any statement in them was contrary to the fact, or short of the fact, Mr. Harriman was always in position to make it conform to the fact.

The truthfulness of these minutes is therefore to be taken as conceded by Mr. Harriman.

Besides, both as to Mr. Harriman's depositions, and the corporate minutes, Plaintiffs had full opportunity to deny, explain, or contradict any part of them, in rebutting affidavits or other documents filed in this application.

They have not done so in any particular.

Hence, on the question whether an injunction should issue, the depositions and minutes must be deemed to have been accepted by plaintiffs as correct.

Furthermore, the statements of Mr. Harriman are not those of a mere witness, knowing the facts, but unauthorized to bind the parties in interest. The Northern Pacific shares transferred by Harriman and Pierce to the Securities Company were acquired and held by them in their personal names ;

Mr. Harriman in person conducted all negotiations for the sale of those shares to the Securities Company; the Northern Securities shares used in part payment for the Northern Pacific shares were issued, and ever since have been held, by Harriman and Pierce in their personal names. Harriman and Pierce have continuously been trustees and managers of all the interests of the Oregon Short Line Company in the Northern Pacific shares and in the Northern Securities shares which passed between the parties in course of the dealings that figure in this suit.

The statements and expressed or implied admissions of Mr. Harriman about the transaction here involved are therefore the admissions of a party, as well as the testimony of a witness.

IV.

The bill claims two distinct parcels of stock, one of them never held by Plaintiffs.

The injunction order discloses the general nature of Plaintiffs' claims. There are two:

1. For $37,023,000. common stock of the Northern Pacific Railway Company, at one time held by Harriman and Pierce and, on November 18, 1901, by them transferred to the Northern Securities Company.
2. For $34,709,000. more, of the same kind of stock, acquired by the Securities Company directly from the Northern Pacific Railway Company, on December 27, 1901.

The last named lot of stock has never been in possession of any of Plaintiffs. It has never existed in the hands of any one save the company that issued it and the company that ever since issuance has held it.

Plaintiffs therefore are here prosecuting two separate claims, for two distinct parcels of property; and the question

at once occurs, whether both could be established by the same set of facts and reasons. The absolute solution of this question would not be so controlling on the question of injunction as it might become at a final hearing; but it can never be left out of view at any stage of the case.

The substance of the grounds on which Plaintiffs claim the $37,023,000. lot of Northern Pacific stock which Harriman and Pierce once held appears in the following passages from the Second Amended bill.

V. * * * * Although incorporated and organized in form according to, and nominally for objects authorized by, the laws of the State of New Jersey, in reality said Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states, and for objects prohibited by the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and as an instrument and agency to effectuate and accomplish the objects of said combination, that is to say: Prior to November 13, 1901, James J. Hill, J. Pierpont Morgan, William P. Clough, D. Willis James, John S. Kennedy, Robert Bacon, George F. Baker and Daniel S. Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of the State of New Jersey, and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns (R., p. 3). * * *

VII. Your orators further show that prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company had acquired, and at the time of the incorporation and organization of said Securities Com-

pany owned, $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest of $82,491,871 par value and said cash * * * (R., pp. 4, 5).

XIII. Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said Anti-Trust Act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns (R., p. 9).

The $34,709,000 lot of stock, which Plaintiffs have never held, appears to be claimed here by them on the same general grounds as the $37,023,000 lot, with the additional ground appearing from the following clauses of the bill:

IX. Your orators further aver that at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Secur-

ities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of the said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,000 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce, and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid (R., pp. 5, 6).

BILL UNVERIFIED BY ANY ONE HAVING OR CLAIMING PERSONAL KNOWLEDGE OF THE MATTERS CHIEFLY MATERIAL.

This is a fitting place at which to point out a surprising omission from this injunction Bill. The Second Amended Bill was filed June 4, 1904—twelve days after argument and submission of the motion for injunction on the First Amended Bill.

The filing of the Second Amended Bill was not followed by any request, from either side, to re-open the application and submit additional proofs or arguments.

On the part of Defendant, no occasion for any further showing was perceived, because every material fact, bearing upon the question of title, or otherwise upon the merits of the controversy, was already before the Court; nothing remained to be added. It was felt that the proofs already in furnished a complete answer to all versions of the Bill so far exhibited, and to any different versions that might thereafter be devised. The Second Amended Bill has not been verified by any one having or claiming personal knowledge of the matters of fact asserted therein as the foundation of Plaintiffs' claims. The

verifiers are MR. WM. D. CORNISH and MR. WINSLOW S. PIERCE. Where was MR. HARRIMAN?

The verifications appear on pp. 16–17 of the Record.

Mr. Cornish is an officer of the Oregon Short Line Railroad Company, and verifies merely formally, as such. He was not a participant in any transaction with the Securities Company. There is no claim that his corporation ever even communicated with the Securities Company, prior to the stockholders' meeting of April 21, 1904, assembled to act on the questions of reducing capital and distributing surplus, when a protest was filed in its name.

While from the beginning of these matters Mr. Pierce was a joint holder or trustee with Mr. Harriman, the latter was the active manager of the stock standing in their names. Mr. Pierce was not, and does not claim to have been, present when any of the things alleged by the Second Amended Bill to have been done by, for, or with the Securities Company was done, except on two occasions, viz., one on an unremembered date prior to the formation of the Securities Company, when he attended a meeting of counsel to consider the form and substance which the then future company's Certificate of Incorporation should have, (R. pp. 185–186); another on November 18, 1901, when, at the offices of the Securities Company, the mutual transfers of stock and cash were made. (R. p. 361.)

On one occasion, and one only, in addition to the two above mentioned, was Mr. Pierce an actor in person, in any matter stated in either version of the Bill, where the Securities Company was also actually or constructively present. At the special stockholders' meeting of April 21, 1904, he attended in person, and for himself and for Mr. Harriman, who was absent from the meeting, subscribed and handed in the protest appearing. R. p. 162–163.

This protest is alleged in the First Amended Bill, at the end of Sub. XIV. (R. pp. 380–381) and in the Second Amended Bill, at the end of the last paragraph but one of the same

numbered subdivision. R. p. 11. The First Amended Bill was verified by Mr. Cornish, as Vice President of the Oregon Short Line Railroad Company, Mr. Alvin W. Krech, as President of the Equitable Trust Company, whose verifications were attached directly to the Bill (R. p. 384), and by Mr. Pierce, whose verification was contained in a separate affidavit accompanying the Bill. R. pp. 361–363. The clause of this affidavit verifying the First Amended Bill is as follows:—

"I am one of the complainants named in the foregoing bill of complaint and have read the same. The matters and things therein stated *so far as they relate to the acts and deeds of the Oregon Short Line Railroad Company, Edward H. Harriman or myself, are true of my own knowledge*, and so far as they relate to the acts and deeds of others I believe them to be true." R. p. 361.

Mr. Pierce recognized the fact that not himself, but Mr. Harriman, was the actual doer of nearly all the things alleged in the Bill, and therefore the only proper witness regarding them, by excusing his own making of affidavit, on ground of Mr. Harriman's temporary absence in a distant part of the country. See closing Sub. of affidavit, R. p. 363. Mr. Pierce's verification of the Second Amended Bill is in the following form:—

"Winslow S. Pierce, of full age, being duly sworn, on his oath says: I am one of the complainants in the foregoing second Amended bill, and am familiar with the contents thereof, *and the matters and things therein set forth, so far as they relate to* MY OWN *acts and deeds are true*, and so far as they relate to the acts and deeds of others, I believe them to be true." r. p. 14.

A glance discloses the difference between the form and effect of the two verifications. The assertion of personal knowledge in the one to the First Amended Bill covered not only the acts of affiant himself, but also, those of Mr. Harriman. *The assertion of personal knowledge in the one to the Second Amended Bill is strictly limited to the acts of Affiant himself*, alleged in that bill. This time mention of Mr. Har-

riman is wholly omitted. Mr. Pierce does not this time assert personal knowledge of anything alleged in the Bill as having been done by Harriman and Pierce. Undoubtedly matters of that kind were intended by the affiant to be placed under the head of things other than "my own acts." The distinction is clear; and the form of the first verification shows it to have been fully appreciated by Mr. Pierce. It would not follow that because Mr. Pierce was a joint trustee for this stock he should personally conduct, or even be present at, negotiations for its sale. They all might be, and in fact were, conducted by Mr. Harriman alone. Mr. Pierce personally appeared in the business only on the occasion of the actual transfers of stocks and money, made as the result of the prior negotiations of Mr. Harriman. The happenings at these negotiations, what was mutually said or done, might or might not be fully communicated to Mr. Pierce; but whether or not they were, his knowledge of them would be from hearsay, and not his own.

When he purposed swearing to personal knowledge of allegations of joint acts of Harriman and Pierce, he knew how to do so. The second verification shows that he also knows how to decline such commitments when unwilling to make them.

The expression "my own acts" was meant by Mr. Pierce to be taken literally, and must be so taken.

Comparison of the First with the Second Amended Bill at once discloses the reason why Mr. Pierce was unwilling to swear to personal knowledge of anything alleged in the latter Bill save his own doings. The First Amended Bill, following in that respect the Original, based Plaintiffs' alleged rights in the Northern Pacific stock wholly upon what it asserted to have been adjudicated in the Government Suit. Not a word in either of the two versions of the Bill about the stock having been transferred to the Securities Company, under a special agreement or understanding with Harriman and Pierce, whereby

the same was not to become the absolute property of the former, but was merely to be held by it, as custodian, or under condition, for the exclusive purpose of being used to restrain trade. The First Amended Bill confines its allgations regarding the mutual transfers of stocks and money, between Harriman and Pierce, on the one side, and the Securities Company on the other, to a bare statement of the fact of the making of the same. (Par. VIII., R. p. 375); Plaintiffs' theory of their case, up to that time, having been that the transfer by them of the Northern Pacific stock, their ownership of the $82,491,000 Securities stock, and the existence of the final decree in the Government suit of themselves constituted sufficient grounds for the recovery they seek. Hence Mr. Pierce was in position to make with perfect truthfulness and propriety affidavit that the allegations of the bill relating to the acts of Mr. Harriman and himself were true, of his own knowledge. He had actually participated in all those acts.

But, in this regard, the frame of the Second Amended Bill effected a total change. Now, for the first time, Plaintiffs felt the need of broader foundations for their case; so, while aiming to preserve their previous grounds, they added allegations asserting transfer of the Northern Pacific stocks under an express and special agreement of the nature above stated.

See Sub. VII. and 2nd par. Sub. V., Second Amended Bill. R. pp. 3-5.

Clearly, an agreement of that kind could not be the "own act" of Mr. Pierce, nor that of Mr. Harriman. It would have to be a joint act of both; although the participation of one might be limited to mere concurrence, expressed only to the other, or even to silent assent.

These new allegations once in the bill, there remained the task of getting them verified on personal knowledge of the affiant. The Union Pacific system is great, and its official

organization comprises a multitude; but plainly it did not suffice in this particular. Mr. Harriman himself had given two depositions used in the Government suit, and a recent affidavit in this very suit, covering the subject; but none of them asserted the existence of any condition attending the transfer of the Northern Pacific stock to the Securities Company. On the contrary, they all vehemently denied it. Mr. Harriman could not be expected to make the desired verification; and the circumstances all unite in compelling the inference that Mr. Pierce was likewise unwilling. Hence the change of form in his verification of the Second Amended Bill, from that he could conscientiously use for the First Amended Bill.

The Second Amended Bill stands verified upon personal knowledge solely as to the one "own act" of Mr. Pierce which the Bill alleges, viz., the making of protest at the special meeting of stockholders of the Securities Company.

But this act is both unimportant and undenied.

To every intent, therefore, the Bill is a mere unverified pleading. At no stage of the application for a special injunction has it been entitled to any greater weight than belongs to such a pleading.

As the claim for the $34,079,000 lot will admittedly fail if that for the $37,023,000 lot fails, the common general grounds of both claims may conveniently be discussed together.

V.

Plaintiffs' claims are self-contradictory. Their claims can be established, if at all, only under rules of common law. Equity rules cannot be invoked in their support.

Plaintiffs apparently aim to propound *two* alternative and contradictory theories :—

1. That the transfer of the Northern Pacific stock to the Securities Company was a mere *bailment*, and consequently terminable at the pleasure of the *bailors*.
2. That the transfer was meant by the parties to be in the nature of a sale ; conditioned, however, that the stock should permanently be kept and used by the vendee for the special purpose of restraining the trade of the two railways ; and that, upon its ceasing to be so used, it must be restored to Plaintiffs on their demand.

Either theory necessarily denies that complete title to the Northern Pacific stock has ever vested in the Securities Company. The first theory assumes that the beneficial title has always remained with Plaintiffs ; the second, that at least a right to enforce a condition, and forfeiture by the Securities Company for breach thereof, has always been theirs.

Under either theory, whatever rights in the Northern Pacific stock Plaintiffs may now have are purely rights at law ; they could have no equitable foundation. Plaintiffs must be assumed to have brought their suit on the equity, instead of on the law side of the court, solely because the stock for which they sue stands on the books of the issuing company in the name of the Securities Company.

In other words, this suit would be best described as one in *equitable replevin*. Plaintiffs must establish title under rules of law, or fail.

VI.

The facts constituting title to the stock in controversy necessarily consist of, and are limited to, the things said and done, and mutually intended, by Harriman and Pierce on the one part, and the Securities Company on the other.

If all maierial facts in regard to those sayings, doings and mutual intentions appear in this Record, the entire case, on both sides, relating to title, must be here.

On these points the Record is complete. It contains all. Nothing more could be supplied. The sources of information have been exhausted. Also, every material fact needed for correct interpretation of these sayings and doings is here.

In the spring of the year 1901, at the instance, and with money furnished by the Union Pacific Railway Company, there were purchased, of the preferred stock of the Northern Pacific Railway Company, $41,085,000 out of $75,000,000, and of the common stock of that company $37,023,000 out of $80,000,000; thus a majority of the total $155,000,000 of capital stock of the Northern Pacific Company.

Union Pacific owns Oregon Short Line. The latter owns Oregon Railway and Navigation.

Mr. Harriman's deposition before the Interstate Commerce Commission discloses the connection of the Union Pacific with this purchase.

"MR. DAY: What is the total capital stock of the Oregon Short Line?

MR. HARRIMAN: I think between twenty-seven and twenty-eight millions.

MR. DAY: It purchased how much stock of the Northern Pacific?

MR. HARRIMAN: Seventy-eight millions.

MR. DAY: How did it pay for that stock?

MR. HARRIMAN: Some in cash and some by issuing its own obligations against that stock.

MR. DAY: How much cash did it pay approximately?

MR. HARRIMAN: Fifteen or twenty million dollars.

MR. DAY: That came out of its own treasury.

MR. HARRIMAN: Yes, sir.

MR. DAY: How was the money raised by the Oregon Short Line to acquire the balance of $60,000,000?

MR. HARRIMAN: By issuing its own certificates of indebtedness.

MR. DAY: Who did it issue the certificates to? What I want—

MR. HARRIMAN: What you want is to find out if the Union Pacific had any interest in that purchase.

MR. DAY: Yes, sir.

MR. HARRIMAN: I want to be frank about it. The Union Pacific helped the Oregon Short Line to finance it and purchased from the Oregon Short Line the certificates of indebtedness, the money for which it was used paying for the Northern Pacific stock.

MR. DAY: *The sixty-one millions of that purchase money came out of the Union Pacific treasury, practically?*

MR. HARRIMAN: *Yes, sir.*

MR. DAY: *Directly or indirectly?*

MR. HARRIMAN: *Yes, sir*" (R., pp. 194–195).

It was further disclosed by Mr. Harriman, in the same examination, that the Union Pacific Railway Company is owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R., p. 194), and that this latter company is in turn owner of practically the entire capital stock of the Oregon Railway and Navigation Company (R., p. 198).

UNION PACIFIC AND NORTHERN PACIFIC PARALLEL AND COMPETING LINES. CONTROL BY THE FORMER OF THE STOCK HERE CLAIMED WOULD GIVE IT CONTROL OVER RAILWAYS OF THE LATTER.

The railways of the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad and Navigation Company, comprise the Union Pacific Railway System, which extends from the Missouri River westward, through the states of Nebraska, Wyoming, Colorado, Utah, Montana, Idaho, Washington and Oregon, to the Pacific

coast, at Portland, and is a close competitor of the Northern Pacific Railway Company not only for both the east and west bound transcontinental traffic, but also for that local to a great territory comprising a large section of each of the four states last named.

These facts are of dominating consequence in this suit. They characterize the purchase of the Northern Pecific stock, by the Union Pacific system, as a scheme to secure control of a powerful competitor in the interstate trade. The record here discloses no trace of a purpose to abandon that plan. This suit is manifestly a mere step in realizing it.

While acquisition by the Union Pacific system of $71,-732,062 of Northern Pacific stock would not give that system a majority of the entire capital stock of the Northern Pacific Company, yet for every practical purpose it would give control of the Northern Pacific Company. Corporations are controlled by stockholders' meetings; and the stock which makes the action of the company is not the totality of stock outstanding, but merely that part of the whole which attends the meetings.

Experience shows that only in rarest instances is the whole body of any stock represented at any meeting.

Under the Northern Pacific charter, a majority of all the shares is required for a quorum; but the majority of any quorum suffices to determine the action of the meeting.

The amount of Northern Pacific stock which plaintiffs here ask the court to take from the Securities Company, and hand over to the control of Union Pacific, forms almost exactly 46 3/10 per cent. of the entire capital stock of the Northern Pacific Company. It would be a majority at every stockholders' meeting where not more than 92 1/2 per cent. of the total should be present. But no one with experience in such matters would expect so large a percentage of the stock of a great corporation to assemble in any meeting. To all practical

certainty, the Union Pacific holdings of Northern Pacific stock would be a majority of all stock represented at any meeting; and whenever the question is of the effect of aggregating a large body of corporate stock in a single hand, experience must be the guide.

In the *Pearsall* case, the Court considered that acquisition by a railway company of a proportion of the stock of a competitor, less than a majority, would be inimical to a State statute forbidding one railway corporation to obtain control over another owning, or otherwise controlling, a parallel or competing line.

161 *U. S.*, 646.

PLAINTIFFS THEREFORE COME HERE IN EFFECT ASKING THE COURT TO PLACE CONTROL OF THE NORTHERN PACIFIC SYSTEM OF RAILWAYS IN THE HANDS OF THE UNION PACIFIC RAILROAD COMPANY.

Of the relative geographical positions of the Union Pacific and the Northern Pacific Railway systems, and of the public laws of the several states on the subject of railway combinations, as well as of the federal laws on the same subject, the court will take notice without proofs.

On the other hand, the distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the total will concentrate in a single interest. The individual defendants in the suit of the United States against the Securities Company and others, and all other persons referred to in the evidence in that case as having been consulted about the formation of the Securities Company, hold altogether but 996,016 shares of the stock of the Securities Company out of a total of 3,954,000 shares. A ratable distribution of the railway stocks would vest in all those defendants and consulted persons, individually, an aggregate of 378,224 shares, or 24–9/10 per cent. of the

total Northern Pacific stock, and 297,493 shares, or 23-8/10 per cent. of the total Great Northern stock.

The Union Pacific interests would get in one lump 320,706 shares or 20-69/100 per cent. of the stock of the Northern Pacific, and 246,389 shares, or 19-71/100 per cent. of the stock of the Great Northern (Record p. 264). The residue of the stock of each railway company, comprising more than a clear majority of each, would be scattered among nearly 3,000 separate holders, not originally concerned in the formation of the Securities Company, and having no relations to each other.

The plan of distribution of the Securities Company is therefore to utterly dissolve the combination condemned in the Government suit, and to diffuse the ownership and control of the railway stocks among thousands of separate and independent holders, while Plaintiffs' plan would merely substitute another combination, still more dangerous and offensive than the original one.

The fact that ratable distribution of the Northern Pacific stock among all stockholders of the Securities Company will leave a majority of the total Northern Pacific stock in the ownership of those who will at the same time become distributees of a majority of the Great Northern stock, forms no legal objection to the *pro rata* plan. After *pro rata* distribution has been effected, the stocks of both railway companies will be held separately by the individuals who have thereby received them.

This Court has expressed the view, in two prominent cases, that the stockholders of a railway company may rightfully acquire and hold, as individuals, the entire capital stock of a competing company. No law, either State or Federal, has ever forbidden such acquisitions.

Pearsall vs. Great Northern Ry. Co., 161 *U. S.*, 646.

State of Kentucky vs. Louisville & Nashville Ry. Co., 161 U. S., 676.

In the Pearsall case this Court said:

"Doubtless these stockholders could legally acquire, by individual purchase, a majority, and even the whole, of the stock of the reorganized company; and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interest, as such, in common."
(p. 671).

In the Louisville & Nashville case it said:

"It is true, as was observed in Pearsall vs. Great Northern Railway Company, that the stockholders of the Louisville & Nashville Railroad Company may individually become the purchasers of the Chesapeake Company, at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the Louisville & Nashville Company. The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line; but against the acquisition by a railway, in any form, of a parallel and competing line."
(p. 693).

Upon the purchase for the Union Pacific Company of the Northern Pacific stock, all of it was transferred on the Northern Pacific books into the personal names of Mr. Harriman, then a Director and the Chairman of the Executive Committee, now also the President, of the Union Pacific Railroad Company, and of Mr. Pierce, a Director, and then also General Counsel, of that Company. It remained in their personal names until transferred out of them to the Securities Company, on November 18, 1901.

Plaintiff Harriman also became a director of the Northern Pacific Company in the summer of 1901; and was re-elected such by the stockholders, at the beginning of October of that year. He has since remained a director.

Retirement of Northern Pacific Preferred Stock.

The preferred stock of the Northern Pacific Railway Company was issued subject to retirement by the company, at par, for cash, on the 1st of any January prior to 1917. This right of the company was expressed on the face of every certificate, whether for preferred or common stock issued by it.

At a meeting of the Board of Directors of that company, held on October 13, 1901, in which Mr. Harriman participated as a director, resolutions were adopted, declaring that the entire issue—$75,000,000—of preferred stock should be retired, at par, for cash, from and after December 31, 1902, and providing means to accomplish the retirement. These means consisted of an issue of bonds by the company to the total amount of $75,000,000, convertible into a like amount of new common stock to be issued for the special purpose; so that, upon the completion of the retirement of the preferred stock, the total stock of the company would remain at $155,000,000, but would all be of one kind. Each holder of the original common stock was given a preemption right running to December 31, 1901, to purchase at par, for cash only, an amount of the convertible bonds equal to 75/80ths of his holdings of common stock.

(Record, pp. 281-286.)

This action taken by the Northern Pacific Board with Mr. Harriman's concurrence as a director, and its effect on the preferred and common stock then held by Harriman and Pierce, are important to be kept in view, as showing precisely what they could sell, on November 18, 1901, and the resulting probable intent, on the part of both sellers and buyer, with which that sale was made, and also as showing the origin of the title to the $34,709,062 Northern Pacific stock which Plaintiffs have never held, but which they now seek to obtain.

Mr. Harriman a Trustee for Stockholders of Securities Company.

On November 13, 1901, the Northern Securities Company was incorporated under the laws of New Jersey. Its certificate of incorporation appears in the Record on pp. 15-18. Its Board of Directors comprised fifteen members. On November 14, 1901, one share of its stock that had been paid for in cash was transferred to Mr. Harriman, and one each to Mr. Jacob H. Schiff and Mr. James Stillman, also then and ever since directors of the Union Pacific Railway Company.

(Record p. 307).

Shortly afterward, and on the same day, Messrs. Schiff, Stillman and Harriman were elected directors of the Northern Securities Company.

(Record pp. 308, 309).

They have since remained directors; and therefore TRUSTEES for the remaining stockholders whom they here attack.

The same day, Mr. Harriman was elected a member of the Executive Committee of the company (Record, p. 311). He has since remained a member.

The Securities Company, being admittedly a corporation, none could contract for it, or bind it, unless properly authorized thereto in conformity with the Certificate of Incorporation constituting its charter.

By the laws of the State of New Jersey, and by the Certificate of Incorporation, the Board of Directors is the source of all authority to act for and bind the company. Without authority from the Board, the company could not be bound. Hence, when the question concerns acquisition of property

by the Company, a vote of the Board must be looked for as the basis of the transaction.

Looking into the minutes of Securities Company, it appears that, on November 13, 1901, the Board adopted a resolution, general in terms, authorizing the president of the Company to "purchase any shares of the common capital stock of the "Northern Pacific Railway Company * * * at a price "not exceeding $115 for each share * * * to be payable "in the fully paid-up stock of this company, at par * * *," (Record, p. 361); that, on November 14, 1901, the board passed another resolution, also general in terms, authorizing the president to purchase any shares of the Great Northern Railway Company at $180 per share, payable in the stock of the Securities Company at par (Record, p. 307).

Sale of the Northern Pacific Stock by Harriman and Pierce to the Securities Company.

The series of acts of the parties constituting the acquisition by the Securities Company from Harriman and Pierce of the preferred and common stock of the Northern Pacific Railway Company, began with a special resolution of the Board of Directors of the Securities Company, passed at a meeting thereof held on November 15, 1901, as follows:

Resolved, That the President be, and hereby is authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,971 thereof in the fully paid-up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of the stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

(Record p. 311)

It appears from the record that this resolution was passed with blanks left for insertion of the amount of Northern Pacific stock to be acquired by the Securities Company, and the amount of its own stock and cash to be delivered to Harriman and Pierce in payment therefor; that these amounts were afterwards made definite and inserted in the minutes of the resolution, between the time of its passage, and the holding of the next meeting of the Board, which was on November 19; and that, an this latter meeting, the minutes of the next former meeting, containing the resolution in its completed form, were read to, and approved by the Board.

(Record, pp. 241–243, 312)

Mr. Harriman was present at, and participated in this meeting of November 19.

(Record p. 313)

No authority to acquire Northern Pacific stock, for or on behalf of the Securities Company, has ever been conferred by the Board of that company other than by the resolutions of November 13, 14, and 15, 1901.

Affidavit of Jas. J. Hill, President of Securities Company (R. pp. 270–271). Plaintiffs have not contracted, or sought in any way to modify the statements of this affidavit. Those statements stand in the record unchallenged.

It is conceded that, on November 18, 1901, Plaintiffs, Harriman and Pierce, in person, took to the office of the Securities Company, in the City of New York, the certificates for the Northern Pacific preferred and common stock, described in the resolution of the 15th, with proper assignments of the stock to the Securities Company, in usual form, endorsed thereon, and delivered the same to the Securities Company; that thereupon, the Securities Company received the certificates for the Northern Pacific stock, and executed and delivered to Harriman and Pierce certificates

running to them in their personal names, for the number of shares of its own stock mentioned in the resolution, together with a check on its bankers for the sum of cash mentioned in the resolution; that almost immediately afterwards, the Securities Company surrendered to the Northern Pacific Railway Company the certificates for the $37,023,000 common stock, and caused all the stock covered thereby to be transferred into its own name on the books of the Northern Pacific Railway Company, and received from the latter new certificates for the same, running to itself. It is conceded that, on demand of Harriman and Pierce, they received from the bankers the $8,915,029, cash, and have since retained the same; also, that they have ever since retained, in their personal names, the $82,491,871 stock of the Securities Company, mentioned in the resolution.

The Record does not show, and it is not claimed by Plaintiffs, that any other transaction or negotiation relating to the Northern Pacific stock which they are claiming, or to the Northern Securities stock and cash transferred to Harriman and Pierce, has ever occurred between Harriman and Pierce, or the Oregon Short Line Railroad Company, on the one hand, and the Securities Company, or any one authorized to speak for it, on the other. The record does show, that in the fall of 1901, negotiations between J. P. Morgan & Co., in their own behalf, on the one hand, and Harriman and Pierce on the other, took place, in the course of which a general understanding was reached that J. P. Morgan & Co. should acquire from Harriman and Pierce their Northern Pacific stock, and should give in payment, part cash and part stock of a corporation to be thereafter organized, which should acquire Northern Pacific stock at a price not to exceed $115 per share, and Great Northern stock at a price not to exceed $180 per share, payable in the stock of the purchasing corporation. Definite figures however were not reached by the negotiators until after the formation of the Securities

Company; and not until November 15, 1901, when, for a specified price, in cash, and in the stock of the Securities Company, Harriman and Pierce agreed to sell to J. P. Morgan & Co. a their holdings of the Northern Pacific preferred and common stock. J. P. Morgan & Co. immediately offered to assign the negotiated purchase to the Northern Securities Company; but the President of that company declined to accept it. Thereupon negotiations were renewed by Morgan & Co. and Harriman and Pierce, with the result, that a sale to the Securities Company was concluded on terms set forth in the resolution of the Securities Board of November 15th, as completed by the filling of the blanks.

These negotiations are related at length, and in great detail, in the Record, by members of the firm of J. P. Morgan Co., as well as by Mr. Harriman. The witnesses do not disagree upon any essential point. (Record pp. 157–158, 164–166). See, also, extracts from Mr. Harriman's testimony *(Post*, pp. 31–39).

It is not claimed that in these negotiations J. P. Morgan & Co. acted for the Securities Company, or had any authority to do so; nor that any understanding between J. P. Morgan & Co. on the one part, and Harriman and Pierce on the other, ever existed, that would in any respect modify the transaction between the latter and the Securities Company, as the same appears upon its face, viz., as an absolute sale of Northern Pacific stock, for a price paid down; nor that, if any such understanding existed, it was assumed by the Securities Company, in any manner or to any extent, or even brought to its notice.

VII.

Burden of proof is on Plaintiffs to show, by proper evidence, that the sale to Sureties Company was different from what, on its face, it appears to have been. No such proof tendered.

Whoever asserts that a transaction, and particularly one evidenced, as this is, by contemporaneous written memoranda, is different from what on its face it purports to be, necessarily assumes the burden of proving the modification. It can only be proven by showing the things said, or the acts done, producing the modification. *No such proof is tendered here by these Plaintiffs. They do not even offer to make any at some future time.*

If the transfer to the Securities Company was not in fact the absolute, unconditioned sale which the form of the transaction indicates, it could only have been because of some instrument made, some letters exchanged, or some words spoken, between Harriman and Pierce on the one side, and the Securities Company on the other. If any such writing ever existed, Plaintiffs can now produce it, or account for its loss and depose as to its contents. If any such letters ever passed, each party undoubtedly has the one it received, and at least an impression copy of the one it sent. It would be hard to suppose that on a mere verbal arrangement, resting alone on memory, Mr. Harriman could be brought to conditionally part with the legal title—for it is admitted that at least that much passed—in $78,000,000 of Northern Pacific stock, so that, as he himself swears, the transferee could any morning, at pleasure sell it; but if any such words were uttered, Plaintiffs can say when and where, who were present, and exactly what was said.

This sale of stock, undeniably absolute in form, would not

be converted into a bailment, nor become subject to conditions, because Mr. Harriman, or even all the parties interested in the Securities Company, may have expected that the stock would be retained and voted on by it for an indefinite period. *Hopes and expectations are not the point; but what the parties actually agreed to and did.* Even if Mr. Harriman could not prove that the sale of the Northern Pacific shares was induced by a hope, on his part, of sometime becoming able to himself control the Securities Company, and through it the railways, now vigorously competing with those of the Union Pacific system, such showing, while not necessarily incredible, would at least be wholly immaterial to the question of what the bargain between him and the Securities Company actually was.

The intention of the parties that the sale of the Northern Pacific stock should be absolute and unconditioned, appears not alone from the form of the transfers. It appears as well from the precedent, attendant, and subsequent circumstances; from the nature of the property transferred; and lastly, from the repeated assertions under oath, of Mr. Harriman himself.

It has been Mr. Harriman's favorite theory, that the sale of the Northern Pacific stock was made to J. P. Morgan & Co., and that the Securities Company merely stepped into the bankers' shoes by assent of the sellers. This assertion was repeated many times in his depositions contained in the Record. Practically the same assertion is again repeated in his affidavit filed in this suit. Can it be imagined that either J. P. Morgan & Co. or Harriman and Pierce ever had any purpose of dealing about a bailment of the Northern Pacific stock? about an arrangement by which J. P. Morgan & Co. should become "custodian" of that stock, for the separate benefit of Harriman and Pierce? or about a transfer of it in some way conditioned or defeasible upon the happening of future events? Impossible. Yet no fact is shown, or even claim made, that upon entry into the negotiation by the Securities Company a change was made in the

nature of the title to be given by the sellers and accepted by the purchaser.

Whatever form of title was meant to be given J. P. Morgan & Co., in event of a purchase of the Northern Pacific shares being made by them, must also have been meant to be given to the Securities Company.

Again, before the negotiations for the sale of the Northern Pacific stock had been concluded, and from November 13, 1901, by the action of the Northern Pacific board taken with Mr. Harriman's cooperation, a limit had been set to the life of the preferred stock, comprising more than half the total number of shares forming the subject of the sale. The preferred stock would go out of existence on Dec. 31, 1901, or within a period of six or seven weeks from the conclusion of the negotiations. Can it be imagined that Harriman and Pierce were arranging for a "custodian" of these preferred shares? Did they feel themselves incapable of collecting from the Northern Pacific Company, and afterwards safely keeping, the money which so very shortly would take the place of these shares? And yet, what is there to indicate any thought of Harriman and Pierce that they would give, or were arranging to give, to the purchasers of their Northern Pacific stock, any different title in the common from that they would give in the preferred?

It is not imaginable that J. P. Morgan & Co., or the Securities Company, would receive from Harriman and Pierce the Northern Pacific stock on bailment, or under any other sort of conditional, and therefore defeasible title, and in turn hand over to the bailors an absolute title to $82,491,000 in stock of the Securities Company, and $8,915,629 in cash.

The same sort of title would naturally pass both ways. Yet, for nearly two and one-half years after the closing of the sale, the Securities stock was treated as the indefeasible property of the Oregon Short Line Railroad Company.

The record shows that the suit of the Government against the Securities Company was begun March 10, 1902.

(Record p. 63)

With full knowledge of the pendency of that suit, the Oregon Short Line Railroad Company on July 17th, following, made an unequivocal and deliberate assertion of its absolute ownership of the consideration it had received from the Securities Company, by pledging all the Securities Company's stock forming part of it, to secure an issue of its own bonds to an equal amount.

(Record pp. 22-60)

The Trust Indenture making this pledge contains, in Article VII., the following clause.

"The deposit and pledge hereunder of said shares of stock, or of any securities, which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation, of the Securities Company, or of any other corporation by which said securities shall have been issued.

"Or the sale of its property *or the distribution of its assets.*

"*In any such case the Trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive, and upon receipt thereof shall surrender the deposited stock certificates or other securities.*"

(Record p. 39)

The making of the pledge, and the terms of the instrument making it, are cited as circumstantial proof of the kind of titles Harriman and Pierce thought they were giving and receiving, in their transaction with the Securities Company. They are also cited as proof of deliberate election by Plaintiffs in regard the nature of the titles mutually passed, under full knowledge of circumstances which might unfavorably affect the value to them of what they had received from the Securities Company.

This deliberate election once made became final, and would not now be subject to retraction, even if Plaintiffs were otherwise permitted to assume a different position.

Of Mr. Harriman's numerous sworn assertions about the nature of the titles mutually intended to be passed, the citation here of but a few will be necessary.

Mr. Harriman's Deposition before the Interstate Commerce Commission.

The following are quotations from his deposition before the Interstate Commerce Commission:

Q. Did you attach to your negotiation for the sale of Northern Pacific stock, any other condition than the one of the money price?

A. No, sir.

Q. No other conditions?

A. No other conditions that I remember.

Q. No other conditions except the one of the money price?

A. I do not remember any condition of the Union Pacific or Oregon Short Line, in any way (R. 208, 209).

MR. DAY: You told Commissioner Prouty, in reply to a question propounded by Commissioner Prouty respecting your reasons for the sale of this seventy-eight millions of stock so shortly after you purchased it, that the Union Pacific had accomplished its object in the purchase. What was that object, or how did you accomplish that object? What assurance have you that you accomplished it, if that was the only object? What assurances were given you by any one respecting the future conduct of the Northern Pacific or those avenues of communication between it and the Oregon Short Line or the Union Pacific?

MR. HARRIMAN: I do not presume that it would be possible for any individual or any combination to give any promise that would be a security to any one else in the affairs of the operation of any railroad, the Northern Pacific or any other. *For instance, these people who purchased the Northern Pacific might sell the stock to-morrow or before the next election, and still whatever assurances there were would be of no avail.*

MR. DAY: Were there any assurances?

MR. HARRIMAN: No, sir.

MR. DAY: None at all.

MR. HARRIMAN: No, sir.

MR. DAY: Directly or indirectly, controlling the operation of the Northern Pacific?

MR. HARRIMAN: That covers a good deal of ground. We had many conferences as to what the movement by various lines would be, and, considering the whole question, the Union Pacific management determined that it was no longer necessary, as it was believed that it would be to the interest of the Northern Pacific to use the avenues open over the Northern Pacific as it had before, notwithstanding it had purchased the Burlington.

MR. DAY: Were any assurances given you regarding the future relations of the Burlington road with the Union Pacific?

MR. HARRIMAN: No, sir.

MR. DAY: Nothing said in respect to that, as to how it should be conducted and used?

MR. HARRIMAN: The Burlington touches the Union Pacific lines at a great many points.

MR. HARRIMAN: I should think it did.

MR. DAY: You asked no assurances regarding that and received none?

MR. HARRIMAN: No, sir.

MR. DAY: Was any inducement held out to you to enter the Northern Securities Company or to take any interest in that?

MR. HARRIMAN: No, sir.

MR. Day: By any of these gentlemen?

MR. HARRIMAN: No, sir.

R., pp. 206, 207.

MR. DAY: And the Oregon Short Line purchased seventy-eight millions of the common and preferred stock of the Northern Pacific Railroad Company last spring?

MR. HARRIMAN: That is about right.

MR. DAY: How is that stock held?

MR. HARRIMAN: In the Oregon Short Line Railroad.

MR. DAY: In the name of that company?

MR. HARRIMAN: It is held for that company.

MR. DAY: In whose name?

MR. HARRIMAN: Harriman and Pierce.

MR. DAY: As trustees?

MR. HARRIMAN: No; I think in their names (R., p. 198).

* * * * * * *

MR. DAY: Well, proceed and tell the whole history of that transaction.

MR. HARRIMAN: The Northern Pacific stock has been sold.

MR. DAY: All of it?

MR. HARRIMAN: All of it.

MR. DAY: I thought you wanted to go ahead and tell the whole story.

MR. HARRIMAN: Well, that is all you asked. There is no more story to tell.

MR. DAY: To whom was it sold?

MR. HARRIMAN: To individuals.

MR. DAY: Who are the individuals?

MR. HARRIMAN: I do not remember.

MR. DAY: When was the sale effected?

MR. HARRIMAN: Sometime during the summer, I think, the last of August or September. It has been sold since July September, or October, or August.

MR. DAY: How long before the meeting of the board of directors of the Northern Pacific Company was it sold?

MR. HARRIMAN: Oh, sometime—I do not remember—thirty or sixty days, perhaps.

MR. DAY: Who negotiated for the sale of that stock?

MR. HARRIMAN: I did, principally (R., p. 199).

MR. DAY: Were you authorized to make the sale by a vote of the board of directors of the Short line?

MR. HARRIMAN: No, sir.

MR. DAY: Your action was without consultation with your codirectors?

MR. HARRIMAN: We had many talks.

MR. DAY: What were the terms of sale—what was the agreement respecting the sale?

MR. HARRIMAN: I do not mean for you to understand that there was no action by the board of directors of the Oregon Short Line but the final transaction; the Oregon Short Line authorized the sale to be made on the terms that were reported to it. In this instance it took no action as to authorizing negotiations.

MR. DAY: What were the terms reported to it?

MR. HARRIMAN: The sale of the stock.

MR. DAY: What were the terms of it?

MR. HARRIMAN: You mean what price we got?

MR. DAY: No; I do not care about the price, but the terms,—the conditions of the sale?

MR. HARRIMAN: No conditions.

MR. DAY: A price was named?

MR. HARRIMAN: Yes, sir.

MR. DAY: You did not know who the purchasers were?

MR. HARRIMAN: I know to whom the stock was delivered. There were other people. I do not think it was all purchased by one house or one person.

MR. DAY: Do you know who it was purchased for?

MR. HARRIMAN: No, sir (R., p. 199).

* * * * * * *

MR. DAY: Did you attach to your negotiations for the sale

of Northern Pacific stock any other conditions than the one of the money price?

MR. HARRIMAN: No, sir.

MR. DAY: No other conditions?

MR. HARRIMAN: No other conditions that I remember.

MR. DAY: No other consideration except the one of the money price?

MR. HARRIMAN: I do not remember any condition of the Union Pacific or Oregon Short Line in any way.

MR. DAY: Or the gentlemen who held the stock, yourself or your co-trustee, or your attorneys—Mr. Schiff or any member of the firm of Kuhn, Loeb & Co.?

MR. HARRIMAN: None other than I have stated.

MR. DAY: Of the various interests?

MR. HARRIMAN: No, sir (R., pp. 208-209).

In the light of this testimony what becomes of the allegation of paragraph VII. of the Second Amended bill, as follows:

> " * * * Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company * * * " (as set forth in paragraphs V. and VI. of the bill, of which complainants admit they had knowledge) (R. pp. 4-5).

MR. DAY: Pending the negotiations for the sale of the $78,000,000 of Northern Pacific stock, which has been referred to, and the questions which arose respecting it from time to time among your associates, who acted as your legal counsel?

MR. HARRIMAN: Mr. Pierce.

MR. DAY: On what basis was such portion of the $78,000,000 as was taken in exchange or exchanged for Northern Securities stock based or taken? What was the basis of the exchange?

MR. HARRIMAN: We made no exchange.

MR. DAY: I thought you said—

MR. HARRIMAN: No. We had no transaction whatever. I think you have got a wrong impression. We had no transaction whatever with the Northern Securities Company (R. p. 213).

MR. DAY: I understood you to say that you took some Northern Securities in part payment.

MR. HARRIMAN: Yes, sir, in lieu of cash. We did not make any exchange.

MR. DAY: You did not subscribe?

MR. HARRIMAN: No, sir, we had no transactions with them (R. p. 214).

* * * * * * *

MR. DAY: Then I asked if you did rely upon the statement that a Securities Company was to be formed?

MR. HARRIMAN: In making the sale?

MR. DAY: Yes, sir.

MR. HARRIMAN: No.

MR. DAY: I do not mean that that was the moving consideration. Would you feel that you had a cause of complaint against the gentlemen you were negotiating with if that stock had not been put into the Northern Securities Company?

MR. HARRIMAN: I do not think we would; I do not know any reason why we should (R. p. 214).

* * * * * * *

THE CHAIRMAN: As I understand Mr. Harriman, he said he negotiated the sale of this Northern Pacific stock when his company decided that it was best to sell it. He reported the terms to his company and they ratified the arrangement.

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the securities of the Northern Securities Company if organized on a certain basis?

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: Subsequently it was organized on that basis?

MR. HARRIMAN: And the stock was delivered and received.

THE CHAIRMAN: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

MR. HARRIMAN: Yes, sir (R. p. 215).

* * * * * * *

COM. CLEMENTS: When did you first seriously consider taking any stock in that company yourself or for the corporations you represent?

MR. HARRIMAN: Only when we sold the Northern Pacific stock (R. p. 216).

This deposition was given January 25, 1902; consequently just 66 days after the completion of the transactions therein related, and while the recollection of them must have remained unimpaired in the mind of the witness. Mr. Harriman's deposition in the Minnesota case was taken Dec. 1, 1902,

(R. p. 233) and in it he constantly treated the transfer of the Northern Pacific Stock to the Securities Company as a *sale*, and not as a bailment, as the following extracts abundantly show :—

Deposition of Mr. Harriman in Minnesota Suit.

Q. Did J. P. Morgan & Company, or any member of that firm, open negotiations with you looking to the purchase or acquisition of such holdings during the fall of 1901 ?

A. Does it make any difference whether I opened the negotiations with them or they with me ? I don't remember. It was either one or the other. The negotiations were opened. Or they may have been opened by some intermediate party. I don't remember just how it was.

Q. At what time were those negotiations opened ?

A. It would be difficult for me to state within a month. It was September or October, I should think.

Q. It was either during the month of September or October, 1901 ?

A. I should think so.

Q. How long did those negotiations continue before they were finally consummated ?

A. I should think about a month or six weeks, possibly two months.

Q. With whom did you have your first dealings in those negotiations, if you remember ?

A. I couldn't remember.

Q. Was it with Mr. Bacon of J. P. Morgan & Company ?

A. I had many talks with Mr. Bacon. I had talks with nearly every member of the firm.

Q. In these negotiations were they acting for themselves or acting with the understanding that these securities or this stock was to be turned over to some holding company when organized ?

A. They never disclosed to me whether they were acting for themselves or somebody else.

Q. Before the negotiations were finally closed was it understood that you were to take some stock in a company to which this stock was to be transferred ?

A. That is my recollection.

Q. And was that the Northern Securities Company ?

A. It was never designated by any name.

Q. You didn't learn what company was to take it until you received the stock of that company in exchange ?

A. Practically at that time.

Q. Did you understand, from the beginning of these negotiations, that this stock was ultimately to be turned over to some holding company which was to be organized ?

A. No, I can't say there was any understanding at the beginning of the negotiations for a settlement of whatever differences we might have in regard to that stock, whether it was to be taken by them or by a holding company, or how it was to be paid for. It was only towards the end, when the thing crystallized, that the suggestion was made that payment should be made partly in cash and partly in a holding company stock. I think it was just towards the end of the negotiations when we were considering whether we would break away or get together on it.

Q. Well, did you understand at any time that they were acting for themselves in the matter and expected to take the stock themselves ?

A. I had no understanding upon that subject.

Q. They were simply trying to secure this stock on some basis, then ?

A. That is the substance of it.

Q. And it was not until toward the end of the negotiations that you learned they were acting for some holding company ?

A. I didn't say I understood they were acting for a holding company. They didn't disclose to me that they were acting for anybody else at all during the negotiations.

Q. Well, you finally learned that the stock was in fact to be turned over to a holding company ?

A. There never was anything on their part, it seems to me, that would lead me to infer that they were to turn that stock over to a holding company. Towards the end, when the matter crystallized, and when we were very nearly at the end of our tether, they offered to pay for these shares in the stock of a holding company so much, and so much in cash. Now, there was nothing said as to whether they would turn this stock over to a holding company, or whether they would hold it themselves; but they would give us that holding company's stock in part payment.

Q. When did you learn that? How long before you actually delivered the stock?

A. Before we delivered our shares ?

Q. Yes.

A. It was several days. I don't remember just when. Perhaps two or three days. It may have been within three or four days, or perhaps two days. I have a great deal to do, Mr. Munn, and since our talk the other day I have been trying to refresh my memory on this very thing; but I was pretty busy in other matters at that time, and have been since.

Q. When you found that you were to take the stock of some other company in part payment for this stock, of course

you knew then that they were acting for a holding company, did you not?

A. I don't see how I could know.

Q. Well, did you, Mr. Harriman?

A. No, I don't see how I could.

Q. When did you first learn that this stock was to be delivered to the Northern Securities Company?

A. When it was delivered.

Q. That was the first you knew about that?

A. That is my recollection. The first I knew was when it was delivered to that company.

Q. When did they first make a proposition to you to make payment for this, or part payment for it, in the stock of some other company?

A. I think that was towards the end of our various conferences and negotiations, as I said; within a few days, perhaps, of the time the thing was absolutely closed.

Q. Now, during these various conferences you had when these negotiations were pending, what was the talk about payment for your stock? Was it to be paid for in cash, or how were they to pay for it?

A. I don't recollect that there was anything said as to just how it was to be paid for until towards the end.

Q. What did these negotiations relate to then? Whether you would surrender your stock or give it up?

A. Whether we would do anything with our stock except to stand where we were on the basis of holding preferred and common stock (pp. 233–236).

* * * * * * *

Q. Did Mr. Morgan, or any of the representatives of J. P. Morgan & Company, with whom you negotiated, state to you that they intended to do that?

A. I imagine they did. I don't remember just what.

Q. Well, that was one of the principal inducements that led you to finally surrender your holdings, was it not?

A. Practically (R. p. 237).

* * * * * * *

Q. At the time you finally consented to accept in part payment for your holdings stock in a holding company, did you insist upon any basis on which any other stock of the Northern Pacific Railway Company should be acquired by that holding company?

A. No, sir.

Q. You finally agreed to turn in your holdings and receive from the Northern Securities Company upwards of 82 millions in stock of this company?

A. Yes, sir.

Did you know at that time on what basis this holding

company was to take in any other Northern Pacific or Great Northern stock?

A. Yes, sir.

Q. On what basis.

A. $115.

Q. For the Northern Pacific?

A. Yes.

Q. And what for the Great Northern?

A. $180.

Q. Did you make any request or demand that they should not take any of the stock of either one of these companies at a higher rate than that?

A. No, sir (R. p. 237).

* * * * * * *

Q. Did they represent to you that that was the basis on which they were going to take in the stock?

A. The statement was made to me that they would put this Northern Pacific stock into a holding company and give us—not this Northern Pacific stock—but that they would give us in part payment a holding company's stock on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a holding company, or had formed a holding company, and would pay us in this stock, and that those were the terms on which it was to be bought (R., p. 238).

* * * * * * *

Q. Did you finally consent to surrender your holdings on the basis on which you did because you had made up your mind they would carry out the determination you had heard expressed, to retire the preferred stock, and thus take away from you the controlling interest in the stock of the Northern Pacific?

A. I think I recollect pretty clearly that from our standpoint we thought it was better for us to accept that price for our stock than to go into a legal contest (R., p. 239).

* * * * * * *

Q. And they never disclosed to you for whom they were acting until the transaction was ready to be closed?

A. Do you mean Morgan?

Q. Yes.

A. Do you mean the exact company?

Q. Yes.

A. My recollection is that he did not. In fact, I don't

think this transaction was closed until practically the very minute the payment was made. I think there was considerable discussion and dispute as to the final payment, and about—I don't remember now whether it was the amount to be paid or whether it was the amount of stock to be delivered; I think it was the amount of stock to be delivered. They supposed we had somewhat more stock than we really had (R., pp. 240, 241).

One of the first acts of the Securities Company, after Mr. Harriman had become a Director and a member of its Executive Committee, was, with his concurrence, to adopt a form of stock certificate, and create agencies for transfer of the stock. R. pp. 313, 318.

The form of certificate, appearing upon p. 318, of the Record, and in the majority opinion of the Circuit Court of Appeals, contains no restriction or even impediment upon the transfer of the stock covered, as freely as is the custom with corporate stock in general. Everybody concerned must have expected that the Securities shares would be traded in by the public. Yet, no provision was made for indicating upon any stock certificate, the consideration for the original issue of the stock covered thereby, whether it may have been Northern Pacific or Great Northern shares, or both, or other property, sold to the Company, or cash paid it. If each separate stock certificate represented, not a ratable proportion of the Securities Company's entire assets, but merely some specific item of property in its possession under a limited title, and for a specific purpose, the certificates would be of variable effect and value. One would represent an amount of Northern Pacific stock; another an amount of Great Northern stock; another an amount of cash; another an amount of property of kinds other than the railway stocks; many part Northern Pacific and part Great Northern; and the transfer of each certificate would necessarily transfer only the specific property covered by it. Is it reasonable to suppose, that, if such a thing had been in-

tended, the parties would have failed to provide for indicating upon the face of each certificate, the precise rights which its ownership would confer? Would such enormous values be left without any ear mark for identification? Impossible. Yet no transferor to the Securities Company of railway stocks, other forms of property, or cash, ever asked for or got any voucher for the amount of his interest in the Company's possessions, save these uniform certificates, each and all freely transferable, and each and all purporting merely to represent an undivided proportionate interest in the same thing, viz., in all the corporate assets.

These facts alone, prove the transfer of the railway stocks by Harriman and Pierce to the Securities Company, to have been meant, on both sides of the transaction, for nothing else than an unconditional sale.

Plaintiffs cannot dispute what the record shows to have been in fact the doings and intentions of all the parties concerned. Neither can they claim that anything done or intended by the parties is not fully shown by the record; nor that any different light would be thrown on any material act or purpose by additional evidence. The actualities are now all before the court.

Further Examination of the Actors in These Matters could Develop no New Disclosures.

Whence could come any utility from retaining the injunction, and subjecting the case to the process of evidence-taking and a formal final hearing? The sole answer suggested by Plaintiffs' counsel is, that opportunity would thereby be afforded for cross-examining witnesses. What witnesses? Counsel do not say. Certainly not Mr. Hill or Mr. Harriman, the actors, for their respective sides, in the business here being considered; for both have been repeatedly examined, cross-examined, and re-examined on every minute point and

detail, and their testimony put into these motion papers. On what subject? Counsel do not say. It could not be upon what the parties actually did; for that matter has many times been gone over, and now appears at length in this Record. Nor could it be upon the intent with which the things were done; for that subject also has been fully threshed out, and the results all embodied in the Record. It could not be for showing that the purchase by the Securities Company, of the Northern Pacific shares, was made for the purpose of enabling it to restrain trade; for that point has already been decided in the Government suit. It could not be for showing that some or all the "conspirators" really own or otherwise control larger amounts of stock of the Securities Company than stand on its books in their names; for neither the Bill nor any affidavit for Plaintiffs makes such a charge against any person. Besides, Plaintiffs' ownership of the stock it claims could neither be established nor refuted by showing the amount of another's, or many other's, holdings of Securities stock. Absolutely nothing could be added to the facts, by the most prolonged taking of testimony. The case would finally have to go to hearing on exactly what this Court has before it now.

VIII.

Plaintiffs really found their claims on what they assert to have been adjudicated in the Government suit, and not on what was actually done and intended by the parties. Plaintiffs strangers to that suit.

But Plaintiffs in effect say, whatever Harriman and Pierce, on the one hand, and the Securities Company on the other

hand, may in fact have done and intended, their transaction was illegal, and has been so adjudged; therefore, what actually was intended has never, in law, been accomplished.

Assertion in Plaintiffs' papers here that the sale of Northern Pacific stock to the Securities Company was intended by the parties not to be one, or if intended to be a sale at all, to be so only upon conditions, appears solely in the Bill; and only in those passages of the Bill which, for purposes of an injunction motion, are to be taken as unverified. Plaintiffs have so far been unable to find any one willing to take the risk of swearing that such a thing is actually known by him.

Practically plaintiffs rely on what they claim has been adjudicated in the suit of the Government against the Securities Company, and sundry individual defendants. Their real position is, that the Securities Company is now merely custodian, or at best conditional owner, of the Northern Pacific shares, not because the parties ever so actually agreed or intended, but rather in spite of their intentions, and solely because the courts have so decided. They were not themselves named parties to that suit; but, nevertheless, they claim the right to have treated as conclusively established in their favor whatever has been determined in it; because they say they were represented in the suit by the Northern Securities Company, whose stock they hold; or, if not by the corporation itself, then by the eight individual defendants who like themselves were stockholders in it.

Plaintiffs claim that the proceedings in the suit have adjudicated:—

1. That the Securities Company has not become owner of the Northern Pacific preferred and common stock it acquired from Harriman and Pierce, but has become a mere "custodian" of the same, for the special purpose of enabling it to commit a series of illegal acts; necessarily, therefore, that the Securities Company has become a mere bailee, and not a purchaser of the stock.

2. That even if the interest vested in the Securities Company by its acquisition of the stock exceeds that of mere custodian, and has the nature of title, nevertheless, such title is not absolute, but is accompanied by an agreement on the part of the Securities Company to use the stock for accomplishing a specified purpose; that such an agreement has the effect of a condition, for the breach of which the Securities Company's title may be terminated by plaintiffs; that such condition has been rendered impossible of performance by the decree of the courts, and further performance of it been expressly renounced by the Securities Company, and, consequently, that plaintiffs may now retake the property at their pleasure.

Authorities upon the doctrine of implied representation of one party by another in judicial proceedings are plentiful; but none has been found—even the great diligence of Plaintiffs' counsel has not enabled them to cite one—where a party has been held to represent another in respect of any matter regarding which their claims and interests were conflicting. Implied representation is limited to matters in which the interests of the party represented and those of the party representing are common and concurrent.

In the Government suit, the Securities Company may be deemed to have represented all its absent stockholders, in matters wherein their common interests as stockholders, in proportion to their respective holdings, were concerned.

But what Plaintiffs demand here is not some ratable interest in the property or business of the company, common to all stockholders. On the contrary, the sole object of this suit is to claim something adversely to the corporation, and to every other holder of its stock, and to exclude each and all of them from any interest therein.

In any suit involving the determination of such a claim, the Securities Company could not represent Plaintiffs.

Part of the relief asked by the Government was a command to the Securities Company to return the railway stocks to those

from whom they had been received. Did the Court have jurisdiction to make such a decree against absent sellers of shares to the Securities Company ? The Court which originally made the decree thought not. (Record, p. 367).

Suppose the views of the Court had been different, and it had proceeded to make an order of that nature. It would necessarily have been required to take up and determine the exact rights of each stockholder of the Securities Company separately. In the case of the Harriman and Pierce stock, that would have involved examination and decision of the very questions now being litigated in this suit.

Would any such determination have been binding on Harriman and Pierce ? Suppose in making one the court had taken a view of their rights different from their own ; would they have been compelled to submit, without opportunity to be heard ? They certainly would, if represented in the suit on such questions by any party to the record.

But no party to the record represented them in regard to any such matter. This proposition includes all the individual defendants as well as the Securities Company. Plaintiffs are strangers to the decree in the Government suit, save in so far as it determines matters common to all the stockholders of the Securities Company. As to all other matters they may use it only as other strangers could.

IX.

For the assumed adjudication in their favor, Plaintiffs rely not on the decree, but upon the opinion of Mr. Justice Harlan.

That opinion does not mean what Plaintiffs claim.

The decree itself is not what plaintiffs rely on to establish their theory of custodianship. For that they rely on some words of an opinion of an honorable Justice of this Court, announced in behalf of himself, and three associates, apparently concurring with a fifth on but a single proposition, viz., that the decree of the Circuit Court should be affirmed. Plaintiffs do not point out anything that Harriman and Pierce on the one side, and the Securities Company on the other, ever actually said or did expressing a mutual purpose to create the relation of bailor and bailee, or *cestui que trust* and trustee, in relation to that property. They merely insist that Mr. Justice HARLAN'S opinion has adjudicated that parties who unquestionably considered themselves buyers and sellers, in reality were not so; and, consequently, that neither of them remains free to now dispute that relation.

Laying aside the question of how far expressions merely *in arguendo* of an opinion are to be regarded as setling any point, or thereafter binding even the Judge who makes them, counsel for Defendant humbly submit, that the meaning plaintiffs attribute to that opinion is manifestly a misinterpretation of it. A single sentence here and there, two or three altogether, are torn by plaintiffs from the context, and held up as the fabric of what the court adjudged.

The following is one of them:

" That disclosed the actual nature of the transaction, which " was only to organize the Northern Securities Company as a " holding company, in whose hands, not as a real purchaser,

" or absolute owner, but simply as custodian, were to be
" placed the stock of the constituent companies—such custo-
" dian to represent the combination formed between the share-
" holders of the constituent companies; the direct and neces-
" sary effect of such combination being, as already indicated.
" to restrain and monopolize interstate commerce, by suppress-
" ing or * * * smothering competition between the lines
" of two railway carriers."
Opinions p. 34.

Another reads:

" The decree, if executed, will destroy, not the property in-
" terests of the original stockholders of the constituent com-
" panies, but the power of the holding corporation, as the in-
" strument of an illegal combination, of which it was the mas-
" ter spirit, to do that which, if done, would restrain interstate
" and national commerce."
Opinions p. 37.

In this instance, the learned Justice followed the established custom of commencing his opinion with a formal and specific finding of the facts, to which application of the law is intended to be made. These findings included the following:—

Prior to November 13, 1901 defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock *and in all respects to act as the owner thereof*, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stock. * * * * * *
Opinions, p. 5.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, *and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of*

the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."
Opinions, p. 7.

If the learned Justice was referring to the same thing in this passage from the findings and in those from his argument on which Plaintiffs rely, it is hard to see how all could be reconciled.

But the frame of the opinion shows that the different expressions were meant to apply to different things.

The findings at the beginning of the opinion seem meant to describe the process by which the Securities Company had become possessed of the railroad stocks—consequently, the relations that had been established between the Company and those from whom it had acquired them.

On the other hand, the quoted expressions in the argumentative part seem intended to refer only to the Securities Company's relations to the stocks *as between itself and the Government.* That was a matter quite different from its title as between itself and the sellers of the stock.

A majority of the court, although by apparently different and dissimilar processes of reasoning, decided that all purchases of the stocks by the Securities Company had been prohibited by a statute which the Government had made. The Securities Company had argued here, as it had done the Circuit Court, that to grant the decree asked for by the Government would in effect be to deprive it of property acquired under the laws of individual states having exclusive power to declare who may be its owners, and the mode of acquiring it. Mr. Justice HARLAN may well be assumed to have used the language upon which Plaintiffs rely merely in answer to that argument. It was as if he had said, the Securities Company having bought these stocks in violation of an Act of Congress, *as against the*

Government it is barred from setting up title in them acquired under the laws of any individual state, and hence, *as against the Government*, is to be accorded the rights in them of a custodian merely.

Stated in this way, findings and argument harmonize.

But the question of the effect of the forbidden transaction, as between the parties to it, is totally different. As between them, it became and has remained completely effectual, under rules of laws perfectly defined and recognized in all courts of the country.

Another thing to be kept in mind while examining all the opinions, in both courts, is that their writers were speaking merely in general terms of the acquisition of the railway stocks as a body.

To the mind of Mr. Justice HARLAN, special features of the individual transaction by which any particular lot of railway stock was acquired, were of no consequence. He expressly says so :

> " However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies."
>
> Opinions p. 34.

Consequently, in the opinion of the learned Justice, all acquisitions of those stocks by the Securities Company were equally illegal, and defense of them under state laws and rights derived therefrom equally inadmissible. To his mind, for the purposes of the case there up for decision, the only thing of the least consequence to be ascertained was the intent and purpose of the Securities Company, and of the men who caused it to be formed, in making the acquisition. All else would be impertinent.

The learned Justice and his concurring Associates purposely omitted examination and consideration of the form and method of acquisition in specific instances. That was something out of order in the case before them.

The learned Justice did not undertake to say what had been the effect of the acquisitions as between the parties to the transfers. Especially he did not undertake to say, that an acquisition in which the parties used the forms of an absolute sale, with an undoubted purpose of making one, and in which one of them unconditionally paid to the other almost $9,000,000, in cash, was, as between themselves, nothing but the creation of a custodian, and therefore nothing but a bailment.

That to retract, or even to modify, in the argumentative part of the opinion, what had previously been asserted in the findings of fact therein, was far from the intentions of the learned Justice, the following additional passage, also from the argumentative part, seems to show:

> The Circuit Court was undoubtedly right when it said—all the judges of that court concurring—that the combination referred to 'led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, *by virtue of its ownership of a large majority of the stock of both companies*; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies'.

The reference (Opinions, p. 34), by the learned Justice, to the testimony of Mr. Morgan, cannot be regarded as having been made to show the nature of the title, which, *as between the Securities Company and sellers to it of the railway stocks*, the former was intended to and did acquire; for if that had been the question, the following other passage from the testimony of the same witness undoubtedly would also have been quoted or at least referred to:

> "Q. In referring to the Northern Securities Company, by way of illustration you have used the example United States

Trust Company once or twice. *Are you to be understood that the Northern Securities Company held the several certificates in the nature of trustee or as owner?*"

"A. *As owner;* but what I meant is this; while the Northern Securities Company as such issued stock for this, a trust company would have issued a receipt; we have issued stock, consequently we could control it. I say, if I had put them in a company with $2,000,000. stock it could have been easily controlled; but in the Northern Securities Company, which is the only company I know of, up to this time, where the stock itself is represented, you cannot control that stock without buying a majority of $400,000,000. or more of stock."

Transcript of Record (Government Suit) p. 361.

The meaning of the decree, and its effect and scope as a judgment, must have remained precisely the same ever since the instant of its filing. Its meaning could not have undergone transformation through the process of affirmance by this court. Its meaning at the instant of affirmance must have been what it had been the instant before, and the instant of its origin in the Circuit Court.

Therefore, the decree cannot now be put forward as having undergone some change, and as having acquired some new force, in the process of passage through this Court, which it did not have as soon as filed by the learned judges of the Circuit Court.

The court that frames a decree should be considered at least as very high authority on the meaning of the language forming it. Hence, in this instance, the views of the Circuit Court for the Minnesota District should seem entitled to great weight.

On April 2, 1904, three of the Petitioners herein, Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company filed in that Court their petition, asking leave to intervene in the Government Suit; asserting that a distribution by Respondent here of its holdings of Northern Pacific and Great Northern shares would be in violation of their rights, and of the decree against the defendants in said suit;

and praying for such orders of that court as should protect their interests in the premises. In other words, Harriman and Pierce, and the Oregon Short Line Company set up in the Minnesota court the same claims they now assert in this suit. Upon the filing of the Minnesota petition, the petitioners gave notice of hearing upon it, for April 12, 1904; and, on that day, both parties appeared by counsel, who argued the matter at length; with the result that a few days afterward the Circuit Court, four judges sitting, filed its decision dismissing the petition, and holding that the *pro rata* method of distribution in no way violated the decree in the Government Suit, and that it would restore to the markets of the world the railway stocks, which, in view of the decree, would otherwise remain worthless. The opinion of the court was by THAYER, Circuit Judge, and appears in the pamphlet of opinions herewith submitted, on pp. 109–115.

As appears by that opinion, "the Government was satisfied with the relief obtained, and expresses itself as satisfied at the present time;" the reference being to a formal declaration signed by the Attorney-General, and then filed in open Court by the District Attorney of the United States for the Minnesota District." The following passages from the opinion contain its most important substance:

"The decree was wholly prohibitory. It enjoined the doing of certain threatended acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. *The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof.* It accordingly contented itself with an order which rendered the stock of

the two Railway Companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time.

"It is true that the decree contained a provision in substance that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company and all shares of stock in either of said Railway Companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two Railway Companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that in view of all the circumstances might appear to be more equitable. *The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree.* It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive, made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

Opinions, pp. 111–112.

For sake of argument, conceding that the Government could treat the Securities Company as holding the stock subject to return, if so ordered by the Court at the suit of the Government, Harriman and Pierce could not so treat it.

Plaintiffs' custodianship theory therefore collapses.

X.

Plaintiffs' alternate theory, that the title of Securities Company was subject to a condition, since broken, also unsupported by fact, law, or adjudication.

Plaintiffs' alternate contradictory theory, that of a conditional sale for a special purpose, terminable by them when the Securities Company should cease to use the railway stocks for the alleged purpose, is equally fallacious. It likewise contradicts both facts and law.

It has to assume as facts :—

1. That part of the transaction between Harriman and Pierce on the one part and the Securities Company on the other was an agreement by the latter to use the railway stock for the purpose of suppressing competition between the railway companies.

2. That such use of it should be perpetual, or at least for some period lasting beyond the date of the decree in the Government suit which terminated the possibility of such a use.

This alternate theory presents the instance of a party to an illegal transfer of property seeking to rescind the transaction and to reclaim what he has transferred.

All the facts going to show the respective degrees of culpability of the respective sides in the transaction are here upon the record. The full and equal guilt of Harriman and Pierce is confessed on the face of the bill. It is more than confessed ; it is asserted as a ground of recovery.

The concluding averment of paragraph VI. is as follows :

"Your orators are informed and verily believe, and therefore aver, that *all and singular the persons*, to whom the stock of the said Northern Securities Company was issued, whether for shares of either of said railway companies, or for cash, had full knowledge and information of the purposes for which said Northern Securities Company was organized, and of the fact that a majority of the capital stock of each of said railway

companies was to be, or had been, deposited with said Securities Company, as custodian or depositary, in pursuance of said agreement."

Record, p. 4.

By their supporting affidavits, plaintiffs have fully established complete advance information of the conspiracy, on their own part.

In his affidavit, Mr. Harriman dates his first full knowledge at some considerable time prior to the formation of the Securities Company; as the following extract shows:—

"The first information we had of the plan was from Mr. Hill and J. P. Morgan & Co., to the effect that Mr. Hill and his associates had determined to organize a holding company, and that they intended to transfer to such holding company a majority of the capital stock of both the Northern Pacific and the Great Northern Companies. My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of the firm, but I cannot remember exactly what each said, and, at the present time can only recollect the substance and result of my conversations with them." Record, pp. 157–158, par. VII.

One of several affidavits of Mr. Pierce appearing in the Record, is as follows:—

"Referring to my affidavit, verified May 16, 1904, in this suit, my attention has been called to the fact that after the arrangement with Messrs. J. P. Morgan & Co. to accept shares of the holding company for the Northern Pacific stock held by the Oregon Short Line Company, as stated in Mr. Harriman's affidavit of May 16, 1904, and shortly before the organization of the Northern Securities Company (the exact date I do not recollect), I attended a meeting at which were present counsel representing Mr. Hill and his associates, counsel representing Messrs. J. P. Morgan & Co., and counsel representing the Oregon Short Line interests. At such meeting a form of certificate of incorporation of a holding company was submitted by counsel representing Mr Hill and was discussed. The form thus submitted and discussed was to the best of my recollection substantially the same as that subsequently used in the incorporation of the Northern Securities Company. The formation of the holding company had been previously decided upon by interests other than our own and in the decision to form such a company I had no part." Record, pp. 185–186.

Of thousands of the holders of the stock of the Northern Securities Company the above quoted averment of the Bill is untrue. The record only shows it to be true of Plaintiffs here, and of the individual defendants in the Government suit; for, on a motion for an injunction, a mere general statement of the Bill unsupported either by the oath of one having personal knowledge, or by documents importing verity, is not to be considered true.

Stockholders are not chargeable with constructive notice of the acts of their corporation.

Pearsall v. W. U. Tel. Co., 124 N. Y. 256 (pp. 277-7).

Rice v. Peninsular Club, 52 Mich. 87.

But all, including Harriman and Pierce, of whom the averment is true, are offenders and equally guilty. There are no degrees in the crime of restraining or conspiring to restrain interstate trade.

Long premeditation is not essential to guilt of any offense. Where design is an ingredient, a minute's forethought is as effectual as a year's.

The very last seller of railway stock to the Securities Company, if he had the knowledge imputed to all sellers by the bill, as much became a participant in the conspiracy to restrain trade as did Mr. Hill and Mr. Morgan. If that be so, certainly the very first sellers with such knowledge, Harriman and Pierce, cannot escape the charge of participation; nor its consequences, either.

If guilty at all of participating in the offense committed, in the eye of the law, as well as in fact, they were guilty equally with the most guilty.

Of all legal principles which the courts are called upon to apply with considerable frequency, there is none over which they, or the text writers as well, are so thoroughly in accord

as that concerning the respective rights of those who deliver and those who receive property transferred without permission of law, or in violation of it.

The large number of leading and typical cases, and of citations from text books, collected by Mr. Stetson, and printed for convenience of Judges and counsel in this litigation prove this.

To dispose of this case, however, trouble need not be taken to examine all these authorities. The law by which the rights of the parties in this Northern Pacific stock must be determined has been settled by a series of decisions of this court.

These cases have established the rule, that where there has been a transfer of property, illegal from any cause, and possession has been delivered to the person to whom the title under the transfer was intended ultimately to go, the transaction has become executed on the part of the transferor, and he cannot thereafter repudiate it and reclaim the property because of the illegality.

This rule governs under all forms of illegality ; whether in doing something which the laws positively prohibit, or something which they merely omit to allow. It governs equally where the violation is concerned with the commission of the most atrocious crime, and where it is merely concerned with use by a corporation of power not granted.

Undoubtedly, in some respects, there must be difference between the legal effect of a transfer made for the purpose of inducing or facilitating the commission of a crime, and one merely lacking permission in the law for making it. A promise, either expressed or implied, to commit an offense, could not form a legal condition or consideration for any sort of an undertaking. Such a condition or consideration would simply be inoperative and void.

For instance, if money be paid as an inducement to commit murder, could the promise to commit it be a consideration,

the failure of which would entitle the payor to recover the money?

The same reasoning must apply to all crimes, whether *malum in se*, or merely *malum prohibitum*. On what principle could classification of crimes for such a purpose proceed? The requirements of public policy must operate equally in respect to all classes; and it is these requirements out of which the rule arises. On the other hand, where absence of permission by law to make it is the sole impediment to a valid transfer, non-performance by the transferee of the conditions of the transfer, in other words, repudiation of the arrangement by him, is commonly recognized as giving the transferor a right of recission and reclamation.

The citation of all the cases in this Court which assert this rule would be unnecessary.

Only the following need be noticed here, because they sum up the whole matter. They have been selected from the class of cases decided by this Court where, without permission of the legislature creating it, a corporation created for the performance of service to the public has transferred its instrumentalities and franchises to another.

The utter invalidity of such transactions, was declared in *Thomas vs. R. R. Co.*, 101 U. S., 71 in the following words:

> "The principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden it imposes, *is a violation of the contract with the state, and is void as against public policy.*"
>
> p. 83.

It was the view of the court that in such cases something more than mere absence of legal power operates to produce the invalidity. Another element is equally, if not more active—

Public Policy. Such unauthorized transfers are direct breaches of duty toward the public and the state. Others than the immediate parties are concerned in them. As ground for invalidating what parties have done, or agreed upon, the unauthorized transfer of a public duty is as effective as a crime.

St. Louis, Vandalia and Terre Haute R. R. Co., vs. Terre Haute & Indianapolis R. R. Co., 145 U. S., 393, was a suit by the maker of an unauthorized lease of a railway and franchises against the lessee to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for 999 years, of which but a few had elapsed at the date of the attempted rescission; and was on the covenant of the lessee to retain 65 per cent. of the gross revenues for its own use; to employ not exceeding 35 per cent. in payment of interest on the lessor's obligations; and to pay over any resulting surplus to the lessor.

Interest is added to the case by the fact that the lessor's counsel, mindful of what the court had said in *Thomas vs. R. R. Co.* justified lessors' repudiation, not only on the ground of legal right to repudiate, but also on that of its duty toward the public and state. Counsel argued:

"The lease being void, it was the right as well as the duty of complainant to recover its property, and thus place itself again in a position to discharge its public duties."
p. 399

The illegality of the lease, and the consequent breach of public duty, were manifest; but the court denied right in the lessor to repudiate it on that ground; at least while the lessee should continue to observe it.

The opinion of the court, announced by Mr. Justice GRAY, contained the following language, which sums up the views of the court:

"It may therefore be assumed, as contended by the plaintiff, that the contract in question is *ultra vires* of the defendant, and therefore did not bind either party, and neither party

could have maintained a suit on it, at law or in equity, against the other."

p. 406.

"The general rule, in equity as at law is, *in pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, *whether to enforce it, or set it aside.*

If the contract is illegal, affirmative relief against it will not be granted at law or in equity, or unless the parties are considered not in equal fault, as where the law violated is intended for a coercion of one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas vs. Richmond*, 12 Wall. 349, 455; *Spring Co. vs. Knowlton*, 103 U. S. 49; *Story Eq. Jur.* 298."

* * * * * * *

"*When the parties are in pari delicto*, AND THE CONTRACT HAS BEEN FULLY EXECUTED ON THE PART OF THE PLAINTIFF, BY THE CONVEYANCE OF PROPERTY OR THE PAYMENT OF MONEY, AND HAS NOT BEEN REPUDIATED BY THE DEFENDANT, *it is now equally well settled, that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed, or money paid under the contract. Thomas vs. Richmond*, above cited; *Ayerst vs. Jenkins*, L. R. 16 Eq. 275, 284.

"The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise these powers, or to perform those duties. If, as the plaintiff contends, the contract was beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in *pari delicto* with the defendant. The invalidity of the contract, in view of the laws to which both parties were bound to take notice, was apparent on its face. *The contract had been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant*, and the defendant has held the property, and paid the stipulated consideration, from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract."

"Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. * * * The case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no

right to retain. *Spring vs. Knowlton*, 103 U. S. 49; *Logan County Bank vs. Townsend*, 139 U. S. 67, and cases there cited.

"But the case is one which, in the words of Mr. Justice MILLER, in a case after cited in this opinion, the court will not disturb the possession of the property that was passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad vs. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317."

pp. 408, 409.

As against the state which had incorporated the lessor, the lease was void, and probably at its suit rescission might have been insisted on and enforced. As against the state, the lessee probably might have been deemed a mere custodian of the railway and franchises, subject to restore the same to the lessor, on the state's demand. But, as between lessor and lessee, the transaction had effect according to the intent of the parties; and would remain effective while observed by the lessee. The state chose not to intervene and assert its prerogative; the lessor could not repudiate what it had done.

But a short time previously this court had decided *Central Transportation Co. vs. Pullman Palace Car Co.*, 139 U. S., 24. The opinion in this latter case had also been announced by Mr. Justice Gray. It was a suit to recover an installment of rental on a lease made by the Central Transportation Co. of its entire assets, business and franchises. The defense was invalidity of the lease from want of power to make it, and was sustained.

The following expresses the substance of the opinion:

"A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

* * * * * * *

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action on the unlawful contract, have always strives to do justice between the parties, as far as could be done consistently, with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation made for it. In such case, however, the action is not maintained on the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it had no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract. The ground and the limits of the rule concerning the remedy, in case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule 'stands on the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can impose any vitality into it' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court requires if relief can be given independently of the contract, or whether it will refuse to interfere, as the matter stands.' *Penn. R. R. vs. St. Louis R. R.*, 118 U. S. 317."

pp. 60–61.

Afterward the controversy between the Central Transportation Co. and the Pullman Co., was given a new phase, by an effort of the former to avail itself of the latter's repudiation of the lease, as ground to recover the leased property and business. The Central Transportation Company asserted its claim in the form of a cross bill, in an equity suit against it by the Pullman Co. already pending, and the court seems to have attributed equity jurisdiction over the claim solely to the fact that such a jurisdiction had already been established over the matters involved, by the voluntary act of the Pullman Company itself in entering the equity side of the court. But for that fact the Central Co. must have resorted to the law side, as its claim was strictly legal in nature.

The reclamation was sustained; and the opinion of this Court—this time by Mr. Justice PECKHAM—included a repetition, in substance, of what has been above quoted from Mr. Justice GRAY'S opinion in the original case. On both appeals, the court in substance said, that a claim such as that made by the Central Co. in the second case was not one founded upon the illegal contract, but one founded upon a repudiation of it. Upon a repudiation by whom? Manifestly not the claimant alone. The repudiation in the Vandalia case had been one of that kind; but this Court denied it effect.

The court did not mean to declare that repudiation of an illegal contract by one party suffices to give the repudiator a right of rescission. The court was speaking in a case where repudiation by the lessor had merely followed, and been occasioned by, repudiation on the part of the lessee. The court meant no more than to say that illegality of a contract is no defense in the mouth of its repudiator, against a demand for restoration of property or money which he has received under it. Mr. Justice PECKHAM certainly went no farther in 171 U. S., than in effect to repeat what Mr. Justice GRAY had previously said in 139 U. S.; and Mr. Justice GRAY could not have meant in the VANDALIA case, to modify, retract, or overrule what he had previously said in the Sleeping Car case; for he cites the latter as supporting the Vandalia case.

The Vandalia case and the Sleeping Car cases established these propositions:

1. A transfer of property or money, made contrary to law and public policy, is irrevocable by the transferor, after execution by him, as long as the promises made by the transferee in consideration of the transfer are kept by him.

2. An illegal contract of transfer is executed within the meaning of the foregoing rule, when the transferor has delivered possession of the subject of the contract to the transferee, *i. e.*, to the party to whom the title is ultimately intended to

go, regardless of whether, under the contract, anything remains to be done by the latter.

In other words, although the illegal contract remains wholly executory on the part of the transferee, the transferor is bound from the time of execution on his part, and remains bound until repudiation by the transferee.

3. None of the executory features of an illegal contract are enforceable in the courts, in favor of either party.

The court will be much assisted in disposing of the present case by a recent one in the United States Circuit Court of Appeals for the 7th Circuit:

Gilbert vs. American Surety Co., 121 *Fed. Rep.* p. 499, *Oct.* 7, 1902.

JENKINS AND BAKER C. Judges. BUNN D. J.

In 1888 Bishop was owner of a preserves factory, and a stock of preserves goods in Chicago. In July of that year, a combination of the leading preserves manufacturers of the country was effected. To that end, a corporation was organized under the laws of West Virginia, called the "American Preservers' Company", and a trust was formed by written contract, to take the active management of the combination, under the name of the "American Preservers' Trust". Bishop joined the combination, and put his factory and stock into it. To do so, he conveyed to the American Preservers' Company his factory and stock by a formal bill of sale—the property all being personal—in which the consideration was stated to be 331 shares of the vendee's stock. These shares were issued to him. No other consideration was agreed to be paid, or was in fact paid.

Shortly after the receipt of the stock, Bishop transferred it to the Trustees in the American Preservers' Trust, and received back 662 trust certificates, entitling the holder to participate in the profits and proceeds of the Trust, in proportion as his Trust certificates should bear to all outstanding.

Bishop never in fact turned over to any one the actual possession of the things covered by his bill of sale, and always retained it himself; but, on delivering his bill of sale, he was employed by the American Preservers' Company at a salary to conduct the business he had sold, and he consented to act, and did act, as its agent for that purpose; insured the property in the name of that company; and made to it regular reports of the business done.

In December, 1888, and again in March, 1891, Bishop, considering the combination illegal, offered to return the trust certificates, and demanded return of the property covered by his bill of sale; but was refused. Nevertheless, he continued to draw his salary as trust agent, and to report the business to the trust, until March, 1891, when he ceased making reports, on the alleged ground of the illegality of the arrangement.

Thereupon, the American Preservers' Company began suit, in a state court of Illinois, in replevin, to recover possession of the property covered by the bill of sale it held. Bishop defended, on the ground of the illegality of the combination.

The case reached the Supreme Court of the State of Illinois, and is reported in 157 Ill., 284. A judgment of the lower court in favor of the company was reversed, and a new trial granted, chiefly on the question of admissibility of certain evidence; but, in the course of its opinion, the court expressed itself as follows:—

"But if it be assumed, that appellant executed the bill of sale, and submitted himself to the control of the trustees, or of appellee, voluntarily, and of his own free will, then it follows that he was *particeps criminis* with them in the unlawful venture. He, as well as appellee, was a party to the unlawful contract evidenced by the bill of sale. If appellee had been an individual, instead of a corporation, and appellant had executed the bill of sale for the purpose of defrauding his creditors, it will not be contended that the bill of sale could be relied on as a basis of recovery by either party."

p. 315.

The retrial granted by the Supreme Court never took place, and the case having been dismissed, suit in the federal court was brought on the replevin bond. Under a statute of Illinois permitting it, the defense of title in the defendant was set up and tried. The Circuit Court, and afterwards the Circuit Court of Appeals, held that, as against Bishop, what had occurred had vested the title to the property covered by the bill of sale in the American Preservers' Company, and that Bishop could not, against the company, dispute his agency or its title.

In the course of its opinion, the Circuit Court of Appeals said :—

" Assuming that the agreement pursuant to which Bishop executed his bill of sale was, as held by the Supreme Court of Illinois, in Bishop vs. American Preservers' Company, and within the principle laid down in Addyston Pipe & Steel Co., 175 U. S. 211, void as against public policy, and in restraint of trade, and that therefore the court will not lend its aid to either party to such unlawful agreement, it is to be remarked that the supposed unlawful agreement had, in fact, been executed by the parties thereto. Bishop had made his bill of sale, and given possession of his property to the Preservers' Company, in execution of the unlawful agreement. Such possession as he afterwards had, of that property, was not in his own right as owner, but as agent of the Preservers' Company ; a trust character was assumed by him. We doubt if such illegal transacsion can be made the subject of defense, in an action at law, unless the suit be brought upon the illegal contract itself. We doubt if it can thus be attacked collaterally. * * *

In the case at bar, Bishop had sold his property to the American Preservers' Company, and parted with his title to it. He had delivered possession to that company. The illegal agreement between him and the promoter of the trust was executed. He therefore was in possession of the property by virtue of his employment as agent of the company. He occupied a position of trust, holding the property, and dealing with it, for the company, for a stipulated compensation, which he promptly received. He may not after years of service under that arrangement, hold as his own the property which he had sold, and for which he had obtained the agreed price."
pp. 502-3.

The sale of these shares is not to be withdrawn from operation of the rule, *in pari delicto potior*, etc., on the ground

that it was a transaction against public policy; for so were the railway lease in the Vandalia case, and the sale of the stock of goods and business in the Preserves case; nor on the ground that it was a criminal act; for so was the sale in the last-named case, and so have been every unlawful wager and every sale made on a Sunday, that the courts have refused to disturb.

Absolutely no feature of the transaction under view differentiates it from the other cases where the rule has been applied.

XI.

Condition of sale asserted by Plaintiffs nothing but a promise to commit a crime.

If, as must be claimed by Plaintiffs under their conditional sale theory, the Northern Pacific stock was transferred to the Securities Company upon condition that it should be used to restrain interstate commerce, it was done under agreement to commit a crime, and for the express purpose of both inducing and making possible the commission. Purchase of this stock made restraint of trade by the Securities Company possible; for when transferred, the stock formed a clear majority of all the stock of the Northern Pacific Company.

The claim of Plaintiffs under their second theory is that the stock has reverted to them, because the Securities Company is now unwilling and unable to continue using it for commission of a crime.

But it is not true, and has not been adjudicated, that the transfer was made upon any such condition, or upon any con-

dition, whatever, relating to the use of the stock by the Securities Company, or otherwise.

It is not claimed that, since the transfer of the Northern Pacific stock, on November 18, 1901, any agreement between the vendors and the Securities Company relating to the stock has been made. It is not claimed that, since the transfer, the Securities Company has suffered or done anything to defeat, or even to decrease, any right in the stock, which the transfer may have conferred upon it, unless it be, firstly, the restraint imposed by the decree in the Government suit, and, secondly, the determination by the Securities Company to distribute the stock. All the facts relating both to the decree and the proposed distribution are upon this record, and are undisputed. Those features of the case, therefore, stand here for determination as mere legal questions on an undisputed state of the facts.

The questions whether of its own force the decree has affixed to the transfer a status unquestionable between these parties, and if it has done so, the exact nature of such status, are also pure questions of law.

XII.

Conspiracy not one to make the Securities Company a bailee or conditional owner of the railway stocks, but one to make it absolute owner.

The decree in the Government suit, by adjudging that the railway stocks, including, of course, the Northern Pacific stock here sued for, had all been acquired by virtue of a conspiracy to restrain interstate trade, necessarily adjudged that a criminal conspiracy had been entered into; but it refrains

from stating details of the crime. It does not even say that the conspiracy was one described in any of the pleadings.

Likely it compels the inference, that the object of the conspiracy was to invest the Securities Company with power to vote upon the stocks of both railway companies, and to collect, and itself indirectly distribute, the revenues accruing thereon.

The decree does not describe the method by which the corporation planned to, or did, invest the Securities Company with that power. It contains nothing compelling or even justifying any specific inference in regard thereto.

Furthermore, the decree is silent about the period of duration in the hands of the Securities Company which the conspirators planned to give to the power. The decree affords no ground for even inference upon that subject. For all the decree contains, it might have been for a year, a decade, a century, or in perpetuity. The decree, therefore, is perfectly consistent with any one of the numerous different modes, by which an unlawful power of that nature could be conferred. It is consistent with the creation thereof by means of a proxy and a dividend order for a limited period; a transfer upon an expressed trust in favor of the transferor; or an absolute and unconditional sale, outright, intended by both seller and buyer to vest indefeasable ownership in the latter.

From all opinions in both courts filed in favor of the decree, the omission of the decree to indicate the method by which the conspirators planned to vest the illegal power in the Securities Company appears not to have been accidental. It seems to have been intentional, and because all the learned judges favoring the decree considered the offense as lying in the mere creation and existence of the power; and not at all in its form, or in the length of its duration.

But this record, outside the decree, shows conclusively what was the method planned by the "conspirators" for placing

the unlawful power in the Securities Company, and, through sale of their Northern Pacific stock with knowledge of the plan, necessarily adopted and made their own by Harriman and Pierce. IT WAS TO MAKE THE SECURITIES COMPANY UNCONDITIONAL OWNER OF THE STOCK. That was the nature and aim of the conspiracy.

The petition for the Government in its suit against the Company so expressly described it, in the following words:—

* * * * * * *

"An unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, *through the instrumentality and by the means following, to wit:* A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock, upon a certain basis, and at a certain rate, *was to be turned over and transferred the capital stock*, or a controlling interest in the capital stock of each of the defendant railway companies, with power in the holding corporation to vote such stock, *and in all respects to act as the owner thereof*, and to do whatever it might deem necessary to aid in any manner such railway companies to enhance the value of their stock. *In this manner the individual stockholders of these two independent and competing railway companies were to be eliminated, and a single common stockholder, the Northern Securities Company, was to be substituted;* THE INTEREST OF THE INDIVIDUAL STOCKHOLDERS IN THE PROPERTY AND FRANCHISES OF THE TWO RAILWAY COMPANIES WAS TO TERMINATE, BEING THUS CONVERTED INTO ONE INTEREST IN THE PROPERTY AND FRANCHISES OF THE NORTHERN SECURITIES COMPANY."

Record, p. 68. par. VI. of petition.

The Circuit Court so expressly found, in the following passages from its opinion:—

* * * * * * *

"Certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, *con-*

ceived the design of placing a very large majority of the stock of both the last-named companies in the hands of a single owner. To this end, these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New Jersey, *which latter company, when organized, should buy all, or at least a great part, of the stock of the Northern Pacific and Great Northern companies.* The individuals who conceived and promoted this plan, agreed with each other to exchange their respective holdings of stock in the last-named railroad companies, for the stock of the New Jersey Company, when the same should be fully organized, and to use their influence to induce stockholders in their respective companies to do likewise, *to the end that the New Jersey Company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.*

Opinions p. 92.

Finally, if any further citation were needed to prove that the conspiracy condemned by the decree in the Government suit, was one for making *a buyer and an owner*, and not one for making *a mere custodian*, of the stocks of the two railway companies, Mr. Harriman's own affidavit filed in this proceeding would furnish it.

The following passages are clear both on the point of what the "conspirators" designed to accomplish generally and on the nature of the particular transaction between the Securities Company and Harriman and Pierce:

"The first information we had of the plan was from Mr. Hill and J. P. Morgan & Co., to the effect that Mr. Hill and his associates had determined to organize a holding company, and that they intended to transfer to such holding company a majority of the capital stock of both the Northern Pacific and Great Northern companies. My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of said firm, but I cannot remember exactly what each said, and at the present time (The affidavits were sworn to on May 16, 1904) can only recollect the substance and result of my conversations with them."

* * * * * * *

"They further stated that *upon the organization of the proposed holding company they would be prepared* TO PURCHASE the holdings of the Northern Pacific owned by the Oregon Short Line, AND PAY THEREFOR in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at

which the holding company would take the common stock held by them and Mr. Hill and his associates, and all other parties, *and they thereupon offered me those terms.*

* * * * * * *

"It was therefore finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holding of Northern Pacific stock for $82,491,871. par value of the stock of the holding company and $8,915,629 in cash. Some time after the terms of the agreement had been settled, and in November 18, 1901, Messrs. J. P. Morgan & Co. notified me to deliver the Northern Pacific stock to the Northern Securities Company, *and informed me that such company would close the transaction and that we would receive from it* THE STOCK AND CASH PAYMENT AGREED UPON. In pursuance of such notification, I attended with Mr. Pierce at the office of the Northern Securities Company, on that day, *when the certificates for said shares of preferred and common stock of the Northern Pacific Company, standing in the name of myself and Mr. Pierce, namely, $78,108,000 par value, duly endorsed, were delivered to the Securities Company,* and Mr. Hill delivered to us certificates for $82,491,871, par value of stock of the Securities Company, in the joint names of Mr. Pierce and myself."

Record, pp. 158–159.

No pretence here of a conspiracy to make the Securities Company *custodian* of the railway stocks generally, or of the Harriman and Pierce Northern Pacific stock in particular.

Nor was any such pretence hinted in the depositions of Mr. Harriman, appearing in the Record.

XIII.

When Harriman and Pierce had transferred the Northern Pacific shares to the Securities Company, and the latter had made payment of the price therefor by handing over to Harriman and Pierce the cash and the certificates for its own stock, coming to them, nothing remained executory between the parties save the implied mutual obligations concerning the Northern Securities stock resulting from the relation of corporation and stockholder, thus created.

The Securities Company has assumed no other form of obligation toward Harriman and Pierce, susceptible of repudiation by it.

The implied obligation from the Securities Company, to Harrison and Pierce, consisted only in this : That while the relation should continue, Harriman and Pierce should be permitted to vote upon the stock, at stockholders' meetings; to receive dividends from the company's earnings on a parity with all the other stockholders; and to share ratably with all other stockholders in any distribution of the company's assets. This is the well-understood engagement of every stock company to its stockholders.

Proposal by a corporation to distribute part, or even the whole of its assets among its stockholders ratably, could not be refusal by it to recognize or to perform the implied contract between itself and any stockholder.

A ratable distribution, in which equality between all stockholders, in proportion to their respective holdings, is preserved, is recognition and performance by it of its obligation to them. Hence, the Securities Company, by proposing ratably to distribute these railway stocks among its own stockholders, including Harriman and Pierce, is not proposing to repudiate,

nor to terminate, the contract with them, arising out of and accompanying the act of making them stockholders.

On the contrary, it is an express and formal recognition, by the Securities Company, of the continued existence and binding force of that contract, and is performance of it.

Distribution among its stockholders of a portion, or of the body of its assets, could be repudiation, or termination of its contract with its stockholders, only when the distribution should be made upon some basis other than that of equal treatment for all.

Distribution on the plan proposed by Plaintiffs would be termination and repudiation by the Securities Company of its contract with its stockholders.

Had the company planned to give back to some other stockholder the exact amount and kind of railway stock bought from him, or from his predecessor in interest, and thereby to prevent ratable distribution among all the stockholders, Plaintiffs might have correctly claimed repudiation and termination of their contract as stockholders. As the only contract between Harriman and Pierce, on the one part, and the Securities Company, on the other, remaining unexecuted, is still recognized by the latter as in full force, and is being faithfully performed by it, naturally, a claim that can find support only in voluntary termination and repudiation of the contract, must fail.

XIV.

Market values of the railway stocks do not determine their ownership.

The rights of any stockholder of the the Securities Company upon distribution of its assets, are not to be determined by the relative values of what was paid the Company for his stock,

and what he will get back under the distribution. The relations between those values only determines the profit or loss in making the purchase of the Securities stock. The Company has not warranted any stockholder a profit. Failure to make one will not enable any—not even Messrs. Harriman and Pierce—to rescind his purchase of stock, and reclaim in kind the price he paid.

Consequently the considerable space taken by Plaintiffs' with computations to show that their ratable proportion of the two railway stocks would not now be worth as much in the market as the $71,000,000 of Northern Pacific they here claim, has not in the smallest degree advanced the solution of the question here at issue, viz., which of the parties, as between themselves, and not as between the Securities Company and the Government, is owner of the shares for which Plaintiffs sue.

Plaintiffs do not claim that, by reason of anything said or done in their dealing with the Securities Company, any *less* title to their stock passed to the latter, than passed to it in its other acquisitions. Admittedly the other stockholders would have at least as much right to recover the specific original consideration for their stock as would these Plaintiffs. On the other hand, every other stockholder has the right to insist, that if the legal effect of the purchase from Harriman and Pierce was to make the Securities Company owner of the stocks so acquired, such stocks shall not be turned back to the sellers, but be divided ratably among all the holders of Securities stock.

The Securities Company is a trustee for all its stockholders ; and the laws would compel it to treat all alike, even if such were not the purpose of its directors and officers.

As matter of fact, the Northern Pacific and Great Northern stocks accruing to Plaintiffs under the *pro rata* plans will be worth in the markets many million dollars more than were their Northern Pacific, preferred and common, on November 18, 1901.

Mr. Harriman's affidavit in this proceeding, taken May, 1904, indicated that since November 18, 1901, the market price for Northern Pacific had considerably advanced, while that for Great Northern had slightly receded. Such statements and comparisons are only good for the day of their making. Market prices fluctuate. Were Mr. Harriman to make to-day an affidavit on the same subject, he would have to say, that while, since November, 1901, the market price for Northern Pacific has risen largely above 115, that of Great Northern has risen much more largely above 180. But such a statement, while true, would be as irrelevant here as is the affidavit appearing in the record, upon this point.

Under the *pro rata* plan of distribution their sale to the Securities Company will have turned out an immensely profitable transaction for plaintiffs, but whether Northern Pacific stock or Great Northern stock has advanced or declined in the markets, has no concern with any point here involved, and in no way diminishes or enlarges the duty of the Securities Company to defend and protect the rights of the whole body of its stockholders in all its assets.

XV.

Established rule, "in pari delicto potior," etc., more deterrent of unlawful combinations than would be new rule Plaintiffs ask Court to substitute for it.

Presumably Plaintiffs ask the court to set aside in this particular case, on the ground that restoration of the parties to their original status would be deterrent of similar transactions in future, the rule, so often asserted and applied by

itself, that, as between wrongdoers, an executed transfer of property must stand.

But would the new rule be as deterrent as the old ?

Under the existing rule, those contemplating unlawful combinations have before them the certainity, that if the combination be overthrown, their unlawful purpose will be defeated, and the property contributed by them be lost to themselves, through dispersion of it among all their associates.

On the other hand, the new rule Plaintiffs seek to have adopted would reduce to a minimum the hazard attending unlawful combinations. If the combination remain unmolested by Government, it will turn out the hoped-for success. If Government interferes, and as a result the enterprise fails, the consequences will be limited to mere restoration of the guilty participant to his original position.

Hence, encouragement of, instead of deterrence from, unlawful combinations ; for their promoters would run no risk of serious loss from any outcome.

XVI.

Unbroken course of Plaintiffs' conduct from November 18, 1901, to filing of Intervention Petition in Minnesota court, in April, 1904, has irrevocably confirmed transfer of the railway stocks as unconditioned sale.

From November 18, 1901, when the sale of their Northern Pacific stock was completed, to April 2, 1904, when Plaintiffs filed in the Minnesota Court their Intervention petition, they said no word and did no act, calling in question the absolute and unconditioned character of the transaction on both sides.

On the contrary, their uniform and unbroken course of conduct with reference to what they had sold to the Securities Company, and what they had received from it in payment, confirmed their sale, and the resulting title of the Securities Company, as an absolute one. They kept and used, as their own property, the $8,915,629, cash, forming part of the price. They also kept and used as their own property the $82,491,871 stock of the Securities Company, forming the residue. The form for the certificates of this Northern Securities stock is quoted in the opinion of the Circuit Court of Appeals, and need not again be quoted here. It asserts unconditioned ownership of the shares of stock of the Securities Company therein specified, by the holder.

On March 10, 1902, the Government filed its petition against the Securities Company. Record, pp. 64–75.

On May 5, 1902, the Securities Company filed its answer to the Petition. Record, pp. 85–101.

In most positive terms, this answer asserted absolute ownership by the Securities Company of all its holdings of the railway shares; necessarily including those acquired from Harriman and Pierce. One allegation of that nature was as follows:

"This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upwards of forty million dollars ($40,000,000) cash in the making of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks."

Record, p. 91, Par. XI.

This answer was necessarily a corporate act of the Securities Company. Mr. Harriman had been a director of the company, and a member of the Executive Committee, from the day it began business. He was attentive to his duties appertaining to these positions, and present at nearly all meetings of Board and Committee, as the copy of the minutes contained in the Record show. Record, pp. 303–318.

Every Director of the company, including Mr. Harriman, must be presumed to have known the contents of this important document before it was made the Company's act by filing. The assertions quoted are not the statement of a mere legal conclusion, but one of pure matters of fact. These statements are, in effect, Mr. Harriman's own. Never, in any way, did he dissent from them, or do any act inconsistent with them until he did so through filing the Petition for Intervention in the United States Circuit Court for the Minnesota district in April, 1904.

On July 7, 1902, thus a few days less than four months after commencement of the Government suit, and a few days more than two months after Mr. Harriman and his fellow directors had caused to be filed in the federal court these solemn assertions of ownership by the Securities Company of the Northern Pacific shares acquired from Harriman and Pierce, the Plaintiff, Oregon Short Line Railroad Company, by the hand of Mr. Harriman, its president, executed a formal Trust Indenture pledging to the Plaintiff, the Equitable Trust Company of New York, as trustee, all the shares of Securities stock that had been paid over to Harriman and Pierce, as the absolute property of the pledgor. Yet there would be no ground for contending that Harriman and Pierce got any better title to what they received, than that they gave to what they parted with in their transaction with the Securities Company. No hint, in this Trust Indenture, that the pledged shares were not real corporate stock, but mere receipts for a special

deposit of other property with a "custodian". On the contrary, throughout the document, the pledged shares are described and transferred as being what they really were, stock.

At the time of affirmance by this Court of the decree, in the Government suit, there had been issued, and was outstanding, of the stock of the Securities Company $395,400,000, par value. Practically all this amount, less the $82,491,871 paid to Harriman and Pierce, were issued after issuance of the latter stock, and consequently with cognizance and co-operation of Mr. Harriman himself as a director. He never suggested that this vast mass of shares, purporting to be undivided interests in every item of property held by the Securities Company, was in reality nothing of the kind, but merely something in the nature of Pawn Tickets.

As directors of the Securities Company, Messrs. Harriman, Schiff and Stillman, all at the same time directors of the Union Pacific Railroad Company, expressly concurred in approval of sales made by the Securities Company, in the public markets, for cash, as corporate stock, of its shares aggregating $7,522,000. Record, pp. 318, 319.

All these sales were for prices averaging considerably more than par.

If these cash shares are mere PAWN TICKETS, *what goods do they represent?*

If these shares are not entitled to a ratable proportion of all property held by the Company, how are they shares at all, and how are they to be dealt with?

Plaintiffs have never disputed power in the Securities Company to create valid stock, and to sell it. This unquestioned power must have been exercised in the case of these cash issues. Their status was not altered by the fact that the shares actually sold had previously been issued to Mr. Hill, and, in an interval between Board meetings had been borrowed from him, by the Company, for sale, in anticipation of replacement with new shares as soon as requisite Board action for

issuing them could be had. The important and controlling fact is, that the Company put the shares upon the public market and sold them to the highest bidder for cash paid on delivery.

In any distribution of Company assets, the quality of corporate stock must vest these shares with undeniable right to a *pro rata* interest in the entire body of property held by the Company; including necessarily the Northern Pacific stock claimed by Plaintiffs.

If that fact stood alone it should suffice to defeat Plaintiffs' claims; for it would make rescission impossible. The right of even part of the stockholders of Securities Company to insist that these Northern Pacific shares are assets, should stamp them with that character for all corporate purposes.

On November 19, 1901, the Board of Directors of the Securities Company, with concurrence of Messrs. Harriman, Schiff and Stillman as directors, appointed Transfer Agents and a Registrar of Transfers for the Company's stock. Record, p. 313.

On November 27, 1901, the Executive Committee, with concurrence of Mr. Harriman, as a member, adopted the form of stock certificate for the Company's stock; which form provides that the stock covered by the certificate will be "transferable "only on the books of the Company, by the holder thereof, in "person, or by duly authorized attorney, upon surrender of "this certificate." Record, p. 317.

Thus, at the outset, Messrs. Harriman, Schiff and Stillman united with the remaining directors of the Securities Company in providing means for freely dealing in the Company's stock.

The investing public has liberally availed itself of these facilities.

Ever since Securities stock began to be issued, it has been bought and sold, in private, and on the public markets, in great volumes. Up to April 18, 1904, approximately 16,000 separate transfers had been registered on the Company's

books. Record, p. 266. Unregistered sales were also very numerous. Record, pp. 272–273, 275–276. All these dealings were on the supposition that the shares dealt in were actually corporate stock. Plaintiffs must at all times have been cognizant of these facts. They were matters of great notoriety. Mr. Harriman's official position with the company compelled him to take notice of them. But no objection, protest, or warning has come from any of these plaintiffs, or from Mr. Schiff or Mr. Stillman.

Had the original acquisition by the Securities Company, of the Northern Pacific shares, been something other than of ownership, the unvaried course of Plaintiffs' conduct, through a period of two and a half years would, in equity, as between Plaintiffs and the remaining stockholders, have sufficed to make it ownership.

XVII.

Original consideration for shares of Securities stock represented by many outstanding certificates not now capable of ascertainment.

As an additional reason why Plaintiffs' proposed method of distributing the railway stocks would now be inequitable, and that proposed by Defendant would be the sole equitable one, Defendant asserted upon the hearing of the original application for an injunction, that the extensive dealings in Securities shares, carried on with Plaintiffs' knowledge and assent, had made impossible ascertainment at this time of the original consideration for shares represented by many stock certificates now outstanding ; and on that point produced the affidavits of Mr. E. T. Nichols, Secretary and Treasurer of the Securities Company from the beginning, and of Messrs. F. B. Blinn and B. G. Mitchell ; all of them men of large experience, and

unquestioned skill in such matters. Record, pp. 263, 273, 276. In assumed opposition, plaintiffs produced the affidavits of Mr. Alexander Millar, Secretary of the Union Pacific Railway Company, and Mr. Otto C. Kahn, Transfer Agent of that company. Record, pp. 373, 182.

In reality, there is no important conflict of statement on the substantial question meant to be raised, for the reason, among others, that affiants for Plaintiff confess ignorance of the facts. In any event, the point could not need determination, until and unless the question of title, on other grounds, should be resolved adversely to Defendant. On the question of a special injunction, difficulty, or impossibility, of tracing present stock certificates to their respective sources, in Northern Pacific stock, Great Northern stock, or cash, is of special importance in making clear the unfairness, and impracticability, of any but the *pro rata* plan of distribution.

XVIII.

The railway stocks may lawfully be distributed in kind. Plaintiffs cannot require them first to be turned into money.

In this court Plaintiffs advance a point wholly overlooked, or at least ignored, in both courts below, viz., that any *pro rata* distribution must be of cash, and not of property; hence, that an essential preparation for such a distribution must be a sale, and conversion into money, of all the Company's holdings of the railway shares. Plaintiffs' counsel cannot claim originality for this point. They were not its inventors. In the very first of the series of litigations begun to obstruct the carrying out of the *pro rata* plan, *Continental Securities Co. vs. Northern Securities Co.*, brought by Mr. C. H. Venner, in the

name of the plaintiff corporation, in the Court of Chancery of the State of New Jersey, the identical point was urged with great persistence, argued at length, but overruled by the Vice Chancellor who heard an application for a special injunction. All this ante-dated the bringing of the present suit; yet while each of the extended series of Bills herein seems in other respects closely modeled on that of Mr. Venner, (R. pp. 245–253), the draughtsman appears either to have overlooked or purposely omitted those portions of it containing the allegations framed to cover this particular point. The Series of Bills in this suit was framed to cover claims of a totally different nature. Each Bill of the Series lacks the needful averments for asserting this claim.

But assuming that this omission might be supplied by amendment; and that a Third Amended Bill, containing averments sufficient for raising the point, would be possible, there is nothing in it. How a corporation may distribute its assets among its stockholders is manifestly a question to be determined by the laws of the incorporating state. Consequently, whether the Securities Company may distribute its railway shares in kind, or must first turn them into cash, and then distribute the latter, is strictly a question of New Jersey law. What that law upon this subject is, could not be better stated than Vice Chancellor BERGEN has done, in the following passage from his opinion in the Venner case:

"By the reduction of the capital stock of a corporation, not impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction, and unless the rights of creditors will be effected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying on of the business for the best interest of the stockholders, may not require. Strong vs. Brooklyn R. R. Co., 93 N. Y. 426. Williams vs. Western Union Tel. Co., 93 N. Y. 163. Morawetz on Corporations 443. The proposed distribution is not a dividend in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

"The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case, the character of the assets make an equitable division easy to accomplish; each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value; if there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean; and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders require that a division of the stock of the two Railway Companies be made between *them, unless prevented by some imperative legal rule; no such rule exists, on the contrary, the power of directors of a corporation to divide property other than money, among the shareholders, is sustained by abundant authority, 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; Ehle vs Chittenango Bank, 21 N. Y. 548; Leland vs. Hayden, 102 Mass. 542.*

"Having determined that the stock of the two Railway Companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a vested interest to the extent of his holdings of the defendant company's stock; that when the capital stock of a corporation is reduced and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company, among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property, so held for distribution, and that the proposed method of division is equitable, it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a Court of Equity." R. p. 262.

When sale of these railway shares is suggested, the magnitude of such a financial operation must be considered.

At average market prices of the past few months, the $153,000,000 Northern Pacific stock represent values aggregating $230,000,000 and the $118,000,000 Great Northern stock values aggregating $260,000,000; both stocks together values aggregating around $500,000,000. An operation like the sale of these stocks would shake to the bottom the financial fabric of both America and Europe. Nothing comparing with it has

ever been undertaken. Besides, who would be benefited by the operation? Certainly not the stockholders of the Securities Company. The proportion that any of those stockholders would realize in money would be a mere fraction of the value of the stock itself coming to him under distribution in kind; for, under forced sale of all these holdings, values would simply be slaughtered.

Nobody would be helped, save a few who thereby would be enabled to engross the entire holdings at prices little better than nominal.

It may be said that no one should be compelled to become a stockholder in a corporation against his will. That is true; but no more true than that no man should be compelled to take money against his will. It is not asserted in the Bill, and it is not true, that the holding of stock in either railway company involves assumption of any obligation by the stockholder; nor of any risk, save as to the soundness of the investment; which latter risk can always be terminated by selling out. For years, these railway stocks have passed from hand to hand, with almost as much freedom as the currency of the country. For purposes of distribution, they have the fitting quality of all being precisely alike in nature and value. Hence their distribution can be as fair and equal as would be possible with money.

Reduction of the capital stock of the Securities Company as has been determined by the Board and the stockholders, will necessarily produce a corresponding surplus in the Company's hands. The authorities cited in Vice Chancellor BERGEN'S opinion show that upon the creation of a surplus, a duty from the corporation to the stockholders will arise to distribute the same among them. The extent of the duty as to the mode of distribution, must necessarily be fairness and equality as between them. All must be treated alike; and if

the form of the assets composing the surplus, at the time of its creation, is not such as to permit equality, they must be put into some other permitting it. If already in such form, and no statute directs differently, it must rest with the Board of Directors and stockholders themselves, to determine, as a matter of business judgment and discretion, whether the assets shall be distributed in present form, or first be changed into something else, permitting equality among distributees. Money has no special quality to make it the exclusive material for such purposes. The sole reason why corporate assets are commonly turned into money, for purposes of distribution among stockholders is, that ordinarily such assets are not in form capable of being equally distributed. The change of form is unavoidable. The use by Directors and majority of stockholders of the discretion manifestly belonging to them to determine whether, preparatory to distribution, corporate assets already susceptible of distribution with perfect equality shall or shall not be changed into some other form, must necessarily be as conclusive and binding upon every individual stockholder, as the use of their discretion upon any other question concerning the company's business policy; at least in absence of designed abuse of discretion; and no such thing is asserted here.

The Securities Company's Board, and almost three-fourths its stockholders, have declared, in the forms prescribed by the laws of the state of New Jersey, that distribution of the company's surplus about to be created will be effected with most advantage to stockholders in kind; and such determination is as binding upon these plaintiffs as upon any other stockholder.

XIX.

Partial distribution of the railway shares impracticable.

Plaintiffs' counsel suggest relief of the Securities Company's stockholders from the great loss and embarrassment unavoidably inflicted by the special injunction through the immediate partial distribution of the railway stocks. This is an astounding proposal to come from parties asserting a claim that not one share of these stocks is a company asset; but that, on the contrary, every share has remained the property of the original seller to the company, and of the assignees of his rights. Unless Plaintiffs can establish the proposition, that the Securities Company holds no share of either Northern Pacific or Great Northern Stock lawfully subject to distribution, they must fail. How, then, can they prescribe as a balsam for wounds of their own infliction, the handing over of one man's property to another? It has a frightfully inconsistent look. The old Philistines could not have excelled that. No distribution of the railway shares among stockholders of the Securities Company could lawfully be made, save as surplus created by reduction of its capital stock. The statutes of New Jersey forbid all distribution of capital under other conditions. Such reductions must result from a proposal made by the Board, approved by a vote of the holders of at least two-thirds the total stock. Such proceedings were taken by the Securities Company for the reduction now in process of consummation. A part of the resolutions adopted by both Board and stockholders specifically ordered the distribution of the railway stocks as surplus, and to save any misunderstanding of the proposition submitted to stockholders, named the precise sum, in the stock of each railway company, to which, in the distribution, each share of Securities stock will be entitled. This provision of the resolutions therefore

formed an essential part of the transaction, and a condition and consideration for surrender by the stockholder of his proportion of the stock to be retired. Consequently the distribution of the entire amount of railway stock specified in the resolutions, is an indispensable condition of the reduction of capital ordered by the pending proceedings. Each stockholder required to surrender his Securities stock can insist upon being paid the full amount in the railway stocks named in the resolutions.

Therefore, under the present proceedings, partial distribution is impracticable. They would have to be abandoned, and new ones started in their place. As under the New Jersey statutes a two-thirds vote of stockholders for a new plan would be indispensable, and as the holdings of Securities stock are scattered over two continents, separated by an ocean, considerable time would be required for assembling anything like a full meeting. But imagine these delays passed, and the meeting assembled; what would be the form of proposition submitted? If Plaintiffs are right, it should be one for the participating stockholders to surrender their Securities stock, in consideration of being handed property belonging to somebody else, and which must therefore be surrendered or paid for, to the true owner, on demand. Could a court of justice be expected to encourage such a proceeding, or to accord to the possibility of its being taken the smallest weight, in determining how its discretion should be exercised in a given instance? Besides, the proposition could not be universal and uniform in its action upon stockholders. It would have to create a separate class, apart from the rest, in which at least Plaintiffs would be contained, and make for it provision not made for the residue. No such method of reducing capital stock and distributing resultant surplus is provided for or tolerated by New Jersey laws. In absence of express agreement otherwise, those laws provide only for methods universal and uniform in effect on all stock,

where there is but a single class; and upon the entire stock of the class involved, where the whole is divided into classes.

But supposing it within the legal competency of these stockholders to specially set apart for Plaintiffs $71,000,000 Northern Pacific shares, even as a provisional arrangement and subject to the event of a law suit, and to authorize the immediate handing over of a ratable proportion of the residue to any stockholder willing to surrender a proportion of his Securities stock therefor; the title of the Securities Company to such residue being subject to like dispute as that to Plaintiffs' stock; and there being a chance that Plaintiffs might, in the final outcome, get a larger proportion of the total company assets than the remaining stockholders; can it be imagined that any considerable proportion would accept the terms? To do so would be contrary to human nature. Would any of the honorable Justices of this court accept them, if a stockholder?

Two methods for distribution of the railway shares are impossible. There can be no commencement of distribution until the possibility of lawfully completing it by the same method, has arisen.

XX.

Retirement of Northern Pacific preferred stock, on January 1, 1902, made impossible a subsequent rescission by either party of the sale of railway stocks to the Securities Company.

Even if Harriman and Pierce on the one part, and the Securities Company on the other, had at or prior to November 18, 1901, made an arrangement covering the Northern Pacific shares, which, from terms, or legal effect, might have

been subject to rescission for any cause, it would not have remained capable of rescission by either party at any time since retirement by the Northern Pacific Company of its preferred stock; that is to say, not since January 1, 1902.

Partial rescission of a transaction in which property has passed, and particularly where property has passed both ways, is unknown to the law. Either the parties must be restored to the *status quo ante*, or both sides abide the situation they have voluntarily created. In the instance under view, what passed between the parties was undivided and unapportionable, on each side. Every share of Northern Securities stock, and every dollar of Northern Securities money, paid over to Harriman and Pierce, applied equally to every share of Northern Pacific common and preferred received from them, and *vice versa*. But when the transaction occurred, the $41,085,000 preferred had already been called for retirement, on the first day of the following year; and stood merely as the representative of that much money due at the date named. When January 1st arrived, the preferred was paid off, and converted into $41,085,000 cash, and thenceforth ceased to exist. To fill the vacancy in the body of the company's capital stock occasioned by extinguishment of the preferred, a totally new issue in equal amount, non-existent before January 1, 1902, was created. It was not a mere substitution for the preferred, but a new creation, occupying the same space.

Of this new stock, the Securities Company acquired $34,709,062, through previous acquisition of an equal amount of the special Northern Pacific bonds convertible into it. The bonds were bought by virtue of a preemption right acquired from Harriman and Pierce in the purchase from them of $37,023,000 old common. This right was a mere option; not an obligation on the holder. The Securities Company might have waived it. Could Harriman and Pierce have objected? No statement backed by the oath of one

claiming personal knowledge appears in this record to the effect that the Securities Company had incurred the smallest obligation to any of these Plaintiffs to exercise this right.

In his depositions read in the Goverment suit, Mr. Harriman many times repeated the assertion, that the sale of the Northern Pacific shares had utterly been without condition (*ante*, pp. 31-35). In his lengthy affidavit made in support of the application for injunction, the subject is dismissed with the following :

> " At the time I agreed with Messrs. J. P. Morgan & Co. to turn over the stock of the Northern Pacific Company held by the Oregon Short Line Company, *it had been understood* between them and myself that *all* of the outstanding preferred stock of the Northern Pacific Company *would be* converted into common stock." (R., p. 159, close Par. VII.)

This statement does not relate to the preferred stock held by Harriman and Pierce in particular. It applies to the whole body of stock of that class in general ; what others held, as well as what they held. It does not assert a promise as to any part of the preferred, but merely an expression of mutual belief as to what would be likely to take place in future. A glance at the resolutions ordering the retirement would have shown both sides the impossibility of the new common coming back to holders of the preferred about to become defunct. Under the plan for retirement adopted with concurrence of Mr. Harriman, himself, as a Northern Pacific director, the preferred stock conferred upon the holder merely a right to be paid off in cash, and carefully excluded him from even the smallest interest in the new issue. Besides, the thing material here is not what was " understood " between Harriman and Pierce and J. P. Morgan & Co., at any time ; but what was agreed between the former and the Securities Company at the time of the sale of the Northern Pacific stock, and as a condition thereof. It is not asserted that any understanding with J. P. Morgan & Co., relating to the treatment of either

class of the Harriman and Pierce stock was ever even brought to the notice of the Securities Company; much less assumed by it.

No interest in the $34,709,002 new common stock, now claimed by Plaintiffs, has accrued to them from any contract, promise, or understanding to which Defendant was or became a party.

This new stock, therefore, could not be the subject of any rescission right arising in favor of Plaintiff, out of the sale of the Northern Pacific shares, whatever view is taken of the legal effect of that transaction.

If any right of rescission could exist at all, it would attach solely to that part of the property actually transferred to the Securities Company, now remaining in existence, viz., $37,023,000 of the old common stock; or at the very utmost to that, and by way of compensation for the preferred stock not now in existence, to the money collected from the railway company by the Securities Co., as the proceeds of the preferred. As the consideration received by Harriman and Pierce was indivisible, any right of rescission belonging to them could be exercised only by returning the whole of it. No such offer appears in this Bill.

XXI.

Sale of Northern Pacific stock not now subject to rescission on ground of mistake, by vendors, or vendee, or both.

Plaintiffs have acquired no right of rescission founded on mistake, either by Harriman and Pierce alone, or by seller and purchaser mutually.

The proofs in the Record show that no concealment from Mr. Harriman of any fact connected with the Securities Company's affairs has ever been attempted, or even possible. His official positions with the company from the commencement—director and member of the Executive Committee—necessarily have made him conversant with all the general features of the company's business, and have afforded him perfect opportunity for learning all its details which he might be interested or even curious to know.

Harriman and Pierce did not sell the Northern Pacific shares to the Northern Securities Company in ignorance of the plans of the latter's projectors, nor of the nature of the transactions the Company itself both contemplated and made. From a time antedating the Company's formation, they knew that when organized it would endeavor to buy a majority of all the stock of the Northern Pacific Company, and would be willing to also buy as much stock of the Great Northern Company as should be offered at a price by its Board declared satisfactory. Every step in the progress of the Securities Company's purchases of a majority of the stock of each railway was known to them as it occurred. Indeed, Mr. Harriman, from his official positions in the Company, was himself an actor in making all purchases.

Harriman and Pierce do not claim to have mistaken any fact; but only the true interpretation of the federal Anti-Trust Act. The effect of this mistake related wholly to duration of ability in the Securities Company to do what the courts have determined to be restraint of trade. In other words, the sole disappointment of Plaintiffs is concerned with the length of time during which the Securities Company might continue an illegal practice.

Harriman and Pierce cannot deny perfect knowledge of the effect of ownership by the Securities Company of a majority of the two railway stocks. They cannot deny knowledge that such ownership carried power in the owner to restrain trade,

and therefore, in effect would itself amount to such restraint. Their sole mistake, if any, lay in the supposition that this particular kind of restraint had been overlooked by Congress, and had not been included with the others prohibited by the Anti-Trust Act.

Such mistakes by vendors do not confer upon them right to rescind executed sales of property.

The mistakes conferring that right are those of facts, and must be equally shared in by the vendee; in other words, they must be mutual (1 Story Eq. Jur., Chap. V.).

If a corporation engages in unlawful enterprises, it is the right of every stockholder to insist upon their abandonment. Such right, if denied, or disregarded, may be enforced by legal process.

Undoubtedly it was the right of these plaintiffs, at any time since acquisition by the Securities Company of a majority of both railway stocks, to demand of the Company that it should rid itself of the power thus unlawfully held. But that right did not include one to insist on a specific return of what had been sold to the Company. It was limited to requiring disposition of the offending property in some manner permitted by law, and at the same time not violative of the rights of other stockholders of the Securities Company. Of such methods there have all the time been two: Firstly, to sell the railway stocks, and, secondly, to make direct *pro rata* distribution of them among all the Securities Company's stockholders. By either method, the unlawful situation created by assistance of Plaintiffs could lawfully be terminated. The Company has voluntarily chosen the second method; but Plaintiffs, instead of co-operating, seek to defeat the effort.

Undoubtedly, when men engage in a business, at the time supposed to be without legal prohibition, but afterwards judicially declared prohibited, it is not only their right, but their duty, to terminate the enterprise. But such right and

duty do not have their origin or any foundation in the mistake. That is immaterial. The right and duty come exclusively from the illegality, and could be no less or greater whether the illegality has been perfectly understood by all concerned from the outset or has been learned at a later period.

The methods used for ending the unlawful situation must always depend upon the nature of the arrangement through which it has been created.

When property has merely been put into the hands of a custodian, or trustee, without intent of passing title, naturally it may be reclaimed in kind, by its contributor, who has always remained its owner.

But where title has intentionally been passed, as where a partnership has been created, and the property been contributed thereto, or an actual and intended sale thereof has been made to a corporation, others beside the original owner have acquired rights therein which must be respected. The title of the original owner, in the specific thing, has ceased to exist. Having voluntarily parted with his title, he cannot reclaim the specific thing, but must be content with his ratable proportion of the total partnership or corporate assets, as the case may be.

These principles are so elementary, and so universally recognized, that citation of specific authorities for their support would be mere waste of space.

JOHN G. JOHNSON,
JOHN W. GRIGGS,
W. P. CLOUGH,
Of Counsel for Defendant
Northern Securities Company.

No. 512.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,

Complainants-Petitioners,

vs.

NORTHERN SECURITIES COMPANY,

Defendant-Respondent.

BRIEF FOR NORTHERN SECURITIES COMPANY, RESPONDENT.

THOMAS THACHER,

Of Counsel.

[illegible]

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Complainants-Petitioners,

vs.

NORTHERN SECURITIES COMPANY,
Defendant-Respondent.

BRIEF FOR NORTHERN SECURITIES COMPANY, RESPONDENT.

This suit is here on writ of *certiorari* issued to the Circuit Court of Appeals of the Third Circuit, upon the petition of Harriman and others, complainants. When the writ was issued, that Court had given its opinion and made a decree that the order of the Circuit Court from which the Northern Securities Company, defendant, had appealed, be reversed.

The order appealed from enjoined this Company, *pendente lite*, from disposing of certain stock of the Northern Pacific Railway Company, which it is the purpose of the suit to recover by final decree. The injunction was granted by the Circuit Court, with-

out deciding whether the complainants were entitled to such final relief, upon the ground that that question should await the final hearing after proofs taken, and upon the further ground that an appeal would lie if the injunction were granted, but not if it were denied.

Manifestly the first of these grounds was insufficient, unless there were issues of fact arising upon the pleadings and stipulations which *must be* determined in order to decide the question, whether the complainants were entitled to the final relief sought. It is submitted that there were and are no such issues. There may be issues of fact bearing upon the extent of the relief to which the complainants are entitled, if their theory of right be accepted; but there are none, we submit, which must be determined in order to decide that their theory of right is not well founded, or, in other words, that they are entitled to no final relief whatever.

By the admission of counsel in the Circuit Court, complainants' theory of right rests wholly on the proposition that the Securities Company never acquired title to the Northern Pacific stock which the complainants seek to recover. That this proposition is unsound, is a conclusion flowing from facts about which there is no dispute. Facts not admitted may add strength to this conclusion, but without them, we submit, the conclusion is clear.

The leading, if not the only, theory in support of the complainants' contention—that the Securities Company never acquired the stock—is that this is the effect of the decrees in the suit of the United States against this Company and others. The decrees, the opinions and the record in that suit were before the Court. Everything needed to determine the effect of the decrees was presented complete and undisputed. The taking of proofs cannot possibly add anything in this respect. So far as the suit rests upon this theory the court never can be more fully advised of the material facts upon which the complainants rely, than it is by the present record.

The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants *appear* to be entitled to ; in other words, that the complainants *appear* to be entitled to a decree that the Northern Pacific stock which they claim, or some of it, be delivered to them, a decree which cannot be enforced if this stock shall have been disposed of. The right to such final relief must *appear ;* if not, the injunction was error. If such right did not *appear*, the question of granting or denying the injunction was not addressed to the discretion of the court. Certainty was not required ; nor, perhaps, the same confident conclusion as upon final hearing ; but nevertheless, to justify the injunction, it must have *appeared* to the court that the complainants were entitled to such final relief. All the material facts being before the court, complete and undisputed, the question was presented precisely as at final hearing. That question does not seem to us a difficult one; but though it were, the court was bound to answer it, finding the complainants entitled to the final relief, or else to refuse the injunction. However unusual or difficult any question may be, if it must be passed upon in determining whether the complainants are entitled to final relief, the court may not put that question aside, and, assuming that it may possibly be answered in favor of the complainants, grant such temporary relief as is allowable only if what it assumes really *appears.* If, upon the record, it does not *appear* that the complainants are entitled to recover this stock the order appealed from was erroneous and should be reversed.

Brooklyn Club vs. McGuire, 116 Fed., 783.
Home Ins. Co. vs. Nobles, 63 Fed., 643.
Central Stock Yards Co. vs. L. & N. R. R. Co., 112 Fed., 823, 828.
Stevens vs. M., K. & T. Ry. Co., 106 Fed., 771, 774.
Amelia Milling Co. vs. Tennessee C. I. & R. Co., 123 Fed., 811.

In some cases "a probable right" is deemed enough. (New Memphis Gas Co. vs. Memphis, 72 Fed., 952; Indianapolis Gas Co. vs. Indianapolis, 82 Fed., 245; Sanitary Reduction Works vs. California Co., 94 Fed., 694; Georgia vs. Brailsford, 2 Dallas, 402); or a "*prima facie* right" Charles vs. City of Marion, 98 Fed., 166).

See, also, Cosmos Exploration Co. vs. Grey Eagle Oil Co., 104 Fed., 20.

In Utah N. & C. R. R. Co. vs. Utah N. & C. Ry. Co., 110 Fed., 879, it is said that "in all cases *essential facts must be clearly proven* in order to put the power of the Court in motion and justify the issue of the writ."

There are cases seeming to hold that, even without a *prima facie* case appearing, an injunction may be granted to preserve the *status quo* until final hearing. Some of them do not really so hold. If there are any which do, it is submitted that they are contrary to sound reason and the weight of authority as well. In Allison vs. Corson, 88 Fed., 581, it is said: "If it is reasonably clear that he (moving party) cannot ultimately succeed—if his pleading discloses no cause of action or defense—no injunction should be granted." In Denver & R. G. R. R. Co. vs. U. S., 124 Fed., 156, the court found the evidence "strongly persuasive" of complainant's right. In Haddon vs. Dooley, 74 Fed., 429; Cartersville Light Co. vs. Cartersville, 114 Fed., 699, and Cohen vs. Delavina, 104 Fed., 946, a probable or *prima facie* case appeared. The facts in City of Newton vs. Levis, 79 Fed., 715, certainly gave rise to a presumption that the complainant was right.

But even if the Circuit Court be thought justified in holding the *status quo* to await the final hearing, or, in case of an appeal, to await the action of the Circuit Court of Appeals, the latter Court rightly followed the same course as in Western Union Telegraph Co. vs. Pennsylvania R. R. Co., 123 Fed., 33.

It is the approved practice on appeals from injunc-

tion orders, not only to consider the merits but to dismiss the bill, if the court can see that the complainant is not entitled to final decree.

Smith vs. Vulcan Iron Works, 165 U. S., 518.
Mast Co. vs. Stover Co., 177 U. S., 485.
Castner vs. Coffman, 178 U. S., 168.
Mayor of Knoxville vs. Africa, 77 Fed., 501.
Bissell Carpet Sweeper Co. vs. Goshen Co., 72 Fed., 545.

It is submitted, therefore, that, if the argument of the complainants still rests upon the theory of *res adjudicata*, so called, that is upon the effect of the decrees in the Government suit, or upon any other theory concerning which the facts are substantially undisputed, this Court, finding such theory unsound, will, not simply reverse the injunction order, but dismiss the bill.

Manifestly no other theory would be presented, if the complainants had not filed their second amended bill of complaint. In their reply brief in the Circuit Court counsel for complainants, after arguing that they might stand upon the decree in the Government suit, though they did not allege the facts therein found and were not parties, say that "*no departure from the case previously presented is made in the second amended bill.*"

It having been objected that, not being parties, they could not sue upon the decree, complainants set up as facts the facts found in the Government suit, and rely on the decision therein as controlling authority. Their contention that title to the stock did not pass, still rests on the proposition that that is the effect of the decree in the Government suit, or, in other words, that it was substantially so adjudged therein.

POINTS.

I.

It was not the legal effect of the decree in the Government suit that title to the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, which the Northern Securities Company now holds, never passed to the last-named company.

The legal theory of the complainants is shown in paragraph XIII. of the second amended bill of complaint (precisely as in the same paragraph of the amended bill) as follows :

> " XIII. Your orators are advised by counsel and therefore aver that *the effect* of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said Anti-Trust Act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

On the other hand, we contend that by that decree the Securities Company was adjudged owner of this stock. Indeed it seems to us that this is the one thing upon which all the judges, in the Circuit Court and in

the Supreme Court, agreed. However they differed otherwise, they all, it seems to us, agreed that this Company owned the stock when the decree was made.

Let us examine first the decree itself.

It adjudges that the stock sought to be reached in this suit, as well as other stock of the two railway companies "*was acquired and is now held*" by the Securities Company. It adjudges that this was by virtue of an illegal combination or conspiracy. The how or why does not now concern us; but only the adjudication that as matter of fact this stock "was acquired and is now held" by the Company.

The decree enjoins the Securities Company from voting upon the stock, and in effect enjoins it from receiving dividends on account of it. Voting and receiving dividends are incidents of ownership. The inference of ownership in the Securities Company flows from these injunctions themselves. The Securities Company is not enjoined from selling or in any manner disposing of the stock; but simply from exercising two rights, incidental to ownership, the exercise of which the Court must have thought would involve a violation of the Anti-Trust Act; for the jurisdiction of the Court was only to *prevent* violations of the act. The Court in effect says: "We find that you have acquired and now hold this stock. But you must not vote upon it, or receive dividends upon it, because this, in our judgment, would be *using* the rights of ownership in violation of the law." In its petition the Government asked the Court, not simply to restrain the Securities Company in the use of the stock, but to declare void the transactions in which it was acquired, and compel its return. The court refused to go beyond restraining its *use;* its *disposition* was left untouched.

Then there is the paragraph of the decree which begins: "But nothing herein contained shall be construed as prohibiting," etc. The argument that the previous language by itself must have meant something which the Court here says it shall not be con-

strued to mean, is unsound. Such provisions are often found in writings of various kinds, inserted only from over-abundance of caution.. Manifestly, this paragraph was added merely to prevent any possible misunderstanding. But what is it that the Court states is not prohibited by its decree? Returning and *transferring* to the stockholders of the two Railway Companies (that is, of course, the former stockholders from whom it had been received) stock received *in exchange for* the stock of the Securities Company; or transferring and assigning such stock to persons now holders of its stock originally issued *in exchange or in payment for such stock* of the railway companies. Here again is recognition of the purchase; that the Securities Company had received the stock of the Railway Companies *in exchange for* its own stock; that its own stock had been issued *in exchange or in payment for* the stock of the railway companies; a further recognition of the present ownership of the latter stock by the Securities Company. But why did the Court so limit this statement? Probably because it thought that possibly wrong inferences might be drawn from its general finding as to the illegality of the scheme, affecting those who had participated therein and their assignees. These persons were the stockholders of the Railway Companies who were parties to the combination, and the present holders of stock issued to them. Other stock the Securities Company had got by purchase for cash or for stock from persons not charged with any wrongful intent. As to this stock and these persons, there was no thought of any possible misunderstanding.

As to the purpose of the Court, however, the Court itself has spoken, having in mind the suggestions of the complainants in line with their argument in this case. See the opinion rendered upon denial of the application of the complainants Harriman, Pierce and Oregon Short Line Railroad Company to intervene

in the Government suit after the affirmance of the decree by this Court. It is there said:

> "It [the Court] accordingly contented itself with an order which rendered the stock of the two Railway Companies, *so long as it remained in the hands of the Securities Company*, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. * * * When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless *in the hands of the Securities Company*, the stockholders *of that Company* would be able and likewise disposed to make *some disposition* of the stock which, under all the circumstances of the case, would be fair and just and would restore it to the markets of the world, where it would have some value instead of being a worthless commodity. It was thought that the duty of thus *disposing of it* could safely be left to the stockholders *of the Securities Company*, and that if any controversy arose in the discharge of this *function*, in view of the situation *that had been created by the decree*, it would be a controversy that would properly form the subject matter of an independent suit between the parties interested."

And then as to this paragraph of the decree: "But nothing herein contained shall be construed," etc., it is said:

> "But this provision was merely permissive. It did not command that the stock should be returned *or exclude other methods of disposing of it* that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner some-

> what different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree."

So this very Court held that the plan, since approved by the stockholders of the Securities Company, which the Directors of the Securities Company are seeking to carry out, was in no way inconsistent with its decree. And yet these complainants rely upon the *effect of the decree* to obstruct that same plan.

The decree of April 9, 1903, certainly did not in terms adjudicate anything as to the *disposition* of this stock as distinguished from its *use*. An implied adjudication is sought to be built upon this particular paragraph, upon a mere rule of construction of no great weight—and rules of construction never bind, but are only aids in reaching the intention—and the Court itself has declared that no such adjudication was intended; that they intended to leave the *disposition* of the stock, which because of the "situation that had been created by the decree" must be disposed of by the Securities Company, to the directors and stockholders *of that company*.

But further evidence against the complainants' theory is found in the opinion filed when the decree was made.

Judge THAYER says, that stockholders of the two Railway Companies "conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single *owner*;" that to this end they agreed to cause the formation of a New Jersey corporation which should "*buy*" all or most of these stocks; that the individuals agreed "to *exchange* their respective holdings" for the stock of the New Jersey Company and to use their influence "to the end that the New Jersey Company might become the sole *owner* of the whole, or at least a major portion, of the stock of both railroad companies;" that the Securities Companies was organized in accord-

ance with this plan, and that shortly after its organization it *acquired* a large majority of all the stock of the Northern Pacific Company, at the rate of $115 per share, *paying therefor* in its own stock at par," and at the same time *acquired* stock of the Great Northern Company, "*paying therefor* at the rate of $180 per share and using its own stock at par to make *the purchase;*" that the Securities Company made *further purchases* of Great Northern stock and soon had *acquired* such stock, amounting to about $95,000,000, using for that purpose its own stock to the amount of $171,000,000; and that "at the present time the Securities Company *is the owner* of about 96 per cent. of all the stock of the Northern Pacific Company and *the owner* of about 76 per cent. of all the stock of the Great Northern Company."

He then goes on to state the results of the scheme: "First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of *its ownership* of a large majority of the stock of both companies."

We come now to the opinions in this Court. The decree of affirmance is the forceful word of the Court. That decree is so clear and simple that there seems to be no possibility of any doubt to be solved by the opinions. But we submit that the opinions confirm our view of its meaning and effect. The opinions which give the reasons for the decision are, of course, those of Mr. Justice HARLAN and Mr. Justice BREWER. The dissenting opinions show why four of the Justices thought, not only that the Securities Company owned the stock, but that it should not have been restrained in the use of it. We find nothing in the opinion of Mr. Justice BREWER which bears upon the question in this case. It is the opinion of Mr. Justice HARLAN which alone calls for careful examination. It is in this opinion especially that counsel for the complainants think they find support for their contention that title to the stocks did

not pass to the Securities Company. They rely not upon any holding to this effect, but upon a word here, a phrase there and statements here and there by way of argument.

We take up the quotations from this opinion as they appear in the complainant's reply brief in the Circuit Court:

> "Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company" (193 U. S., 321-2).

The quotation stops in the middle of the sentence. All that is wanted is the word "*holding.*" But to hold stock usually means to own it. Certainly it does not exclude the idea of ownership. Read the sentence through, however. It appears that to this company

> "*in exchange for* its own capital stock upon a *certain basis and at a certain rate*, was to be *turned over* the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as *the owner thereof* * * *."

And read the next sentences:

> "In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were *to be converted into* an interest *in the property and franchises of the holding corporation.* Thus, 'by making the stockholders of each system *jointly interested* in both systems, and by practically *pooling* the earnings of both for the benefit

> of the *former* stockholders of each, and by *vesting* the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, *a virtual consolidation effected*, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.' "

The next quotation is :

> " In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized " (p. 322) ;

but what immediately follows is passed by. It appears that among the objects stated in the certificate were : " 1. To acquire by *purchase*, * * * any shares of capital stock * * * 3. To *purchase* * * * shares of the capital stock of any other corporation or corporations * * *."

And a little further on it is stated that Hill and associates and Morgan and associates *assigned* to the Securities Company stock of the two railway companies " upon an agreed *basis of exchange* of the capital stock of the Securities Company for each share of the capital stock of the other companies " (p. 324).

The next quotation is as follows :

> " In further pursuance of the combination, the Securities Company *acquired* * * * substantially all the capital stock of the Northern Pacific, Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company " (p. 324).

Looking behind the asterisks, we find the following:

> " additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, *held, as owner and proprietor.*"

The next quotation was so dealt with as to be misleading. What appears in the opinion is as follows:

> " The Securities Company, *the bill also alleges* was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely ' to incorporate the pooling of the stocks of said companies ' and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool" (p. 324).

Mr. Justice HARLAN states only that all this is alleged in the bill. He found no such facts. And yet this paragraph—the language of the petition and not the language of Mr. Justice HARLAN—is the treasure house of words from which the complainants' counsel draw especially in their argument. Here they find the words " mere depositary," " custodian," " trustee," " beneficial certificates," etc. Two of these words are used in later quotations and we shall not overlook them. But it is hardly worth while to discuss their meaning at this point.

Possibly counsel felt justified in representing these statements taken from the petition as statements of facts found by Mr. Justice HARLAN, by the words following shortly after: " In our judgment, the evidence fully sustains the *material* allegations of the bill" (p. 325). But if so, we submit they were in error. Mr.

Justice HARLAN, after stating the nature of the suit and quoting the act of 1890 in full, says: "Let us see what are the facts disclosed by the record." Then for several pages facts as he found them are stated; and then in two paragraphs, one of which is that last quoted, he merely states that the "bill alleges" so and so. What he regarded as the *material* allegations is not otherwise shown than by what follows, being, in part, the next quotation in the reply brief in the Circuit Court:

> "Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation" (pp. 325–6).

And the next sentence:

> "The stockholders of these two competing companies *disappeared*, as such, for the moment, but

immediately reappeared as stockholders of the holding company * * *."

And a sentence a little further on, as follows:

"Those who *were* stockholders of the Great Northern and Northern Pacific and *became stockholders* in the holding Company are now interested in preventing all competition between the two lines, and *as owners of stock or of certificates of stock in the holding company*, they will see to it that no competition is tolerated" (p. 327).

Read also this, which almost immediately follows:

"The result of the combination is that all the earnings of the constituent companies make *a common fund* in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but *upon the basis of the certificates of stock issued by the holding company.*"

And also the sentence a little further on:

"The Circuit Court was *undoubtedly right* when it said—all the Judges of that Court concurring—that the combination referred to 'led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, *by virtue of its ownership* of a large majority of the stock of both companies * * *" (p. 328).

We have now reached the end of that part of the opinion specially intended to show the facts; in which, rather than in the argument which follows, we should naturally look for the court's finding as to the title to the stock of the two railroad companies; and in the

light of which what is said *arguendo* should be read. It may be well to stop and summarize.

> The plan was to form a *holding* corporation, to which, *in exchange* for its stock at a certain rate, was to be *turned over* the stock of the two railway companies, the interests of stockholders in the two companies being *converted into* interests in the *property* and franchises of the holding corporation. In pursuance of the plan, the Securities Company was organized; Hill and associates and Morgan and associates *assigned* to it a controlling amount of the stock of the two companies upon an agreed basis *of exchange* for its stock; the company *acquired* additional stock of the two companies, issuing its stock therefor on such basis; and at the time of the bringing of the suit held as *owner and proprietor* substantially all the Great Northern stock and a controlling interest in the Northern Pacific stock. "Those who were stockholders" of the two railway companies had become "stockholders in the holding company." The control of the two roads had been placed "in the hands of a single person, to wit, the Securities Company, by virtue of its *ownership* of a large majority of the stock of both companies."

This we submit is a correct summary of Mr. Justice HARLAN'S statement of the facts of the case, full and complete so far as bearing upon the question at issue, except that we have not incorporated his words "or more properly speaking custodian," taking as more exact what he said before and after. We shall consider these words in connection with similar words later on in the opinion. The only straw in this summary for the complainants to catch at for support is the use of the phrase "holding corporation." This, alone by itself, would naturally mean a corporation holding stock in other companies, a stockholder in other companies; that is, having title to stock in

other companies. But it does not stand alone. Stock of the two railway companies was to be "*turned over*" to it in exchange for its stock. An *exchange* is a sale. What one turns over in exchange he parts with. What he receives in exchange becomes his, in consideration of what he has turned over. The stock was to be turned over "at a certain rate." This in itself negatives the idea of a mere deposit. No need of a rate or basis of exchange if title to what was "turned over" was to be retained. The interests of stockholders of the two companies were to be *converted into* interests in the property and franchises of the holding company. How "converted," if those who "turned over" their stock continued to own it? What *property* of the holding company were they to become interested in, if the stock to be turned over was not to become its property or assets? But what is the need of this careful study of words when it is said that when the suit was begun this company held the stock "as owner and proprietor", that those who were stockholders of the two companies had become stockholders of the holding company, that the company had control "by virtue of its *ownership* of a large majority of the stock of both companies"? Could language be clearer? And if there be found in the argumentative part of the opinion any words which seem to mean something else, must they not be construed into harmony with these clear statements of fact?

Passing on now to the argumentative part of the opinion, and dropping by the way the obvious suggestion that words must be read in the light of the context, we find the next quotation as follows:

> "In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. * * * What the Government particularly com-

plains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a *common corporate trustee* designated to act for both companies in repressing free competition between them " (pp. 334–5).

The quotation should be supplemented by adding the next sentence, as follows:

" *Independently of any question of the mere ownership of stock* or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? "

And, also, what is left behind the asterisks, as follows:

" This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the *ownership* of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can *acquire and hold stock* in other State corporations. Still further, it is asked, generally, whether the organization or *ownership* of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such

> contentions or takes any such positions as those statements imply. It does not contend that Congress may control the *mere acquisition* or the *mere ownership* of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed."

We fail to see anything in these quotations to supply ammunition to the complainants, unless it be the use of the phrase "common corporate trustee," which will be considered in connection with a later quotation. Otherwise these quotations seem to show that the Judge at least did not mean to *deny* the ownership of the stock by the Securities Company, did not consider such a denial necessary to his argument.

The next quotation (p. 338) contains nothing pertinent to the present inquiry except the use of the word "hold," as to which we have already commented.

The next quotation (p. 343) is made for the phrase "the device of a holding corporation." It amounts to nothing for the present purpose, unless "holding" be given a new meaning.

In the next quotation the proceeding is spoken of as one to

> "prevent the Northern Securities Company from exercising the power it acquired in becoming the *holder* of the stocks" (pp. 344).

The same comment applies. It may be added, however, that here is a recognition of the *acquisition* of

the stock by which the power was acquired, and of the fact that the decree only affected the use of such power.

The next quotation (p. 344) is a statement of one of the contentions against the Government, quoted only for the word "holder."

The next is this:

> "The purpose of the combination was *concealed* under very general words that gave no clue whatever to the *real purposes* of those who brought about the organization of the Securities Company" (p. 345).

We do not know the purpose of this quotation.

The next quotation (p. 346) is made only for the words "holding corporation and trustee."

The next and perhaps the most important quotation in the view of the complainants is as follows:

> "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing

> competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of both these (constituent companies) into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of custodian, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies" (pp. 353-4).

In connection with this language, we consider the use of the words "or more properly speaking, custodian," on page 325, and the words "common corporate trustee," on page 334, and the words "holding corporation and trustee," on page 346.

Manifestly what the Judge sought here to bring out was, the singleness and continuity of the purpose back of the transactions mentioned up to the time when the stocks were turned over by the conspirators, so-called, and also the fact that behind this purpose stood all the time the same persons, the corporation, brought into existence by them, not being really a new party merely making an investment. A corporation is really an association of persons. The legal person said to be created by incorporation is not a reality. Until after the "conspirators" had carried out their agreement and other interests came in, they alone were the corporation. It *represented* them only. It was their "common corporate trustee" as every corporation is trustee for its stockholders; or the "custodian" of their in-

terests as stockholders. There was involved in this no investment by a new party. When the stocks received from the associates were turned over and stock of the new company issued therefor, the same persons in reality owned all the property jointly as had before owned in severalty the stocks of the railway companies. And so, he argued, the case was not one of an ordinary investment or purchase by a new party, but simply a pooling of interests by the so-called conspirators in accordance with the original purpose. In this sense the stock was put into the hands of the Securities Company "not as a *real* purchaser." It was not an *absolute* owner, because every corporation holds its assets in trust for its stockholders. And up to this point, as the Judge understood the facts, the stockholders of the new company were the very persons whose purpose he held to be condemned by the law; and so it represented the combination formed by those who had been stockholders of the constituent companies. He lifted the fiction of incorporation and found the same persons who had combined together and no others, in order to meet the argument that the law as applied would operate as an unwarrantable interference by Congress with the right of citizens to acquire property in accordance with State laws. There is nothing in all this contrary to the assertion that the Securities Company "obtained" or "acquired" (both words are used in the paragraph) these stocks, that what it held it owned as fully as a corporation can own property, that these stocks became its assets, that the stockholders of the two railway companies were *converted into* stockholders of the Securities Company, that these stocks were "pooled" in the hands of this Company through its ownership of them, that the interests of the stockholders of the railway companies were irrevocably "turned over" and what these persons thereafter had were interests in the *property and franchises* of the Securities Company *as its stockholders.*

Are we to suppose that this language, used in argu-

ment, is intended to contradict what is said in the preceding statement of facts? After writing this paragraph should Mr. Justice HARLAN have turned back and completely changed that statement, especially where he assents to the finding of the Circuit Court that control of the two roads was in the hands of the Securities Company, "by virtue of *its ownership* of a large majority of the stocks of both Companies"?

Immediately after this, Mr. Justice HARLAN recites the decree below, not omitting the adjudication that the stock "was acquired and is now held" by the Securities Company, and says that "no valid objection can be made to the decree below, *in form or in substance.*"

He goes on to say that if there was such a combination as was found, the Court "could prohibit the parties to the combination from *doing the specific acts* which being done would effect the results denounced by the Act;" recognizing that the decree merely restrained the Securities Company from *doing specific acts* through the *use* of its stock, and did not affect the title to the stock or the power of the Company to dispose of it as its assets.

A little further on, in answer to the suggestion, that no relief could be granted because the combination had already accomplished its object, Mr. Justice HARLAN (evidently with approval) quotes from the opinion below as follows:

> "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and *has acquired* the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding *to use it* and execute the purpose for which the combination was formed, it must be left in possession of the power it has acquired, *with full freedom to exercise it.* * * *"

The power has been acquired, the stock is owned; but *the use* of the stock, the *exercise of* the power may be restrained.

When immediately after this quotation Mr. Justice HARLAN says: "The Circuit Court has done only what *the actual situation* demanded" does he not clearly recognize that the decree affects not the ownership of the stock, but merely its use in restraint of commerce? The "*actual situation*" was, that the control of the two roads *had been placed* "in the hands of a single person, to wit, the Securities Company, by virtue of *its ownership* of a large majority of the stock of both companies." Clearly Mr. Justice HARLAN understood the effect of the decree to be limited as explained in the later opinion of the Circuit Court upon the application for intervention, that that decree merely "rendered the stock of the two Railway Companies, *so long as it remained in the hands of the Securities Company*, valueless for the purpose of carrying out the objects of the unlawful combination;" that it only affected the use of the stock; did not affect its ownership; did not affect the disposition of it, save that "the situation that had been created by the decree," because of the restraint put upon the owner in its use, would force that owner, the Securities Company, to somehow dispose of it; to dispose of it in such manner as might be determined by the directors and stockholders of that Company.

Almost immediately after the last quoted sentence of the opinion and in the same line of argument, Mr. Justice HARLAN says—and this quotation is relied upon by the complainants—as follows:

> "The decree, if executed, will destroy, not *the property interests* of the original stockholders of the constituent companies, but *the power* of the holding corporation as the instrument of an illegal combination of which it was the master spirit, *to do that* which, if done, would restrain interstate and international commerce. The *exercise of that*

> *power being restrained*, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose" (pp. 357, 358).

This, it seems to us, confirms our understanding of the opinion. The decree does not affect property interests, but simply restrains *the exercise in restraint of commerce of the power* which had been acquired. The stocks which the Securities Company owns are not affected, nothing is taken from the value of such stocks for legitimate uses, the assets of the company are not depleted, the property interests of its stockholders are not impaired. Any peculiar value attaching to the stock in the hands of the Securities Company, dependent upon its use to restrain commerce, is illegitimate; that peculiar value is destroyed, but the legitimate value of the stocks is in no way affected. Nothing has been done which takes away from these stocks as assets any element of value which they had in the hands of those who sold them to the Securities Company.

But counsel for the complainants, here again catching at a single phrase, and disregarding the context, claim support for their contention in the words "the property interests of the *original stockholders of the constituent companies*." The argument to which this paragraph of the opinion was addressed, was, that while the jurisdiction of the Court was only to *prevent* violations of the Act, this decree operated to undo what had been done. In a general way the answer is that the decree does not undo what has been done—does not affect any vested rights. By "original stockholders of the constituent companies" the Judge evidently meant "those who were stockholders of the Great Northern and Northern Pacific and *became stockholders* in the holding company." These were the only persons whom he had in mind as stockholders of the Securities Company. There is nothing to indicate that he realized that any stock had been

issued by the Securities Company otherwise than in exchange for stocks of the "constituent companies;" and the phrase described the body of the persons whose doings alone he had been considering. Surely he did not mean to imply anything contrary to his previous statement of the facts; he did not mean to imply that there was no stock and were no stockholders of the Securities Company, that the property interests of the "original stockholders" in the constituent companies had not been converted into interests in the Securities Company, that there had been no exchange but only deposits of stock under a voting trust, that the depositors and their assigns now own in severalty what the depositors severally deposited, and that the stocks of the constituent companies are not assets of the Securities Company to be disposed of as the directors and stockholders of that Company may determine.

We submit that there is no support for the theory that it is the effect of the decree that the Securities Company never got title to these stocks.

II.

It does not follow as matter of law, from the facts shown by the record, including the decree, that title to these stocks did not pass to the Securities Company.

The second amended bill brings in as facts the facts which were found in the Government suit and upon which the decree therein was made, or some of them, so as to permit the complainants to rely not simply upon the decree as *res adjudicata* (it having been objected that they were not parties to that suit), but upon the facts there found and the fact of the decree

and, by way of authority, upon the decision therein made upon such facts.

We assume that all such facts sufficiently appeared for the purposes of the order appealed from. This assumption, however, has no application to whatever the complainants meant in paragraph V. by the words as follows :

> " and that said holding company should act as custodian, depositary or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns,"

nor to the similar words following, nor to the phrases in paragraphs VI. and VII. in conformity therewith. Read in connection with what precedes, these words cannot be taken as meaning what the complainants' counsel would make them mean for purposes of argument. But if they be deemed to have such meaning, they are supported by no evidence—merely the general verification of Cornish and Pierce as to their belief, and are inconsistent with what is stated in the original and first amended bill and in the second amended bill itself. From the record in the Government suit and the proofs in this case, they clearly appear to be untrue. The insertion of these words is a manifest effort to make a basis of facts to fit the few words in Mr. Justice HARLAN'S opinion, which are really the sole ground of the complainants' contention. It is an attempt to turn argument into allegation, and protect it by a general verification. No Judge has doubted—no one can doubt—that in the plan condemned as unlawful it was *intended* that the Securities Company should become the owner of the stocks " acquired " by it, and that it did and does own these stocks, if it was possible in law to bring about this result. Let the complainants have the benefit of all *facts* in arguing that the effect of the decree in the Government suit is to make what was intended, what the complainants and everybody else

supposed had been done, a nullity in the eye of the law. But surely they cannot claim that they have foreclosed argument by these loose allegations, unsupported by evidence and refuted by the whole record.

For the facts found in the Government suit reference is made to the summary of Judge THAYER'S statement of facts (*ante*, p.), and to the summary of Mr. Justice HARLAN'S statement (*ante*, p.).

We accept the decree as determining, for the purposes of this appeal, the illegality of the combination.

As to the transaction in which the Oregon Short Line Railway Company parted with the stock it seeks to recover, let us see what is the case made by the bill itself, after throwing out or altering such allegations as are proved incorrect by the evidence of Mr. Harriman himself. The bill limits the complainants, at least. A cause of action for the recovery of the stock must be found *within the allegations*, or else there can be no injunction *pendente lite* (Leo vs. Union Pacific Ry. Co., 17 Fed., 273). On the other hand, so far as the allegations are disproved, or, rather, so far as they do not *appear* to be true, they are as if they were not for the purposes of this appeal.

Paragraphs I. and II. only show citizenship of the parties with a view to jurisdiction. It may be noted, however, that it is alleged that the Securities Company "is a corporation organized and existing by virtue of the laws of the State of New Jersey." Here, at least, is something done under the illegal plan which is not null and void.

Paragraph III. tells about the stock of the two Railway Companies issued and outstanding. What is said about the conversion of common stock of the Northern Pacific into preferred stock is shown by record evidence to be untrue (Record, p. 305 *et. seq.)*

Paragraph IV. shows that the two railways were and are substantially parallel and competing.

Paragraph V. alleges that the Securities Company was organized November 13th, 1901, by filing a certificate under the New Jersey law. As the certificate is

attached, the statement as to its contents is of no interest.

Then come allegations as to the plan. It is said that the company was organized in pursuance of a combination in restraint of trade, &c. This is largely conclusion of law. What follows the words "*that is to say*" shows what it is meant to allege *as facts.* It is there said that prior to November 13th, 1901, Hill, Morgan and others (not including any of the complainants) owning or controlling a majority of the stock of the Great Northern Railway Company and a majority of the *common* stock of the Northern Pacific Railway Company agreed among themselves, not with the complainants, "to organize a holding company * * * and that said holding company should *acquire and permanently hold* a majority of the shares of the capital stock" of the two railway companies "and *control the operation and management thereof in perpetuity,* and that the then existing holders of such railway shares should *deposit* the same with said holding company and *receive in lieu thereof* share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as *custodian, depositary or trustee* of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

If there were nothing but this to tell what happened before the organization of the Securities Company, what should we naturally understand? The company to be organized was to "*acquire* the stocks" and "*permanently hold*" them. This means ownership, through which the company could control the two companies in perpetuity. "The then existing holders" (that is, of course, owners) should *deposit* their shares. "Deposit" evidently means "deposit so as to transfer title." This is made entirely clear by what follows: "and *receive in lieu thereof* share certificates of the said holding company." If this does not mean an exchange,

what can it mean? "In exchange" is used as equivalent later in the bill several times. They are to receive $180 and $115 per share, respectively, in stock of the new company. The new company, of course, could not issue stock except for money's worth. Clearly then, the stock deposited is to become the property of the company *acquiring* it by the issue of its stock. Even upon demurrer it would be held to be here alleged, that Hill, Morgan and others agreed among themselves that the new company should become the absolute owner of the stocks referred to. But what of the allegation that it was part of the agreement that the new company should act as "custodian, depositary *or* trustee" of said shares, etc.? Every corporation is a custodian or trustee for its shareholders and "the existing stockholders of said railway companies" were to become stockholders of the Securities Company. Upon demurrer the court would disregard this allegation as not stating a fact, being a mere legal characterization, which like adjectives, epithets, etc., are of no force in stating a cause of action. The evidence, especially that of Harriman, shows that the plan undoubtedly contemplated absolute ownership of the railway stocks by the Securities Company. That this was the plan as found in the Government suit, see Point I.

Next follows this: "Thereupon, in pursuance of said agreement, said Northern Securities Company was organized * * * and forthwith agreed to *acquire and hold* the shares of said railway stocks as aforesaid, as custodian, depositary or trustee, and to issue *in exchange therefor* its own share certificates *upon said agreed basis.*" Would not this be treated as nothing upon demurrer? Agreed with whom? It is not said. Certainly not with any of the complainants. Up to this point they have not come into the case stated. Does it mean that it agreed with the existing stockholders of the railway companies represented by Hill, Morgan and others? If so, what rights can the com-

plainants base thereon? But in any event, with whomsoever the new company agreed, it only agreed to purchase the railway stocks at $180 and $115 respectively by the issue of its own stock "in exchange therefor." The agreement necessarily involved its becoming owner of the stocks received in exchange. Being such owner, it would hold the same, whether it so agreed or not, as trustee for all its stockholders. Counsel, we presume, will not seriously assert that the company agreed in terms as stated. This averment was evidently made to fit a theory, not to state a fact. The evidence as against any limitation of ownership is full and there is no evidence to the contrary. Ownership unlimited, except as ownership by corporations is in a sense always limited, was found in the Government suit. See Point 1.

We must not overlook the use of the words "*permanent*" and "*in perpetuity.*" Undoubtedly it was the expectation of Hill, Morgan and others that the Company would permanently hold the stocks and permanently or in perpetuity control, that is, elect the directors of, the two railway companies. But the method adopted with this expectation was vesting in the Company the ownership of the railway stocks, absolute and unconditional.

Up to this point the bill has dealt only with what Hill, Morgan and others planned before the Securities Company acquired any of the stock.

Paragraph VI. shows that the Securities Company issued more than $387,000,000 of its stock to holders of railway stocks "in exchange for" such stocks (which were put in the names of its agents) and issued further stock for cash.

It is alleged that the issue of its stock was "in pursuance of said agreement" and that it was "for the purpose and with the intention of effectuating the scheme or combination above alleged and to enable the Northern Securities Company, as such holding corporation, to hold a majority of the shares of the said railway companies and control the operation and man-

agement of the same." If this means, that until the Securities Company got a majority of the stock of the two railway companies, the purpose of its purchases was to get such majority, well and good. But the bill itself shows that before the company was formed Hill, Morgan and others controlled a majority of each of those stocks, the Northern Pacific preferred stock omitted because it was to be redeemed. This could not have been the purpose of any further purchases. It could not have been the purpose of the purchase of the minority holdings of the complainants.

The remaining allegation of this paragraph is to the effect that all to whom stock of the Securities Company was issued knew of the purposes for which the Company was organized and of the fact that a majority of the stock of each of said railway companies was to be or had been deposited with the Securities Company as custodian or depositary in pursuance of said agreement. This is one of those general allegations which can hardly stand alone. It is unsupported by any proof. But it is not important for our present purpose, except as it includes Harriman and the Oregon Short Line Railroad Company.

Down to this point nothing has been said of the transaction which is the subject of this suit, namely, that in which the complainants parted with the stock which they now seek to recover. This transaction is first spoken of in paragraph VII. It is therein shown that the Oregon Short Line Railroad Company held $37,023,000 common stock and $41,085,000 preferred stock of the Northern Pacific Railway Company. The preferred stock, it is not disputed, was subject to redemption; and, before this transaction, had been called for redemption. The common stock held by the Oregon Short Line Railroad Company was a minority holding, the bill itself showing that a majority of the common stock was controlled by Hill, Morgan and others. In this situation the bill alleges that the Oregon Short Line Railroad Company and Harriman

and Pierce, in whose names the stock stood, agreed with the promoters and incorporators of the Securities Company (it is not shown who they were) " to *transfer* and deposit with said Northern Securities Company *under the terms and conditions aforesaid* the said shares of the Northern Pacific Railway Company ", preferred and common, and "*receive in exchange* therefor certificates of said Northern Securities Company *representing an interest therein of* $82,491,871, par value, and $8,915,629 in cash." This is not yet the transaction with which we are here concerned, but only a preliminary agreement with persons not named. From the affidavit of Mr. Harriman in this case (Record, p. 158) it appears that whatever agreement (apparently mere negotiation) there was before the exchange was with Morgan & Co. From that affidavit and other testimony of Mr. Harriman it is clear that there was nothing in fact for the words "*under the terms and conditions aforesaid*" to fit ; there were no terms or conditions other than as stated. It was simply agreed or proposed that the railway stocks be turned over and the Securities Company stock and cash be received in exchange therefor (Record, pp. 158, 199).

Finally we come to the actual transaction—the only transaction with which this case is concerned directly —and this is told in the following words :

> " Harriman and Pierce, acting for your orator, the Oregon Short Line Railroad Company, did on or about the 18th day of November, 1901, *transfer and deliver* to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and *received in exchange* therefor certificates of said Northern Securities Company *representing an interest of* $82,491,871 par value *and said cash*, that is, $8,915,629."

That was the transaction—a mere transfer and delivery of the railway stocks for Securities Company stock and cash. That was the only transaction which the complainants or any of them had with the Northern Securities Company. It was completely closed—not an agreement to sell but a sale, involving no executory agreement whatever. The title to the railway stocks passed to the Securities Company, the stock of the Securities Company and the cash was delivered and paid therefor. There was no concurrent agreement, no condition of any kind; no provision whatever for the doing of anything further, save that the certificates of stock evidenced the ordinary rights of stockholders in all the property of the Securities Company.

The allegation in paragraph IX., to the effect that it was agreed between Harriman and Pierce and the Securities Company that the preferred stock should be converted into common stock, is shown to be untrue by the record of the action of the Northern Pacific Company, in which Mr. Harriman participated (see record, page 284).

At the end of paragraph VII. is this allegation :

> "The exchange aforesaid was made by your said orators in good faith, in the belief that the organization of said Securities Company was not, and the acquisition and holding by it of said railway stocks as aforesaid would not be, in violation of any statute of the United States."

Why this belief? Was it not chiefly, if not entirely, because these gentlemen knew that simply outright and unconditional purchases of stock were involved, because they thought that the Anti-Trust Act could not affect rights acquired by such purchases, in accordance with the views of Judge JACKSON in *In Re Green*, 52 Fed. Rep., 104, and of four of the justices of this Court? That the Securities Company should buy and own the stocks was the substance of the plan.

That it had done so, absolutely and unconditionally, was the chief, if not the only, ground of confidence in the legality of what had been accomplished.

The findings in the Government suit, the affidavit of Mr. Harriman herein, the testimony of Mr. Harriman and others in the Government suit and in the suit of the State of Minnesota against the Securities Company, the original bill herein, the first amended bill herein, and even the second amended bill herein, properly read, and also the necessities of the situation, all without a dissentient voice, prove that the transaction between the Oregon Short Line Railroad Company and the Northern Securities Company was an absolute, unlimited, unconditional, completed sale to the Northern Securities Company of the Northern Pacific stock, for which the Securities Company issued its stock to the amount of over $82,000,000 and paid nearly $9,000,000 in cash. In other words, the stock herein sought was sold and transferred to the Securities Company in exchange for its stock and for cash, unless what everybody intended, and what everybody supposed had been done, is to be treated as not done because of the law.

(See Affidavit of Harriman *in this suit*, Record, pp. 155 to 160; Testimony of Harriman before Interstate Commerce Com., Record, pp. 199, 208, 209, 210, 213; Testimony of Harriman in Minn. v. No. Sec. Co., Record, pp. 233 to 235; Minutes of Northern Securities Directors' Meetings, Record, pp. 305, 300, 309, 310, 311, 312.)

We insist, first, that in the Government suit it was adjudicated that this transfer was not null and void. It was there adjudged that the stock "*was acquired and is now held*" by the Securities Company; and if there would otherwise be any doubt as to the meaning of these words, it is made clear by the opinions, including that of Mr. Justice HARLAN, that they meant that the title to the stocks was acquired and is held by this Company (see Point I.).

If this is not *res adjudicata*, in the strict sense, be-

cause the complainants were not parties to that suit, it is controlling authority, the facts as now shown being as therein found.

Argument can proceed no further except by assuming that the decree in that suit did not mean what it said. And in what it did, aside from using the words quoted, the decree assumed and in effect declared the ownership of the stocks to be in the Securities Company.

But let us assume that we are wrong in this; and that the decree has no bearing in the case except as deciding that the combination was illegal. Upon that assumption, does it follow that *the transaction in which the Oregon Short Line Railroad Company parted with its stock* was void and no title passed to the Securities Company?

Two reasons are suggested by complainants for so claiming:

(1) That the transaction was illegal.

(2) That it was *ultra vires.*

A.

That transaction was not void because illegal.

That transaction was not illegal. It was not found in the Government suit to be in violation of the Anti-Trust Act. The combination formed by Hill, Morgan and others was found to be illegal, and it was held that the Securities Company became a participant therein upon its organization. But it was not held that its purchase of stocks from the Oregon Short Line Railroad Company was in violation of that Act.

It appears that the sale of these stocks to the Securities Company did not aid in the accomplishment of the purpose which was condemned. The bill states that prior to this transaction Hill, Morgan and others controlled a majority of the common stock of the Northern Pacific Company. It is undisputed that the preferred stock had before this transaction been called for redemption, and also that the right to take the con-

vertible bonds exchangeable for new stock was given proportionally to the holders of the common stock. It is manifest, therefore, that the purpose of the combination to vest control of the two railroad companies in the Securities Company was accomplished, or its accomplishment secured, before the transaction under consideration. The purchase of the Oregon Short Line holdings in no way aided this purpose.

But if it be assumed that that transaction was in itself illegal under the Anti-Trust Act, it does not follow that it was void.

Whether a transaction prohibited is therefore void, so that no right can accrue through it, or not, depends upon the legislative intent. To forbid that a thing be done, is not necessarily to declare that if done it shall be void in law.

> "The statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."
>
> Harris vs. Runnels, 12 How., 79.

In that case the penalty clause of the statute, imposing a fine upon buyer and seller, was taken by the Court as indicating that the Legislature did not intend to declare the contract void.

In *Gold Mining Co. vs. Natl. Bank*, 96 U. S., 641, a suit by a National Bank to recover a balance of overdraft, the court rejected a defense based on the fact that the amount of the debt exceeded one-tenth of the paid-in capital of the Bank, in violation of the prohibition of Section 5200 of the Revised Statutes, citing *Runnels vs. Harris.*

In *National Bank vs. Mathews*, 98 U. S., 621, and in *National Bank vs. Whitney*, 103 U. S., 99, mortgages were held valid although the transaction in which the mortgages were taken was prohibited. And these cases were approved in Logan County Bank vs. Townsend, 139 U. S., 67, 76. Thompson vs.

St. Nicholas Nat. Bank, 146 U. S., 240, 251 and in Scott vs. Deweese, 181 U. S., 202, 211.

See, also,

Burck vs. Taylor, 152 U. S., 634, 648.
Frits vs. Palmer, 132 U. S., 282,
McBroom vs. Scottish Investment Co., 153 U. S., 318.
Jarvis Trust Company vs. Willhoit, 84 Fed., 514.
Central Trust Co. vs. Columbus Ry. Co., 87 Fed., 815.
Scott vs. Deweese, 181 U. S., 202.
Sioux City Terminal Co. vs. Trust Co., 82 Fed., 134.
Chattanooga S. R. Co. vs. Evans, 66 Fed., 809, 815.

Section 1 of the Anti-Trust Act declares every contract, combination or conspiracy therein described illegal, but immediately goes on to prescribe the penalty for making such a contract or engaging in such a combination or conspiracy, the penalty being fine or imprisonment or both. Section 2 prescribes a like penalty for monopolizing, etc. Section 3 is like Section 1, except that it relates to trade or commerce in a territory or the District of Columbia. Sections 4 and 5 give special jurisdiction to *prevent* violations of the Act. Section 6 reads: "*Any property owned* under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section one of this Act, and being in course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States and may be seized * * * ." Section 7 gives a right of action for three-fold damages to any person injured by reason of anything here forbidden or declared to be unlawful.

Here, then, is an unusually full specification of penalties for violation of the Act; and in terms it recognizes that *property may be owned* under a contract or combination or pursuant to a conspiracy therein declared to be illegal. The specification of penalties and

the recognition of rights which may be acquired bars the inference that Congress intended that a contract forbidden by the Act should be made void.

Moreover such an inference is barred by the fact that the power of Congress to make void such transactions as the one in suit is at best doubtful. It is not necessary to establish the lack of power, but that the power is doubtful cannot be disputed in the light of the opinion of Judge JACKSON *in re* Greene (52 Fed., 104) and the opinion of Mr. Justice WHITE in the Government suit.

B.

The transaction was not void because ultra vires.

It was within the power of the Company, according to the language of the certificate, and was expressly authorized by the New Jersey law. Section 51 provides: "Any corporation may purchase * * * the shares of the capital stock of * * * any other corporation or corporations of this or any other state * * *."

Whether an act of a corporation is *ultra vires* or not, is determined by the law of the state which created it. No other state or sovereignty can enlarge or limit the corporate powers or capacity. It may forbid the corporation from doing some or even any acts within its jurisdiction; transactions so forbidden will be illegal, but not *ultra vires*. Corporations, like natural persons, are subject to the laws which operate generally upon persons. If they violate such laws, their action is illegal, perhaps criminal, but it is not *ultra vires*, if it is within the power given it by its charter. The violation of a Federal Statute by a state corporation does not make a case of *ultra vires*.

But even if the transaction were *ultra vires*, it would not for this reason be void.

The decisions of the Supreme Court of the United States in *Central Transportation Company vs. Pullman Car Co.*, 139 U. S., 24, and other cases, to the effect

that contracts *ultra vires* are void, are relied upon by the complainants. We insist that they have no application. The Securities Company is a new Jersey corporation. The effect of its acts as a corporation is to be determined by the law of New Jersey.

The law of New Jersey as declared by its Courts, is that an executed *ultra vires* transaction is not void.

> *Camden & Atlantic R. R. Co. vs. May's Landing, etc., R. R. Co.*, 48 N. J. L., 530, 567.

The New Jersey corporation law, as to its meaning and effect, is peculiarly a matter determinable by the New Jersey Courts.

The decision of Vice Chancellor BERGEN in the Continental Securities Company case (Record, p. 257) is in itself sufficient authority.

Were there any doubt as to the proposition that, with respect to the *ultra vires* transactions of a corporation, the law of the domicile is controlling, it must certainly be true that either the law of the domicile or the law of the place of the transaction controls. The place of the transaction in this case was New York, and the New York law is to the same effect as that of New Jersey—that an executed *ultra vires* transaction stands as valid.

> *Whitney Arms Co. vs. Barlow*, 63 N. Y., 62.
> *Woodruff vs. Erie Ry. Co.*, 93 N. Y., 609.
> *Rider Life Raft Co. vs. Roach*, 97 N. Y., 378.
> *Bath Gas Light Co. vs. Claffy*, 151 N. Y., 24.
> *Vought vs. Eastern Bdg. &c., Assoc.*, 172 N. Y., 508.

But even in the Federal courts, with respect to the passing of title, the law is the same. In the National Bank cases above referred to, the transactions were expressly prohibited, but the prohibitions were in the statute under which the corporations were formed. Hence, the transactions were *ultra vires* as well. Yet the contracts, being executed on the one part, were enforced upon the other.

III.

Even if the transaction in which the Oregon Short Line Railroad Company parted with the stock were void because illegal or ultra vires, nevertheless the complainants could not recover.

In *Equitable Life Assurance Society vs. Wetherill*, 127 Fed. Rep., 947, 949, the court says:

> "It is claimed by the plaintiff in error that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal *and void*. It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed."

Though it be assumed that the intention of the Anti-Trust Act was as if it had said that transactions in violation of it should be void, yet the complainants could not recover.

> "The transaction being illegal the law leaves the parties to suffer the consequences of their illegal acts. * * * When, then, it is said that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it."
>
> *Smith vs. Bean, 15 N. H., 577.*

> "Upon this principle possession acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it *as a sufficient title.* Neither party is allowed to impeach its validity by asserting the illegality of his own act. * * * The court does not give it effect, but simply refuses its aid to undo what the parties have already done."
>
> *Myers vs. Meinrath, 101 Mass., 366.*

"He (the vendor) could only impeach a sale by showing the illegality of his own acts, which in the case of an executed and completed contract he certainly cannot do. This disability on his part to reclaim it would *avail the party holding it as a sufficient title.*"

See, also,

St. L., Vandalia T. H. R. R. Co. vs. T. H. & C. R. R. Co., 145 U. S., 393.
Higgins vs. McCrea, 116 U. S., 671.
White vs. Barber, 123 U. S., 392.
Horton vs. Buffington, 105 Mass., 399.

It is unnecessary to consider whether there is any different rule in this respect in relation to transactions merely *ultra vires*. There is, we think, no question of *ultra vires* in this case. The suggestion is that the transaction was *ultra vires*, because illegal under the Anti-Trust Act. If illegality is involved, even though the transaction be also *ultra vires*, the rule applies. The vendor is not permitted to make a claim based upon the illegality of his own act.

The Vandalia case *(supra)* was one of *ultra vires*.

That the transaction, being as heretofore shown, was completely executed, is beyond dispute.

It is also beyond dispute that that transaction has never been abandoned. The Securities Company claims the ownership which was thus acquired and proposes to exercise the rights of such ownership by distributing the stocks as surplus assets among its stockholders.

LASTLY.

The decree of the Circuit Court of Appeals should be affirmed, the injunction order reversed, and the bill dismissed.

THOMAS THACHER,
Of Counsel.

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Office Supreme Court U. S.
FILED
MAR 17 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS AND COMPLAINANTS,

versus

NORTHERN SECURITIES COMPANY, IMPLEADED WITH NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR IMMEDIATE ISSUANCE OF MANDATE.

The defendant, The Northern Securities Company, respectfully suggests that, notwithstanding the decision and decree of the United States circuit court of appeals for the third judicial circuit, reversing the interlocutory decree of the circuit court of the United States for the district of New Jersey, granting the special injunction in said suit, and

notwithstanding the decision and order of this court affirming the said decree of the said circuit court of appeals, the writ of injunction, a copy whereof, together with a copy of return of service, appears in the Transcript of Record, on pp. 349–350, will, as this defendant is advised by counsel, remain in force until the same has been finally vacated by the issuance and filing of the proper mandates of this court and of the said circuit court of appeals, so that, until the issuance and filing of such mandates, the distribution by this defendant among its stockholders of the stocks of the Northern Pacific and Great Northern Railway Companies held by it will be impossible.

Wherefore this defendant prays that the immediate issuance of the mandate of this court in said suit be directed, and for such other order in the premises as the court may deem just.

JOHN G. JOHNSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON,
JOHN W. GRIGGS,
W. P. CLOUGH,
Of Counsel for Defendant, Northern Securities Company.

MARCH 16, 1905.

[Endorsed:] Supreme Court United States, Oct. term, 1904. No. 512. Edward H. Harriman and others *vs.* Northern Securities Company. On writ of certiorari to the circuit court of appeals for third circuit. Motion for immediate issuance of mandate. John G. Johnson, Elihu Root, Francis Lynde Stetson, John W. Griggs, W. P. Clough, counsel for Northern Securities Company.

Supreme Court U. S.
FILED
FEB 21 1905
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

E. H. HARRIMAN ET AL.

vs.

Northern Securities Co.

PETITION TO FILE INTERVENING BRIEF ON BEHALF OF THE CONTINENTAL SECURITIES COMPANY.

JAS. HAMILTON LEWIS,
Solicitor for Petitioner, Continental Securities Co.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. .....

E. H. HARRIMAN ET AL.

vs.

JAMES J. HILL ET AL.

PETITION TO FILE INTERVENING BRIEF ON BEHALF OF CONTINENTAL SECURITIES COMPANY.

To the Honorable Supreme Court of the United States:

Your petitioner, The Continental Securities Company, by James Hamilton Lewis, its solicitor, respectfully shows and presents to the court:

I.

That it is a corporation organized and existing under the laws of the State of Massachusetts and a stockholder of the Northern Securities Company to an amount in excess of $50,000 and as spokesman for an amount in excess of $500,000; that in this petition it speaks for itself and all other stockholders holding stock of the said Northern Securities Company to any and all extent wherein the same may be situated or affected as your petitioner.

II.

Your petitioner represents that in the controversy before the court it is sought to obtain a ruling, and the issues are so limited as to only obtain a ruling, as will affect and control the private interests of the persons to the litigation at

bar; that the interests of the several stockholders of the Northern Securities Company will necessarily be passed upon by the court in the hearing, consideration, and decision of the cause now before the court, but, as your petitioner avers, without any contentions or rights of the said individual stockholders being duly or fully presented to the court.

III.

Your petitioner avers and presents to the court that there are many questions of law necessarily included and comprehended in the case at bar which, if determined, would settle the rights, limitations, and liabilities, as well as establish the privileges and benefits, of the individual stockholders of the Northern Securities Company; that if the said rights of the said individual stockholders and the contentions necessary to the justice of their position be omitted in the hearing now before the court, rulings of the court may be made touching the question which inadvertently would wrongfully limit the rights of the stockholders to the legal quantity of property or value which in law and equity would otherwise be ordered and decreed to them by the court upon a hearing of such necessarily legal questions and legal contentions as enter in the said cause now at bar in the consideration of the rights of the stockholders as compared to the situation before the court and as related to the Northern Securities Company and to the complainant and respondent in their official and representative capacity as officers and trustees of the said Northern Securities Company.

Wherefore petitioner prays the right to file a brief in behalf of itself and such other stockholders as may be similarly situated and affected, insisting upon and concerning the rights of the stockholders of the Northern Securities Company, so far as may be pertinent in the consideration of the case at bar.

Respectfully submitted.

JAS. HAMILTON LEWIS,
Solicitor for Petitioner, Continental Securities Co.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 28 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Appellees,

vs.

NORTHERN SECURITIES COMPANY Impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Appellant.

512.

PROCEEDINGS UPON CERTIORARI.

BRIEF ON BEHALF OF INTERVENOR, CONTINENTAL SECURITIES COMPANY.

JAS. HAMILTON LEWIS,
Solicitor for Continental Securities Company.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH STREET, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK, *Appellees,* vs. **NORTHERN SECURITIES COMPANY Impleaded with NORTHERN PACIFIC RAILWAY COMPANY,** *Appellant.*	PROCEEDINGS UPON CERTIORARI.

BRIEF ON BEHALF OF INTERVENOR, CONTINENTAL SECURITY COMPANY.

TO THE HONORABLE SUPREME COURT:

Your petitioner, by consent, intervening for the purpose of making suggestion concerning the rights of the stockholders of the Northern Securities Company, present as suggestions of law pertinent to the consideration of the main cause at bar the following:

(1) The Continental Securities Company of New Jersey (improperly stated in the record as from Massachusetts) is at present waging a cause of action in the courts of New Jersey against defendant, North-

ern Securities Company, to establish certain rights as stockholders which would be seriously affected by the ruling in the above named cause should the said ruling touch the rights of the stockholders without a hearing of the rights of such stockholder from the standpoint of the stockholders' contention. Your petitioner therefore suggests the following considerations of law:

(a) The main suit at bar has for its purpose the settlement of what proportion of the properties of the Northern Securities shall be accorded to the contestants. The contestants claiming to be stockholders. The appellant Harriman *et al.* insisting upon certain special stocks of the Union and Southern Pacific and O. R. & N. Railway, the respondent insisting on a *pro rata* division of general stocks instead of specific ones. In the main litigation nothing is being urged looking to the protection or the assertion of the rights of the stockholders of the Northern Securities Company, that is, the holder of the stock of the Northern Securities Company, where said stock is neither that of the Great Northern Railroad, Northern Pacific, or of the Southern or Union Pacific lines.

(b) Your petitioner as stockholder therefore asserts:

(1) That when the Northern Securities Company was held to be illegal as an institution to the extent of attempting to hold and control the stock of the Great Northern and Northern Pacific Railroads, together with that of the Union Pacific and its branches, the said Northern Securities was therefore decreed to be without legal power to hold the said stocks. Therefore could not legally hold the said stocks, nor be legally possessed of them for any purpose whatsoever.

(2) When the conduct was *ultra vires;* when the conduct was itself illegal and the institution, in so far as attempting to conduct these particular properties or hold the same, violated a public statute,—the law of public policy,—and acted contrary to good morals and in direct violation of the laws of the government, then such institution was in the position of a criminal. The properties in its apparent possesson was in no wise in its legal possesson for any purpose or object.

See decision *Northern Securities* case, 193 U. S., 197.

Particularly is this true where the manner of holding was contrary to the statutes of the United States. Such holding was a void one in all respects.

Central Trust Co. v. *Indiana & Lake Mich. R. R. Co.*, 39 C. C. A., 220, 98 Fed., 666.

Central Transp. Co. v. *Pullman Car Co.*, 139 U. S., 224.

(3) No court can authorize by any form of decree the Northern Securities Company to exercise any distribution, or power, or control, or allotment of either of the stocks of the Great Northern, Northern Pacific, or Southern or Union Pacific. To do such would be to recognize some legal dominion by the Northern Securities Company of a thing which in law it could neither legally or morally hold for any purpose. Therefore, when these companies desire to obtain through their proper agencies their specific stocks, they do not take them from the Northern Securities, they take them from the place where they are—they take their own, and not a thing that any time was the

special or general property of a person which could not hold any special or general property in the particular stocks.

Pullman Car Co. v. *Central Transportation Co.*, 171 U. S., 138.

McMullen v. *Hoffman*, 174 U. S., 639.

Particularly, therefore, no claim can be made by any person to these stocks upon the theory that they are the property of the Northern Securities Company, either as a dissolved corporation or as an existing institution.

East St. Louis Connecting Railway Company v. *Jarvis*, 34 C. C. A., 639, 92 Fed., 735.

Cox v. *Terre Haute & I. R. Co.* (C. C. A.), 133 Fed. (No. 5, p. 374).

ILLEGAL CONTRACTS—UNLAWFUL PROPERTY.

"The subject of the effect of illegal contracts of corporations, either *ultra vires* in the proper sense or contrary to the statute or public policy, has been frequently considered by the Supreme Court of the United States. The settled rule in that court is that such a contract is wholly void and of no effect for any purposes. That the objection is not merely that the corporation ought not to have made it, but that it could not make it. That the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful contract any validity by way of estoppel or otherwise, nor be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time."

Thomas v. *Railroad Co.*, 101 U. S., 71, 86.

Penn. Co. v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S., 290, 310.

Oregon Railway Co. v. *Oregonian Ry. Co.*, 130 U. S., 138.

Central Transportation Co. v. *Pullman's Car Co.*, 139 U. S., 24, 60.

McCormick v. *Market Bank*, 165 U. S., 538, 550.

California Bank v. *Kennedy*, 167 U. S., 362, 368.

Pullman Co. v. *Transportation Co.*, 171 U. S., 138.

"It is also the settled doctrine of the Supreme Court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas. Co.*, 130 U. S., 396, 410; *Miller* v. *Ammon*, 145 U. S., 421, 426), and that 'it is vain to contend that any right can be acquired under such a contract.' (*Montgomery* v. *United States*, 15 Wall., 395, 399.) To same effect see *Desmare* v. *United States*, 93 U. S., 605, 612; *Sprott* v. *United States*, 20 Wall., 459, 461; *United States* v. *Lapene*, 17 Wall., 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall., 72, 76; *The Ouchita Cotton*, 6 Wall., 521, 532."

Speaking of a contract merely *ultra vires* but not in direct violation of a statute, Mr. Justice Miller, in the Pennsylvania Co. case, supra, used the following language (118 U. S., 317):

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

"And this language has been repeatedly cited with approval, *e. g.*, in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S., 24, at p. 61. See also *Jacksonville, etc., Railway* v. *Hooper*, 160 U. S., 514, at p. 524. In the Central Transportation Co.'s case the court said (139 U. S., 59, 60):

"'A contract of a corporation, which is *ultra vires*

in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This general rule has been applied or recognized in analogous cases arising out of illegal contracts and particularly in cases affecting illegal combinations or trusts. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep., 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

"Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

These positions are most amply and ably sustained by the briefs in this cause and the general law upon this subject often recognized and asserted by this court. I beg to acknowledge indebtedness to the briefs of able counsel for complainants on foregoing propositions.

Stockholders' Rights in Distribution.

THE ONLY PROPERTY WHICH LEGALLY CAN BE RESORTED TO OR CAN BE APPORTIONED IN BEHALF OF THE STOCKHOLDERS OF THE NORTHERN SECURITIES COMPANY IS $7,500,000 OF STOCK—CASH OR PROPERTY RETURNS FROM THE LEGALLY HELD STOCK.

Now, therefore, since the stocks of these several railroad companies heretofore referred to cannot be in any respect property of the Northern Securities Company, nor can stock issued upon the basis of these different railroad stocks be regarded as stock of the Northern Securities Company; to the contrary, as a stockholer, and in behalf of all stockholders similarly situated, we most respectfully contend:—

That as the Northern Securities Company has $7,500,000 of stock issued from its said company irrespective and apart from any estate derived from the stocks of the said railroads heretofore mentioned, this $7,500,000 of stock of the Northern Securities Company is the only legal stock of that company. All other stock based upon the alleged estate of the stocks of the railroads heretofore mentioned is at once an illegal stock, represented by no legal property, and the stocks of those railroads can in no wise be treated as property of the Northern Securities Company for the purpose of liquidation to the holders of the stock of the Northern Securities Company.

The stockholders of the Northern Securities Company, therefore, should have their apportionment in proportion to the stock they hold from out of and only of the $7,500,000 legitimately issued by the Company,

as that is the only amount outstanding and issued in excess and to the exclusion of that issued upon the illegal, false and void basis of property, to-wit: stock in the railroads heretofore designated and named.

See paragraph 6 of the bill of complainant, and answer of respondent conceding the same, as appears in the record.

The outstanding capital stock of the Northern Securities is $395,400,000, divided into 3,954,000 shares of one hundred dollars each.

In the plan of distribution suggested in paragraph 14 of the complaint of the complainant, it is proposed to reduce the stock to $3,954,000, or 39,540 shares of a hundred dollars each. This is but one per cent of the outstanding capital. The ninety-nine per cent so retired would consist of and include 3,914,460 shares of an aggregate par value of $391,446,000.

Therefore, it is apparent for each share of one hundred dollars par value of Northern Securities surrendered for retirement, this plan of distribution proposes to give $39.27 of Northern Pacific stock and $30.17 of Great Northern stock.

It will be recalled that the Northern Securities issued $176,822,900 of stock in exchange for approximately $153,759,400 of the stock of the Northern Pacific Railroad. It also issued about $211,057,600 in exchange for about $118,124.200 of Great Northern stock.

Then, or incidental therewith, the Northern Securities issued and sold for cash—with which to purchase other properties—and for corporate purposes acquired $7,522,000 *distinct of any property or issues arising from the stocks of the railroads heretofore named.*

See record in main litigation, particularly paragraph six.

It is therefore clearly apparent that 75,000 shares of the Northern Securities stock were issued for cash or other properties received for legitimate corporate purposes.

DISTRIBUTION PROPOSED INEQUITABLE STOCKHOLDERS.

The plan of distribution proposed is illegal, improper, unjust and inequitable in this: that to reduce the capital stock to 39,540 shares, or one per cent of the capital, would be to compel the surrender for Northern Pacific and Great Northern stocks of 35,460 shares (Northern Securities Company) of an aggregate par value of $3,456,0000—more than one-half of the whole and all of the legitimate assets, to-wit: the $7,500,000, of the stock legitimately issued—exclusive of the Northern Pacific and Great Northern stocks acquired.

The plan is inequitable and unjust, because it would force the holders of legitimate stock of the Northern Securities issued legitimately to take the railroad stocks unlawfully held by the Northern Securities, and which the Northern Securities could not lawfully endorse over or convey, nor to which could it give title. It forces the stockholders of the Northern Securities to take stocks of other companies, which they may not desire, and which, as in the present case, some decline to accept, and which, if accepted, would still be subject to an action by the railroads issuing the said stock at the first instance, *upon the ground that the receivers of the same through the Northern Securities distribu-*

tion could hold no legal title to that which was in the first place illegally conceived and unlawfully possessed.

Again, it would give to the stockholders of the Northern Securities Company, who received their stock wholly and exclusively in exchange for Northern Pacific or Great Northern stock, a ninety-nine per cent interest in legitimate assets, to-wit: the $7,500,000, in which they have no rightful interest and in which these latter should not participate, but which, in equity, must exclusively belong to the original holders of that $7,500,000, or their assignees or transferees.

The plan is inequitable and unjust to the further extent in that it proposes that $391,446,000 of stock shall be surrendered in exchange for Northern Pacific and Great Northern. This, it is evident, *is* $3,565,500 *more than was originally issued by the Northern Securities in exchange for Northern Pacific and Great Northern stock.* The Northern Securities thus charging a profit upon its illegal transaction and compensation for this original illegal exchange of $3,565,500.

The Conclusions from Premises Conceded.

These arguments herein made are gathered from the bill of complaint and from the answer of the respondents admitting the facts and figures.

It is impossible that this method should prevail without wringing from the legitimate stockholders that which is theirs, and making them take that which they do not elect to accept, and taking that which is the legal assets of the company and making a "*hotchpotch*" of illegal and legal matter and proportioning the ille-

gal matter to those who should only have legal stock, and giving the legal property to those who can only have legal property in that which was illegally acquired, to-wit: in taking back that which was their own—never the property of the Northern Securities.

No Estoppel Can Be Urged.

Neither of the main parties to the main contention can urge that, being in possession of the original stocks, they have property in them sufficient to distribute, or that, having the money of the stockholders, put in while the Northern Securities was in possession of the illegally held property, the stockholder is denied the right forsooth that he was a stockholder in an enterprise which, to some extent, was had for wholly illegal purposes—that the stockholder cannot insist upon taking back to himself that which only legally the company would have the right to give as its property and which he as stockholder legally could alone acquire.

2 Pomeroy's Equity, sec. 941.
Story's Equity Jurisprudence, sec. 298.
O'Connor v. *Ward,* 60 Mississippi, 1025, 1037.

Nor can the defense of illegality in the enterprise in any wise be urged as against the right of the stockholder who insists upon his proportion only of legal assets held by the company.

Kinsman v. *Parkhurst,* 18 How., 289, 293.
Brooks v. *Martin,* 2 Wall., 70.
Planter's Bank v. *Union Bank,* 16 Wall., 483.
Block v. *Darling,* 140 U. S., 234.

ONLY LEGAL ASSETS CAN BE DISTRIBUTED.

It is an undisputed proposition of law that where a corporation is dissolved any distribution of its assets, after paying its debts, must be only with regard to what could be legally transferred by private or public sale and what could have been given title to by private contract.

7 Thomp. on Corps, sec. 8596.

Therefore the intervenor cannot be compelled to accept stock other than that which he actually subscribed for, or what that actually represents, in the legal property of the corporation.

Railroad Co. v. *Knoxville,* 98 Tenn., 1; s. c., 37, S. W. Rep., 883.

7 Thomp. on Corps., sec. 8622.

Wherefore, your intervenors move the court that the rights of the stockholders other than those who are parties to the main litigation also be determined, and that a decision be made which shall protect them along the lines of the suggestions herein made.

Respectfully submitted.

JAS. HAMILTON LEWIS,
Solicitor for Continental Securities Co.

Supreme Court of the United States.

No. 512.—October Term, 1904.

Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York, Petitioners,
vs.
Northern Securities Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[Argued March 1, 2. Decided March 6, 1905.]

Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the Circuit Court of the United States for the District of New Jersey, April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21 and 23 by Bradford, J., holding the Circuit Court.

On the fourth day of June a second amended bill was filed, and on July 5, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. Rep. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the Circuit Court of Appeals for the Third Circuit, which, on January 3, 1905, reversed the order. 134 Fed. Rep. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the Circuit Court of Appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor through reorganization of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to one hundred and fifty-five million dollars, divided into eighty millions of common stock and seventy-five millions of preferred stock, and

it was resolved "that such preferred stock shall be issued upon the condition that at its option the company may retire the same, in whole or in part, at par, from time to time, on any first day of January prior to 1917." The plan of reorganization which was adopted provided that as to the new company which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any first day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any first day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Co., and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington and Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway and Navigation Company. The interests in control of the Union Pacific system might properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line Company purchased Northern Pacific preferred stock to the amount of $41,085,000, and common stock to the amount of $37,023,000, aggregating $78,100,000 of stock, being a majority of the $155,000,000, total capital stock of the Northern Pacific Company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was re-elected. They were also directors of the Union Pacific Railway Company. They both attended a meeting of the North-

ern Pacific board on November 13, 1901, and Harriman was chosen a a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of $100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for $75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of $100 cash for each and every share.

On November 15, the Executive Committee of the Northern Pacific Company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the thirteenth day of that month, with a capital stock of $400,000,000, divided into 4,000,000 shares of the par value of $100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State."

On the 14th day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Co., were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board and an executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"*Resolved*, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific

Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his co-directors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company and that company had delivered to them the 824,000 shares of its stock and $8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities Company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities Company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says $7,522,000 " was issued for cash used for the purchase of other property and for corporate purposes."

From the organization of the Securities Company until the affirmance of the decree in the Government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in

the Securities Company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company, the Short Line Company executing a trust indenture, which contained this clause: "The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the Circuit Court of the United Stated for the District of Minnesota by the United States against the Northern Securities Company, The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. 209, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which resulted April 9, 1903, in a decision in favor of complainants, 120 Fed. Rep. 721, and a decree as follows:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants,

and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

"Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"*Resolved*, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the Circuit Court for the District of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul, April 12 and 13. The Government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. Rep. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there

were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said

Northern Securities Company representing an interest in $82,491,871 par value and said cash. . . ."

"That at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway company acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employees be perpetually enjoined and restrained from in

any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

"Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same."

The proofs embraced the pleadings and decrees in the suit of *United States* v. *Northern Securities Company*; the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota* v. *Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co.* v. *Stove Manufacturing Co.*, 177 U. S. 495; *Castner* v. *Coffman*, 178 U. S. 183; *Knoxville* v. *Africa*, 77 Fed. Rep 501.

In *Western Union Telegraph Company* v. *Pennsylvania Railroad Company*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33. The Telegraph Company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the Telegraph Company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the Telegraph Company appealed therefrom to the Circuit Court of Appeals. 195 U. S. 547. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court.

Complainants deny that the Securities Company became the owner of the Northern Pacific Railway shares, and assert to the contrary that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the Circuit Court for the District of Minnesota in the Government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties of record to that suit, and that they were not parties by representation, if the effect of the transfers as between the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed, which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that: "Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of the defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the Circuit Court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the Government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities Company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company; and the Securities Company was forbidden from acquiring further stock of either of the railway companies and it was provided that nothing should be construed as prohibiting the Securities Company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares

to the Securities Company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the Circuit Court itself, for in its opinion of April 19, 1904, the Court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned or exclude other methods of disposition of it that, in view of all the circumstances, might appear to be

more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the Circuit Court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohens* v. *Virginia*, 6 Wheat. 399; *Caroll* v. *Caroll's Lessees*, 16 How. 297. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

Treating the question as an open one, it seems to us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock . . . at an aggregate price of $91,407,500, payable, as to $82,491,871

thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to $8,915.629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. . . . The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged."

And the Securities Company sold 75,000 shares of its stock for $7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But assuming that the transaction was in form, and at least *prima facie* in substance, one of purchase and sale, it is denied that the equitable title vested because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities Company, carried out by that company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here again we concur in the views of the Circuit Court of Appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily aban-

doned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities Company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities Company, as constituting, the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation, the Securities Company had power to acquire and to hold, and at any time to sell, the shares of other corporations. And under that act it had power, in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in accepting the shares of the Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities Company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the Circuit Court for the District of Minnesota in the Government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities

Company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two-thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, Vandalia & Terre Haute Railroad Company* v. *Terre Haute & Indianapolis Railroad Company*, 145 U. S. 393, "is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. . . . When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The Circuit Court decrees put at rest any question that the ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the Government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities Company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities Company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France and other parts of Europe; nearly a year after the filing of the Government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Comany; notwithstanding the decree of April 9, 1903, they stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the

facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities Company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific Company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities Company was on its own account and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is here no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners or part of them cannot reclaim the specific shares and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

True copy.

Test:

Clerk Supreme Court, U. S.